Document 1 of 75

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2012/Volume 1

Volume 1

Paradza v Minister of Justice & Ors	2012 (1) ZLR 1 (S)
Matukire v Medicines Control Authority of Zimbabwe	2012 (1) ZLR 29 (S)
Shamrock Holdings Ltd v Minister of Environment & Tourism & Ors	2012 (1) ZLR 39 (S)
S v Kadzinga	2012 (1) ZLR 48 (S)
Chiwawa v Mutzuris & Ors	2012 (1) ZLR 52 (S)
Pioneer Transport (Pvt) Ltd v Delta Corporation & Anor	2012 (1) ZLR 58 (H)
Cabat Trade & Finance (Pty) Ltd & Anor v MDC-T	2012 (1) ZLR 76 (H)
Kingdom Bank Workers' Committee v Kingdom Bank Financial Holdings	2012 (1) ZLR 93 (H)
Free Methodist Church of Zimbabwe v Dube & Ors	2012 (1) ZLR 103 (H)
Zvoma v Moyo No & Ors	2012 (1) ZLR 117 (H)
Victoria Falls Municipality v Nyathi & Ors	2012 (1) ZLR 132 (H)
Kaiser Engineering (Pvt) Ltd v Makeh Enterprises (Pvt) Ltd	2012 (1) ZLR 139 (H)
Moyo v Mkoba & Ors	2012 (1) ZLR 143 (H)
S v Sikoti	2012 (1) ZLR 148 (H)
Machaka v Minister of Local Government & Ors	2012 (1) ZLR 153 (H)
Gabarinocheka v Officer Commanding Traffic, Central Business District, Bulawayo & Ors	2012 (1) ZLR 155 (H)
Mathe v Mathe	2012 (1) ZLR 160 (H)
Zellco Cellular (Pvt) Ltd v Net-One Cellular (Pvt) Ltd & Ors	2012 (1) ZLR 164 (H)
S v Manuwa	2012 (1) ZLR 174 (H)
Mashonaland Turf Club v Mutangadura	2012 (1) ZLR 183 (S)
Chikomo v Yehudah	2012 (1) ZLR 187 (H)

Mpukuta v Motor Insurance Pool & Ors	2012 (1) ZLR 192 (H)
Zimbabwe Online (Pvt) Ltd v Telecontract (Pvt) Ltd	2012 (1) ZLR 197 (H)
Evans & Anor v Surtee & Ors	2012 (1) ZLR 202 (S)
S v Madzokere & Ors	2012 (1) ZLR 211 (S)
Firstel Cellular (Pvt) Ltd v Sefaidiga & Anor	2012 (1) ZLR 231 (H)
S v Rose	2012 (1) ZLR 238 (H)
Stupendis Enterprises (Pvt) Ltd v Kasi & Ors	2012 (1) ZLR 245 (H)
Belinsky v Chipere	2012 (1) ZLR 253 (H)
Sabeta v Commissioner-General, Zimbabwe Revenue Authority	2012 (1) ZLR 258 (H)
Barnsley v Harambe Holdings (Pvt) Ltd & Anor	2012 (1) ZLR 265 (H)
S v Muchekayawa	2012 (1) ZLR 272 (H)
S v Kurotwi & Anor	2012 (1) ZLR 275 (H)
Simbi v Mazuwa & Ors	2012 (1) ZLR 280 (H)
KM Auctions (Pvt) Ltd v Samuel & Anor	2012 (1) ZLR 286 (S)
Musundire v OK Zimbabwe Ltd	2012 (1) ZLR 292 (H)
Mudisi & Ors v Tomana No & Ors	2012 (1) ZLR 305 (H)
Khumalo & Anor v Mukondiwa-Mazhandu & Anor	2012 (1) ZLR 317 (H)
Mukoko v Attorney-General	2012 (1) ZLR 321 (S)
JG Construction v Chadwick & Anor	2012 (1) ZLR 358 (H)
CT Bolts (Pvt) Ltd v Workers Committee	2012 (1) ZLR 363 (S)
S v Noormohamed	2012 (1) ZLR 367 (H)
Mauchaza v Nota	2012 (1) ZLR 373 (H)
Ashanti Goldfields Zimbabwe Ltd v Nguwo	2012 (1) ZLR 381 (H)
S v Mpofu	2012 (1) ZLR 384 (H)
S v Ndlovu	2012 (1) ZLR 393 (H)

Zimbabwe Open University v Magaramombe & Anor	2012 (1) ZLR 397 (S)
Nyikadzino v Tsvangirai	2012 (1) ZLR 405 (H)
Mutara & Anor v Mutara & Ors	2012 (1) ZLR 415 (H)
S v Ncube	2012 (1) ZLR 422 (H)
Zaranyika v Zvoma & Anor	2012 (1) ZLR 425 (H)
Zimbabwe National Water Authority v Kariba Municipality	2012 (1) ZLR 429 (H)
Makek Enterprises (Pvt) Ltd v ZB Financial Holdings	2012 (1) ZLR 437 (H)
S v Dube	2012 (1) ZLR 440 (H)
Trustees, Alexandra Club v Pathfinder International (Pvt) Ltd	2012 (1) ZLR 445 (H)
Wamambo v Municipality of Chegutu	2012 (1) ZLR 452 (H)
Sub Saharan Management Consultants (Pvt) Ltd v Sirituta Investments (Pvt) Ltd & Ors	2012 (1) ZLR 462 (H)
Fitzgerald v Chong & Ors	2012 (1) ZLR 472 (H)
Moore v Moore	2012 (1) ZLR 476 (H)
Mudzumwe & Ors v MDC & Anor	2012 (1) ZLR 490 (H)
Makova v Masvingo Mirror (Pvt) Ltd & Ors	2012 (1) ZLR 503 (H)
V Daya & Co (Pvt) Ltd & Anor v Savanna Tobacco (Pvt) Ltd	2012 (1) ZLR 517 (H)
Bhebhe v Estate Bhebhe & Ors	2012 (1) ZLR 521 (H)
Ndlovu v Debshan (Pvt) Ltd & Anor	2012 (1) ZLR 531 (H)
S v Madzokere & Ors	2012 (1) ZLR 538 (H)
Deputy Sheriff, Harare v Conview Energy (Pvt) Ltd & Anor	2012 (1) ZLR 546 (H)
PG Industries (Zimbabwe) Ltd v Machawira	2012 (1) ZLR 552 (H)
Hanzi v Zimbabwe National Road Administration & Ors	2012 (1) ZLR 559 (H)
Nyambi & Ors v Minister of Local Government & Anor	2012 (1) ZLR 569 (H)
Chikomba Rural District Council v Pasipanodya	2012 (1) ZLR 577 (S)

Decimal Investments (Pvt) Ltd v Arundel Village (Pvt) Ltd & Anor 2012 (1) ZLR 581 (H)

Gold Driven Investments (Pvt) Ltd v Matipano No 2012 (1) ZLR 588 (H)

Tsvangirai No v Mugabe No & Ors 2012 (1) ZLR 594 (H)

Medical Investments Ltd v Daka No & Anor 2012 (1) ZLR 600 (H)

© 2015 Juta and Company (Pty) Ltd.

Document 2 of 75

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2012/Volume 1/PARADZA v MINISTER OF JUSTICE & ORS 2012 (1) ZLR 1 (S)

PARADZA v MINISTER OF JUSTICE & ORS 2012 (1) ZLR 1 (S)

Citation	2012 (1) ZLR 1 (S)
Case No	Judgment No. S-46-03
Court	Supreme Court, Harare
Judge	Sandura JA, Ziyambi JA, Malaba JA, Gwaunza JA & Uchena AJA
Heard	3 September 2003*
Judgment	3 September 2003
Counsel	*J J Gauntlett SC*, with him Mrs *J B Wood* and *J Samukange*, for the applicant *C Muchenga*, with him Mrs *L Matanda-Moyo*, for the respondents
Case Type	Constitutional application
Annotations	Link to case annotations

Flynote

Constitutional law – *Constitution of Zimbabwe 1980 – Declaration of Rights – s 13 and 18 – right to liberty and to protection of the law – arrest on reasonable suspicion of having committed an offence – discretion reposed in arresting officer – unreasonable exercise of discretion a breach of* D *arrested person's constitutional rights*

Constitutional law – *Constitution of Zimbabwe 1980 – Attorney-General – power to institute prosecution – accused person a member of the judiciary – Attorney-General not precluded from bringing prosecution before procedure for removal of judge completed – Constitution of Zimbabwe* E *1980 – ss 76(4)(a) and 76(7)*

Constitutional law – *Constitution of Zimbabwe 1980 – judiciary – independence of – meaning of and limitations on – judge accused of criminal conduct not associated with his adjudication of a case – not entitled to insist that procedure for removal of judge be completed before* F *criminal proceedings may be instituted – Constitution of Zimbabwe 1980 – ss 79B & 87*

Court – *judge – independence of – meaning of and limitations on – judge accused of criminal conduct not associated with his adjudication of a case – not entitled to insist that procedure for removal of judge be completed before*

criminal proceedings may be instituted

G **Words and phrases** – *"misbehaviour" – includes criminal misconduct*

2012 (1) ZLR p2

Sandura JA

Headnote

The applicant, a judge of the High Court, was arrested in his chambers on A allegations of attempting to defeat or obstruct the course of justice, alternatively corruption. He was taken to a police station and held overnight before being taken to the magistrates court for remand. He sought an order declaring that his arrest, detention and remand were unconstitutional, setting aside the decision to place him on remand, and B directing that the sum deposited by him as bail be refunded and that his passport be restored to him. It was argued that his arrest and detention were unconstitutional because (a) the decision to arrest and detain him was so outrageous in its defiance of logic that no sensible person who had applied his mind to the issue could have arrived at it; and (b) they violated his rights as set out in ss 79B and 87 of the Constitution. C

Held (per Malaba JA, Ziyambi JA, Gwaunza JA and Uchena JA concurring), that under s 13 of the Constitution a person may be deprived of his personal liberty if an arrest is authorised by law upon reasonable suspicion of his having committed a criminal offence. It is lawful for a peace officer to arrest a person on reasonable suspicion of having committed a First Schedule offence. This includes the common law offence of attempting D to defeat or obstruct the course of justice. However, the law-maker did not intend that the power given a peace officer to arrest is always, or even ordinarily, to be exercised. He has a discretion as to whether or not to arrest the suspect. As there was no likelihood that the applicant would abscond, interfere with State witnesses, or commit further offences, the E decision to arrest, detain and remand him was unreasonable.

Held, further, that a judge is a public officer in terms of the Prevention of Corruption Act [*Chapter 9:16*] and is liable for prosecution if he commits an act proscribed by the Act.

Held, further, that under s 76(4)(a) of the Constitution the Attorney-General has power in any case in which he considers it desirable so to do to F institute and undertake criminal proceedings before any court, not being a court established by a disciplinary law. He is not, in the exercise of those powers, subject to the direction or control of any person or authority.

Held, further, that s 79B of the Constitution guarantees the independence of the judiciary, and s 87 provides a procedure for the removal of a judge on G grounds of misbehaviour. Misbehaviour includes criminal misconduct. However, there is nothing in the Constitution which provided that the procedure for the removal of a judge charged with a criminal offence from office must take precedence over the institution of criminal proceedings against him for the same offence. The two procedures are mutually exclusive. To hold that the procedure for removal of a judge must be H

2012 (1) ZLR p3

Sandura JA

A followed before the Attorney-General could institute a prosecution would be a clear violation of the provisions of s 76(7).

Held, further, that the judicial independence protected by s 79B relates to adjudication of cases; it could not be argued that when a judge commits a criminal offence at a time when he is not involved in the adjudication B of a case (as was alleged *in casu*) he cannot be arrested and charged with that offence on account of the principle of judicial independence.

Held (per Sandura JA, dissenting) that because the judiciary plays a pivotal role in the interpretation, protection and enforcement of the Constitution, judges occupy a special position in our society. A judge remains a judge until he or she resigns or retires in accordance with s 86 C of the Constitution, or is removed from office in terms of s 87. Only judges may direct or control other judges, and the tribunal appointed to investigate the question of a judge's removal from office consists of judges, former judges, and lawyers qualified for appointment as judges. No such arrangement is made for members of Parliament; if a member D of Parliament is convicted of a criminal offence, Parliament relies on the findings of the court. It could not have been the

intention of the framers of the Constitution that a peace officer could arrest a judge and trigger the prosecution, indictment and trial of the judge before the Chief Justice has had the opportunity to consider whether to advise the President that the question of the judge's removal from office should be investigated.

E *Held*, further, that this view did not fetter the Attorney-General's powers in terms of s 76(7) of the Constitution. The Attorney-General should act within the provisions of the Constitution and should have deferred the institution of criminal proceedings against the applicant until after the applicant had been dealt with in terms of s 87.

Cases referred to F

Bysack v Sham Sunder Haldar [1953] SCR 533

Chandler v Judicial Council 398 US 74; 26 L Ed 2d 100 (1979)

CCSU & Ors v Min for the Civil Svc [1984] 3 All ER 935 (HL)

Govt of the Republic of Namibia & Anor v Cultura 2000 & Anor 1994 (1) SA 407 (NmS)

G *Gupta v Union of India* [1982] 2 SCR 365

Holgate-Mohammed v Duke [1984] 1 All ER 1054 (HL)

Kauesa v Min of Home Affairs & Ors 1996 (4) SA 965 (NmS)

Min of Law & Order & Ors v Hurley & Anor 1986 (3) SA 568 (A)

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

H *R v Whitaker* [1914] 3 KB 1283

Sandura JA

Rattigan & Ors v Chief Immigration Officer & Anor 1994 (2) ZLR 54 (S); 1995 (2) SA 182 (ZS) A

Veeraswami v Union of India & Ors [1991] 3 SCR 189

Legislation considered

Constitution of Zimbabwe 1980, ss 13(1), 13(2), 18(1), 41, 42, 43, 76(4), 76(7), 79B, 86 and 87 B

Criminal Procedure & Evidence Act [*Chapter 9:07*], s 25(1)(b)

Foreign legislation

India

Constitution of India, art 124(4) & (5), 218 C

Korea

Constitution of Korea, art 106

United States

Constitution of the United States, art I, s 3; art III, s 1

Case information

J J Gauntlett SC, with him Mrs *J B Wood* and *J Samukange*, for the applicant D

C Muchenga, with him Mrs *L Matanda-Moyo*, for the respondents

Judgment

Sandura JA: This application was brought in terms of s 24(1) of the Constitution of Zimbabwe ("the Constitution"), seeking an order declaring that the arrest, detention and remand of the applicant were unconstitutional, E setting aside the decision to place him on remand, and directing that the sum of $20 000 deposited by him as bail be refunded and that his passport be restored to him. In addition, the applicant prayed for costs on the legal practitioner and client scale.

During his submissions counsel for the respondents conceded, quite correctly, that the applicant's arrest, detention and remand were unlawful and, therefore, F unconstitutional. Accordingly, we granted the order sought by the applicant, with costs on the ordinary scale, and indicated that our reasons would be handed down in due course. I now set them out.

The factual background is as follows. The applicant is a judge of the High Court stationed in Harare. On 17 February 2003, he was arrested by the fifth G respondent ("Nyathi"). The allegation against him was that he had, on 15 and 16 January 2003, attempted to defeat or obstruct the course of justice in that he had tried to influence two other judges of the High Court stationed in Bulawayo to release the passport of his business partner, who was undergoing trial on a charge of murder, to enable him to undertake a business trip overseas. Alternatively, it was alleged that the applicant had contravened s 360(2)(b) H

Sandura JA

A of the Criminal Procedure and Evidence Act [*Chapter 9:07*], the allegation being that he had incited the two judges in Bulawayo to contravene s 4(a) of the Prevention of Corruption Act [*Chapter 9:16*].

According to the applicant, the arrest took place in his chambers, but that is disputed by Nyathi, whose version is that, after arriving at the applicant's B chambers, he explained the purpose of his visit and the applicant agreed to accompany him to the offices of the Criminal Investigation Department where the arrest was effected. However, this dispute of fact is not relevant in determining the issues which arise in this application.

After the applicant had been questioned, a warned and cautioned statement was recorded from him and he was later detained at Borrowdale Police C Station, less than a kilometre away from his home, in a police cell which he shared with other inmates.

On the following day, he was taken to the magistrate's court where he was remanded out of custody, having been granted bail. The Request for Remand Form 242, which was completed by Nyathi, indicated that bail was D not opposed. In addition, it indicated that the applicant was not likely to abscond, that he was not likely to interfere with the evidence or witnesses for the prosecution, and that he was not likely to commit other offences.

Subsequently, the applicant filed this application seeking the order already referred to at the beginning of this judgment.

E Mr *Gauntlett*, who appeared for the applicant, advanced two main arguments. The first was that the applicant's arrest and detention were unconstitutional because the decision to arrest and detain the applicant was so outrageous in its defiance of logic that no sensible person who had applied his mind to the issue could have arrived at it; and the second was that the applicant's arrest, detention and remand were unconstitutional because they violated F the applicant's rights set out in ss 79B and 87 of the Constitution. I shall deal with these arguments in turn.

The constitutionality of the arrest and detention in the light of sections 13 and 18 of the constitution

The deprivation of personal liberty by an arrest or detention is *prima facie* G unlawful. Consequently, the person arresting and detaining another must establish that his actions are authorised by law.

Thus, in *Minister of Law and Order & Ors v Hurley & Anor* 1986 (3) SA 568 (A) at 589E-F, Rabie CJ said the following:

> "An arrest constitutes an interference with the liberty of the individual concerned, H and it therefore seems to be fair and just to require that the person who arrested

Sandura JA

> or caused the arrest of another person should bear the onus of proving that his A action was justified in law."

In our jurisdiction, every person is accorded the protection of the law by s 18(1) of the Constitution, which reads as follows:

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

However, the protection of the right to personal liberty is regulated by s 13 of the Constitution. Subsections (1) and (2) of that section, in relevant part, read as follows:

> "(1) No person shall be deprived of his personal liberty save as may be authorised by law in any of the cases specified in subsection (2).
>
> (2) The cases referred to in subsection (1) are where a person is deprived of C his personal liberty as may be authorised by law –
>
> (a) – (d) …
>
> (e) upon reasonable suspicion of his having committed, or being about to commit, a criminal offence;".

Thus, the deprivation of personal liberty must be authorised by law. D

On the facts of the present application, the relevant law is s 25(1)(b) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] which, in relevant part, reads as follows:

> "(1) Any peace officer and any other officer empowered by law to execute criminal warrants is hereby authorised … to arrest without warrant – E
>
> (a) …;
>
> (b) any person whom he has reasonable grounds to suspect of having committed any of the offences mentioned in the First Schedule;".

The offences mentioned in the First Schedule include the common law offence of attempting to defeat or obstruct the course of justice.

It is clear from s 25(1)(b) of the Act that the officer effecting the arrest must F have reasonable grounds for suspecting that the person he intends to arrest has committed the offence in question. As Gubbay CJ said in *Muzonda v Minister of Home Affairs & Anor* 1993 (1) ZLR 92 (S) at 96C-D:

> "… he must satisfy himself that reasonable grounds for suspicion of guilt do exist. That requirement is very limited. He is not called upon before acting to have G anything like a *prima facie* case for conviction. Certainty as to the truth is not involved, for otherwise it ceases to be suspicion and becomes fact. Suspicion, by definition, is a state of conjecture or surmise whereof proof is lacking …"

In the present matter I shall assume, but without deciding, that Nyathi had reasonable grounds for suspecting that the applicant had committed the offence or offences in question. The question which then arises is whether H

Sandura JA

A he was required by law to arrest and detain the applicant. In other words, did he have the discretion whether to arrest him or not?

That question was answered by Lord Diplock in *Holgate-Mohammed v Duke* [1984] 1 All ER 1054 (HL) at 1057e-g as follows:

> "… since the wording of the subsection under which he acted is '*may* arrest without warrant', this left him with an executive discretion whether to arrest her or not. B Since this is an executive discretion expressly conferred by statute on a public officer, the constable making the arrest, the lawfulness of the way in which he has exercised it in a particular case cannot be questioned in any court of law except on those principles laid down by Lord Greene MR in *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1947] 2 All ER 680, [1948] 1 KB 223, that have become too familiar to call for repetitious citation. The *Wednesbury* C principles, as they are usually referred to, are applicable to determining the lawfulness of the exercise of the statutory discretion of a constable under s 2(4) of the 1967 Act, not only in proceedings for judicial review but also for the purpose of founding a cause of action at common law for damages for that speciesof trespass to the person known as false imprisonment, for which the action in the instant case is brought."

D Similarly, in *Muzonda's* case *supra* at 98B-D, Gubbay CJ commented on the provisions of s 29(1)(b) (now s 25(1)(b)) of the Criminal Procedure and Evidence Act as follows:

> "Section 29(1) of the present Act employs the phrase 'is hereby authorised … to arrest'. I am satisfied that, read with para (b), it is to be construed as imparting a discretion upon the peace officer in the exercise of his power of arrest. This E conforms with common sense. … In short, in enacting s 29(1)(b), the law-maker did not intend that the power given a peace officer to arrest is always, or even ordinarily, to be exercised."

I entirely agree, and am satisfied that Nyathi had the discretion whether to arrest the applicant or not.

In the circumstances, the decision to arrest the applicant can only be held to F be unreasonable and subject to interference by this court if, as Lord Diplock stated in *Council of Civil Service Unions & Ors v Minister for the Civil Service* [1984] 3 All ER 935 (HL) at 951a-b, it was "so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it".

G The factors to be considered in determining whether an arrest was unreasonable in the *Wednesbury* sense were set out by Gubbay CJ in *Muzonda's* case *supra* at 99E as follows:

> "In making the determination of whether the decision to arrest the plaintiff is open to challenge, several important factors require to be considered. They are:
>
> (i) the possibility of escape;
>
> (ii) the prevention of further crime; and
>
> (iii) the H obstruction of police enquiries."

Sandura JA

In the present case, bearing in mind that there was no likelihood that the A applicant would abscond, interfere with State witnesses, or commit further offences, there can be no doubt that the decision to arrest, detain and remand the applicant was unreasonable in the *Wednesbury* sense. Consequently, as submitted by Mr *Gauntlett*, the applicant was not deprived of his personal liberty in a manner authorised by law within the contemplation of s 13(1) B of the Constitution.

On that basis alone, the applicant was entitled to the order sought. Nevertheless, I shall deal with the second argument advanced by Mr *Gauntlett* because it raises issues of constitutional importance.

The unconstitutionality of criminal proceedings in view of sections 79B and 87 of the Constitution C

The second argument advanced on behalf of the applicant was that his arrest, detention and remand violated his constitutional rights as set out in ss 79B and 87 of the Constitution.

Section 79B reads as follows:

> "In the exercise of his judicial authority, a member of the judiciary shall not D 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."

And s 87, in relevant part, reads as follows:

> "(1) A judge of the Supreme Court or the High Court may be removed from E office only for inability to discharge the functions of his office, whether arising from infirmity of body or mind or any other cause, or for misbehaviour and shall not be so removed except in accordance with the provisions of this section.
>
> (2) If the President considers that the question of the removal from office of the Chief Justice ought to be investigated, the President shall appoint a tribunal to inquire into the matter. F
>
> (3) If, in the case of a judge of the Supreme Court or the High Court other than the Chief Justice, the Chief Justice advises the President that the question of removal from office of the judge concerned ought to be investigated, the President shall appoint a tribunal to inquire into the matter.
>
> (4) A tribunal appointed under subsection (2) or (3) shall consist of not less than three members selected by the President from the following – G
>
> (a) persons who have held office as a judge of the Supreme Court or the High Court;
>
> (b) persons who hold or have held office as a judge of a court having unlimited jurisdiction in civil or criminal matters in a country in which the common law is Roman-Dutch or English, and English is an official language;
>
> (c) legal practitioners of not less than seven years' standing …; H

Sandura JA

> A one of whom shall be designated by the President as chairman.
>
> (4a) – (5)…;
>
> (6) A tribunal appointed under subsection (2) or (3) shall inquire into the matter and report on the facts thereof to the President and recommend to the President whether or not he should refer the question of

the removal of the judge from office to the Judicial Service Commission, and the President shall act in B accordance with such recommendation.

(7) …

(8) If the question of removing a judge of the Supreme Court or the High Court from office has been referred to a tribunal under subsection (2) or (3), the judge shall be suspended from performing the functions of his office until the President, on the recommendation of the tribunal or the Judicial Service C Commission, revokes the suspension or the judge is removed from office in accordance with subsection (9).

(9) If the question of the removal of a judge has been referred to the Judicial Service Commission in accordance with subsection (6) and the Commission advises that the judge be removed from office, the President shall, by order under the public seal, remove the judge from office."

D Before interpreting the provisions of the two sections of the Constitution set out above, and determining whether the applicant's rights were violated, it is pertinent to note that the Constitution is the supreme law of the land and that it creates a fundamental framework within which the respective ambits of the legislative, executive and judicial arms of the State are defined. It is E not exhaustive in its own terms and, consequently, a generous and purposive interpretation of the Constitution has to be adopted in order to give effect to its underlying values.

Thus, in *Government of the Republic of Namibia & Anor v Cultura 2000 & Anor* 1994 (1) SA 407 (NmS) at 418 F-G, Mahomed CJ said:

"A constitution is an organic instrument. Although it is enacted in the form of a F statute, it is *sui generis*. It must broadly, liberally and purposively be interpreted so as to avoid the 'austerity of tabulated legalism' and so as to enable it to continue to play a creative and dynamic role in the expression and the achievement of the ideals and aspirations of the nation, in the articulation of the values bonding its people and in disciplining its Government."

Similarly, in *Rattigan & Ors v Chief Immigration Officer & Anor* 1994 (2) ZLR 54 (S) G at 57F-H, 1995 (2) SA 182 (ZS) at 185E-F, Gubbay CJ said:

"This court has on several occasions in the past pronounced upon the proper approach to constitutional construction embodying fundamental rights and protections. What is to be avoided is the imparting of a narrow, artificial, rigid and pedantic interpretation; to be preferred is one which serves the interest of the Constitution and best carries out its objects and promotes its purpose. H All relevant provisions are to be considered as a whole and, where rights and

---

Sandura JA

freedoms are conferred on persons, derogations therefrom, as far as the language A permits, should be narrowly or strictly construed."

I am in complete agreement with Mahomed CJ and Gubbay CJ on the proper approach to constitutional interpretation.

I now wish to consider s 79B. This section provides that, in the exercise of his judicial authority, a member of the judiciary shall not be subject to the B direction or control of any person or authority. The only exception to that provision, which is stated in the section, is where a written law places a member of the judiciary under the direction or control of another member of the judiciary. The section is clear and unambiguous.

With regard to this section, the argument advanced by counsel for the applicant was that by arresting the applicant and detaining him, Nyathi placed the C applicant under the direction or control of persons who are not members of the judiciary, which is not permitted by s 79B. He submitted as follows:

"There could hardly … be a more direct, encompassing form of 'direction or control' than one which puts a hand on the judge (in arresting him), requires him to attend court as an accused, and then locks him or her in a cell."

I respectfully agree with counsel's submission. In terms of this section a D judge, whilst serving as such, cannot be placed under the factual direction or control of anyone other than that of another member of the judiciary in terms of a written law.

This provision was intended not only to entrench the independence of the judiciary, but also to ensure that the judiciary, which plays a pivotal role in E the protection and enforcement of the Constitution, continues to function effectively.

In the circumstances, it is clear beyond doubt that the arrest, detention and remand of the applicant constituted a contravention of s 79B of the Constitution.

I now come to s 87, which deals with the removal of judges from office. F Its provisions have already been set out. Although the Constitution does not say what constitutes misbehaviour, I have no doubt in my mind that it includes criminal misconduct. If that were not the case, there would be an obvious absurdity because it would mean that a judge could be removed from office for ethical transgressions but could not be removed from office if he G committed a criminal offence, no matter how serious the offence may be. That could hardly have been the intention of the framers of the Constitution.

The applicant's contention with regard to s 87 was that where a judge is alleged to have committed a serious criminal offence, as opposed to a minor one, such as a traffic offence, he has a right to be dealt with in terms of s 87 first before any criminal proceedings are instituted against him. In other H

Sandura JA

A words, the contention was that the Chief Justice would first decide whether the circumstances are such that the judge's removal from office ought to be investigated. If he held that view, he would deal with the judge concerned in terms of s 87. Otherwise, he would take no action against the judge and, thereafter, criminal proceedings might ensue.

B On the other hand, the respondents contended that the institution of criminal proceedings against the judge concerned does not have to wait until the judge is dealt with in terms of s 87 or until it is decided not to deal with him in terms of that section. In their view, the judge may be prosecuted before the Chief Justice has decided to proceed against him in terms of s 87 or at any time after the Chief Justice has decided to proceed against him in terms of C that section. I respectfully disagree.

Because the judiciary plays a pivotal role in the interpretation, protection and enforcement of the supreme law of the land, i.e. the Constitution, judges occupy a special position in our society which is recognised by the Constitution. An examination of the Constitution reveals a scheme in terms D of which the independence of the judiciary is guaranteed. It is as follows:

1. Section 79B provides that, in the exercise of his judicial functions, a judge shall not be subject to the direction or control of any person who is not a judge. This section entrenches the independence of the judiciary which is vital for the proper functioning of a constitutional democracy. E
2. Section 86 entrenches in the Constitution the continued discharge by a judge of his or her functions until he or she resigns or retires.
3. Section 87(1) provides that "a judge … may be removed from office only for inability to discharge the functions of his office … or for misbehaviour *and shall not be so removed except in accordance with the provisions of this section*" (emphasis added). This section does not F permit any removal, temporary or otherwise, unless it is in accordance with the provisions of the section.
4. Section 87(3) provides that if the Chief Justice advises the President that the question of a judge's removal from office ought to be investigated, the President is obliged to appoint a tribunal to inquire into the matter. G It is significant that the President does not have any discretion in the matter.
5. Section 87(4) provides that the tribunal appointed by the President shall consist of not less than three members selected by him from the following: H
   (a) former judges of the Supreme Court or the High Court;

Sandura JA

   (b) judges or former judges from other countries where the common A law is Roman-Dutch or English, and English is an official language;
   (c) legal practitioners of not less than seven years' standing (i.e. those qualified for appointment as judges).
6. Section 87(6) provides that the tribunal shall inquire into the matter and report on the facts thereof to the President and recommend to the B President whether or not he should refer the

question of the judge's removal from office to the Judicial Service Commission. It is significant that the President has no discretion, but is obliged to act in accordance with the tribunal's recommendation.

7. Section 87(8) provides that if the question of removing a judge from office has been referred to the tribunal the judge shall be suspended from performing his functions until the President, acting on the recommendation of the tribunal or the Judicial Service Commission, revokes the suspension. It is pertinent to note that this is the only temporary interference with the performance of the judge's functions permitted by the Constitution.

8. Finally, s 87(9) provides that if the question of a judge's removal from office has been referred to the Judicial Service Commission and the Commission advises that the judge be removed from office, the President shall remove him from office. Once again, the President does not have a discretion in the matter, but acts in accordance with the advice given by the Commission, which is chaired by the Chief Justice.

Thus, the scheme provided by the framers of the Constitution in respect of judges is clear. A judge remains a judge until he or she resigns or retires in accordance with the provisions of s 86, or is removed from office in accordance with the provisions of s 87. Only judges may direct or control other judges, except where judges are directed or controlled as ordinary citizens, for example, where a police officer directs or controls traffic.

In addition, the tribunal appointed by the President, on the advice of the Chief Justice, to investigate the question of a judge's removal from office, consists of judges, former judges and lawyers qualified for appointment as judges. In other words, only judges may inquire into the misconduct of other judges and report thereon. It is significant that their recommendation is binding on the President.

It is pertinent to note that the framers of the Constitution did not provide a similar scheme in respect of members of Parliament. The position of a member of Parliament is set out in ss 41, 42 and 43 of the Constitution.

2012 (1) ZLR p13

Sandura JA

Section 41(1), which deals with the tenure of seats of members of Parliament, in relevant part, reads as follows:

"Subject to the provisions of this section, the seat of a member of Parliament shall become vacant only –

(a) –(k) …;

(l) in the circumstances set out in section 42;

(m) if he is required, by virtue of the provisions of s 43, to vacate his seat;

(n) – (o) …;

(p) if he has been convicted of an offence under the Electoral Act and has been declared by the High Court … to be disqualified for registration as a voter or from voting at any election;

(q) …;".

Section 42, which sets out what happens to the seat of a member of Parliament sentenced to death or to imprisonment, reads as follows, in relevant part:

"Subject to the provisions of this section, in the event of a member of Parliament being convicted –

(a) within Zimbabwe of a criminal offence; or

(b) outside Zimbabwe of an offence, … which if committed within Zimbabwe would have been a criminal offence;

and being sentenced by a court to death or imprisonment … for a term of six months or more, such member shall cease forthwith to exercise his functions and to be entitled to any remuneration as a member and his seat shall become vacant at the expiration of thirty days from the date of such sentence."

And s 43(1), which deals with the expulsion or suspension of members convicted of certain offences, reads as follows:

"Subject to the provisions of this section, if –

(a) a member of Parliament is convicted of an offence referred to in section 42(1) and is sentenced to imprisonment for a lesser period than that specified in that subsection or to a fine or other punishment not specified in that subsection; and

(b) Parliament, after taking into account the nature of the offence and the sentence imposed, resolves, by the affirmative votes of not less than two-thirds of its total membership, that the member is unfit to continue as a member or that the member should be suspended from the service of Parliament for G such period, not exceeding six months, as Parliament may specify;

the member shall forthwith vacate his seat or, as the case may be, be suspended from the service of Parliament for the period so specified."

It is clear from the above provisions that, where it is alleged that a member of Parliament has committed a criminal offence, there is no investigation H of the allegations by a tribunal similar to the one which investigates the

Sandura JA

question of removing a judge from office. As far as the facts are concerned, A Parliament relies upon the findings of the court which convicted the member of Parliament. In other words, apart from the Attorney-General instituting criminal proceedings against the member of Parliament and conducting a trial, the Constitution does not provide any other way in which Parliament can investigate the allegations, in order to determine whether or not the member B should be expelled or suspended from Parliament. It follows, therefore, that where it is alleged that a member of Parliament has committed a criminal offence, there is nothing in the Constitution which would delay the institution of criminal proceedings against him.

However, judges ought to be treated differently for the reasons already given. In my view, it could not have been the intention of the framers of C the Constitution that a peace officer could arrest a judge and trigger the prosecution, indictment and trial of the judge before the Chief Justice has had the opportunity to consider whether to advise the President that the question of the judge's removal from office should be investigated. They must have intended that the allegations would first be investigated and the facts ascertained by a high-powered judicial tribunal consisting of judges, D former judges and lawyers qualified for appointment as judges before the police were involved in the investigations.

The conclusion I have reached is supported by the Chief Justices of Botswana, Malawi, Mauritius, Namibia, South Africa, Swaziland, Tanzania, Uganda and Zambia who, on 5 March 2003, issued a joint statement on the arrest and E detention of the applicant. The relevant part of the statement reads as follows:

> "Like everyone else judges are not above the law. Their position as judges in a democratic state, however, requires that they must be and must be seen to be independent and not subject to direct or indirect pressure from the executive. For this reason the investigation of criminal charges against them needs to be conducted with sensitivity to their status, their role in society and their relationship F with the executive. Procedures should be followed to avoid as far as possible any suggestion that a particular judge is being victimised by the executive for his or her views or decisions. For this reason special procedures are usually followed in democratic societies where allegations of serious criminal conduct are made against a judge. Such procedures ordinarily involve the holding of an independent enquiry into whether or not the judge should be impeached. If the allegations are then found to have substance, and the judge is impeached, a G criminal prosecution may follow. The Constitution of Zimbabwe makes provision for such a procedure to be followed in respect of the impeachment of judges. It is regrettable that this procedure, rather than arrest, detention and prosecution, has not been followed in respect of the allegations against Mr Justice Paradza."

I now turn to a hypothetical question which was raised during the hearing of this application. The question was whether a peace officer should not arrest H

Sandura JA

A a judge where he has good grounds for believing that the judge, who has committed a serious offence, is about to leave the country in order to avoid trial. Whilst I have my views on this issue, I shall not answer the question because it is not the practice of this court to answer hypothetical questions.

As Dumbutshena AJA said in *Kauesa v Minister of Home Affairs & Ors* B 1996 (4) SA 965 (NmS) at 974D-E:

> "… we consider it appropriate to refer to what was said by Bhagwati J (as he then was) in *M M Pathak v Union of India* [1978] 3 SCR 334 in relation to the practice of the Supreme Court of India:

'It is the settled practice of this court to decide no more than what is absolutely necessary for the decision of a case.'

C We respectfully endorse those words, particularly when applied to constitutional issues, and commend such a salutary practice to the courts of this country. Constitutional law in particular should be developed cautiously, judiciously and pragmatically if it is to withstand the test of time."

I now wish to comment on the judgment prepared by Malaba JA. He has come to the conclusion that when there is an allegation that a judge has D committed a serious criminal offence, on the basis of which the judge could be removed from office in terms of s 87 of the Constitution, the judge does not have the right to be dealt with in terms of that section before criminal proceedings are instituted against him.

In reaching that conclusion, he relied upon the provisions of subss (4)(a) and E (7) of s 76 of the Constitution, which deal with the powers of the Attorney-General, and the *obiter dicta* expressed by Shetty J in *K Veeraswami v Union of India and Ors* [1991] 3 SCR 189 at 250B-251D.

The relevant provisions of s 76 of the Constitution read as follows:

"(4) The Attorney-General shall have power in any case in which he considers it desirable so to do – F

(a) to institute and undertake criminal proceedings before any court …;

(4a) – (6) …;

(7) In the exercise of his powers under subs (4) or (4a), the Attorney-General shall not be subject to the direction or control of any person or authority."

The interpretation given to the above provisions by Malaba JA was that G this court would be acting in violation of s 76(7) of the Constitution if it declared that the Attorney-General could not institute criminal proceedings against the applicant before the applicant was dealt with in terms of s 87 of the Constitution. I respectfully disagree.

It must be remembered that the powers of the Attorney-General are to be H exercised within the framework of the Constitution. That means that, in

exercising his powers, the Attorney-General is obliged to comply with A all the provisions of the Constitution. As already stated, a generous and purposive interpretation of the relevant provisions of the Constitution leads to the inescapable conclusion that the applicant should have been dealt with in terms of s 87 of the Constitution before criminal proceedings were instituted against him. B

Accordingly, the Attorney-General should have acted in accordance with the provisions of the Constitution and deferred the institution of criminal proceedings against the applicant until after the applicant had been dealt with in terms of s 87 of the Constitution. As he did not do so, it was within the powers of this Court to declare his action unconstitutional. C

Having said that, I wish to set out the relevant constitutional and statutory provisions which were considered in the *Veeraswami* case *supra*, and the issues which the Supreme Court of India had to determine in that case. I do so in order to facilitate a better appreciation of the fact that what Shetty J said was *obiter*.

Clauses (4) and (5) of Article 124 of the Constitution of India, which govern D the removal from office of a judge of the Supreme Court or of the High Court, read as follows:

"(4) A judge of the Supreme Court shall not be removed from his office except by an order of the President passed after an address by each House of Parliament supported by a majority of the total membership of that House E and by a majority of not less than two-thirds of the members of that House present and voting has been presented to the President in the same session for such removal on the ground of proved misbehaviour or incapacity.

(5) Parliament may by law regulate the procedure for the presentation of an address and for the investigation and proof of the misbehaviour or incapacity of a judge under clause (4)." F

In terms of Article 218, the provisions of clauses (4) and (5) of Article 124 also apply to judges of the High Court.

Mr Justice Veeraswami ("Veeraswami") was charged with contravening s 5(1)(e) of the Prevention of Corruption Act, 1947, which provided that a public servant committed the offence of criminal misconduct – G

"… if he or any person on his behalf is in possession or has, at any time during the period of his office, been in possession, for which the public servant cannot satisfactorily account, of pecuniary resources or property disproportionate to his known sources of income."

Section 6(1)(c) of the same Act provided that a public servant could not be prosecuted for the offence specified in s 5(1)(e) of the Act unless the H

Sandura JA

A prosecution was sanctioned by the authority competent to remove the public servant from his office.

Veeraswami's appeal was heard by five judges of the Supreme Court of India. These were Ray, Shetty, Sharma, Venkatachaliah and Verma JJ.

In determining the appeal, the Supreme Court of India had to answer the B following questions:

1 Is a judge of the High Court or of the Supreme Court a public servant within the meaning of s 2 of the Prevention C of Corruption Act, 1947?

2 Can a judge of the High Court, including the Chief Justice, or a judge of the Supreme Court be prosecuted for an offence under the Prevention of Corruption Act, 1947?

3 Who is the competent authority to remove a judge either of the High Court or of the Supreme Court from his office, whose sanction for the prosecution of the judge is required in terms of s 6(1)(c) of the Prevention of Corruption Act, 1947?

D It was in the course of answering the second question that Shetty J expressed the *obiter dicta* quoted *in extenso* by Malaba JA in support of the conclusion that the institution of criminal proceedings does not have to wait until after the judge concerned has been dealt with in terms of s 87 of the Constitution. I say that the views expressed by Shetty J in this regard were *obiter dicta* because they were not necessary for the determination of the three issues E before the court which I have set out above.

The specific question which Shetty J was considering when he expressed the *obiter dicta* was whether a judge could be prosecuted at all for an offence under the Prevention of Corruption Act, 1947, and not whether such prosecution could precede the judge's removal from office. By a majority F of four to one, the court held that a judge could be prosecuted for such an offence, but Verma J dissented and was of the view that, although a judge was a public servant within the meaning of s 2 of the Prevention of Corruption Act, 1947, he was outside the purview of the Act and could not be prosecuted for an offence under the Act.

However, it is pertinent to note that although the majority judgment was G prepared by Shetty J, Ray J prepared his own judgment in which he expressed his concurrence with the conclusions reached by Shetty J in respect of the three issues which the court had to determine, but did not comment on the *obiter dicta* (see pp 216B-228E).

Venkatachaliah J did not prepare a separate judgment and there is nothing in H the judgment prepared by Shetty J (see pp 228E-269E) which indicates that

---

Sandura JA

Venkatachaliah J agreed with the views expressed by Shetty J, although A the headnote gives the impression that he agreed with those views.

Verma J, who prepared a long dissenting judgment (see pp 269E-306F), did not comment on the *obiter dicta* expressed by Shetty J. That was obviously due to the fact that he held the view that a judge could not at any time be prosecuted for an offence under the Prevention of Corruption Act, 1947. B

However, Sharma J, who concurred with the majority judgment only in respect of the first two of the three questions set out above, prepared a separate judgment in which he commented on the *obiter dicta* expressed by Shetty J. He was of the opinion that the removal of the judge from office and the granting of the sanction to prosecute the judge should be combined in order to avoid a situation where a convicted judge continued to be a judge entitled C to exercise his powers. At 268E-269A the learned judge said the following:

> "It is true that the grant of sanction will be delayed until the accusation is examined according to the law enacted under clause (5) of Article 124, but once that stage is over and a finding is recorded against the judge, there should not be any hitch in combining the two matters – that is the removal and the grant of sanction – which are obviously intertwined … The two matters – the prosecution and D removal – should not, therefore, be treated to be separate and unconnected with each other. Otherwise, there will be scope left for the judge concerned to claim that although he may be facing prosecution or may have been even convicted after trial, he still continues to be a judge entitled to exercise his powers, as he has not been removed from his office. *It was stated during the course of the hearing that actually such a situation has arisen in another country where a* E *judge although punished with imprisonment was insisting that he still continued in his office*. I do not think that such a thing is permissible in this country … *Before closing this chapter I would again repeat that this issue is not arising in the present case and will have to be considered and finally decided only when it directly arises*" (emphasis added).

In our jurisdiction, the absurdity referred to by Sharma J would inevitably F arise if a judge were to be prosecuted before he was dealt with in terms of s 87 of the Constitution. That is so because, unless the judge is suspended from performing the functions of his office in terms of s 87(8) of the Constitution, which can only be done when the question of his removal from office has been referred to a tribunal, he is, in terms of the Constitution, entitled to G perform his judicial functions.

The suggestion by Shetty J – that a judge who is facing a criminal prosecution should voluntarily withdraw from judicial work and await the outcome of the criminal prosecution – would not apply in our jurisdiction because there is a specific provision in the Constitution in terms of which such a judge may be suspended from performing the functions of his office. There is no such H

Sandura JA

A provision in the Constitution of India. In any event, the suggestion cannot be enforced because the judge concerned cannot legally be compelled to abstain from performing the functions of his office.

In interpreting the relevant constitutional provisions, it is important to remember that the provisions should be interpreted in a way which does B not lead to any absurdity. Applying that principle, it is my view that it was never the intention of the framers of the Constitution that a judge could be prosecuted, convicted and sentenced before he was either suspended from performing the functions of his office or removed from office.

A contrary interpretation of the relevant constitutional provisions would inevitably lead to the absurdity highlighted by Sharma J.

C The other case relied upon by Malaba JA, *Chandler v Judicial Council* 398 US 74, 26 L Ed 2d 100 (1970), did not at all deal with the issue as to whether a judge could be prosecuted for a criminal offence before he was impeached. What Mr Justice Douglas and Mr Justice Black said in that case simply means that judges, like other people, are not above the law. The D case is, therefore, of no assistance in the present matter.

In any event, the Constitution of the United States of America does not have any provisions similar to the elaborate provisions of s 87 of the Constitution of Zimbabwe which specifically deal with the removal of a judge from office. Section 1 of Article III of the Constitution of the United States, which deals E with the judiciary, reads as follows:

> "The judicial power of the United States shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The judges, both of the Supreme and inferior Courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation which shall not be diminished during their continuance in office."

F However, s 3 of Article 1, which deals with impeachments, provides as follows:

> "The Senate shall have the sole power to try all impeachments …
>
> Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust or profit under the United States: *but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment and punishment, according to* G *law*" (emphasis added).

That, in my view, is a strong indication that the impeachment of a judge precedes the institution of criminal proceedings against him.

Finally, I wish to deal with the question of costs. As already stated, the applicant prayed for costs on the legal practitioner and client scale. In view H of the fact that the applicant's arrest and

detention constituted a very serious

Sandura JA

violation of his constitutional rights, I was of the opinion that the applicant was A entitled to costs on the higher scale. However, my colleagues felt otherwise.

In the circumstances, after hearing both counsel, we granted the order sought, with costs on the ordinary scale.

Judgment

Malaba JA: I have read the judgment prepared by my brother Sandura. A concession was made on behalf of the respondents on the fact that the B arrest, detention and remand of the applicant violated the provisions of ss 13(1) and 18(1) of the Constitution of Zimbabwe ("the Constitution"). The concession, in my view, was dispositive of the real dispute between the parties and provided sufficient ground for the order made by the court.

It was not necessary to go into the question whether the arrest, detention and C remand, that is, the institution of criminal proceedings against the applicant, were also in contravention of ss 79B and 87 of the Constitution. As Sandura JA, who was the presiding judge, considered the question to be of great constitutional importance and expressed views on it with which I respectfully disagree, I have found it necessary to express my own views on the matter.

The contention advanced by the applicant was that, under the constitutional D scheme, criminal proceedings cannot be instituted against a sitting judge of the Supreme Court or High Court before the procedure provided for in s 87 of the Constitution for his removal from office has been gone into and completed because to do so would violate the principle of judicial independence contained in s 79B. He argued that the initiation of criminal proceedings E against him before the procedure for his removal from office had been gone into and completed should be declared unconstitutional. He did not claim that a judge of the Supreme Court or High Court enjoyed immunity from prosecution for criminal offences.

It was suggested in the heads of argument that the applicant could not be F charged with an offence under the Prevention of Corruption Act [*Chapter 9:16*] ("the Act") because as a judge he is not a "public officer". Section 4(a), with which the applicant was charged, makes it a criminal offence for a "public officer", in the course of his employment as such, to do anything that is contrary to or inconsistent with his duty as a "public officer" for the purpose G of showing favour or disfavour to any person.

A "public officer" is defined in s 2 of the Act to mean "a person holding or acting in a paid office in the service of the State, a statutory body or a local authority". This definition is wide enough to include a judge. He or she is a constitutional functionary appointed into a public office so that the judicial authority and function of the State are discharged. The salary and allowances H

Sandura JA

A paid to a judge for his service to the State are paid out of the Consolidated Revenue Fund. In *R v Whitaker* [1914] 3 KB 1283 at p 1296 Lawrence J said:

> "A public officer is an officer who discharges any duty in the discharge of which the public are interested, more clearly so if he is paid out of a fund provided by the public. If taxes go to supply his payment and the public have an interest in the duties he discharges he is a public officer."

B It was held in *Whitaker's* case *supra* that a judicial officer was a "public officer". So a judge of the Supreme Court or High Court would be criminally liable should he or she commit any of the acts proscribed under the Act.

I now turn to consider the argument for the submission that the institution of criminal proceedings against the applicant as a sitting judge before the C procedure for his removal from office had been gone into and completed violated his constitutional right to judicial independence.

I start by setting out the provisions of the Constitution the interpretation of which is relevant to the determination of the question in issue.

Section 76(1) creates the office of the Attorney-General. Section 76(4)(a) D provides that the Attorney-General shall have power in *any case in which he considers it desirable so to do to institute* and undertake criminal proceedings before any court, not being a court established by a disciplinary law (the emphasis is mine). Section 76(7) provides that:

> "In the exercise of his powers under subsection (4) or (4(a)) the Attorney-General shall not be subject to the direction or control of any person or authority."

E Section 79(1) of the Constitution vests judicial authority in Zimbabwe in the Supreme Court and the High Court and such other subordinate courts as may be established by or under an Act of Parliament. Section 79B secures the independence of a judge in the exercise of the functions of his office. It provides that:

> F "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."

Judicial independence is further protected by the provisions of s 87(1), which declare that:

> "A judge of the Supreme Court or the High Court may be removed from office only for inability to discharge the functions of his office, whether arising from G infirmity of body or mind or any other cause, or for *misbehaviour* and shall not be so removed except in accordance with the provisions of this section."

The mandatory procedure to be followed and things to be done when the removal of a judge from office for misbehaviour needs to be investigated are set out in s 87, subss (2) to (9). In the case of a judge of the Supreme H Court or High Court the procedure for his or her removal from office for

---

misbehaviour only commences when the Chief Justice advises the President A that the question of removal from office of the judge concerned ought to be investigated. On receipt of the advice from the Chief Justice, the President is obliged to appoint a tribunal to inquire into the question of the removal of the judge concerned from office.

The correctness of the contention advanced by the applicant depends on the B interpretation adopted of ss 79B and 87 and the view taken of the nature and character of judicial independence. The first part of the argument made in support of the contention was that the concept of "misbehaviour" in s 87 of the Constitution included serious criminal offences such as were charged against the applicant and the only machinery with legal sanction for dealing with such criminal conduct was the procedure for the removal of a judge C from office. Although Mr *Muchengwa* for the respondents argued that "misbehaviour" in s 87 did not include criminal misconduct, I agree with Mr *Gauntlett* that misbehaviour includes serious criminal offences.

In *K Veeraswami v Union of India* [1991] 3 SCR 189 a complaint against the appellant, a former Chief Justice of the Madras High Court, was made to D the Delhi Special Police Establishment (CBI). On 24 February 1976, whilst the appellant was still Chief Justice of the Madras High Court, the police registered a case of corruption against him with the courts at New Delhi. It was alleged that, taking into consideration the sources of income of the appellant as a judge and Chief Justice of the High Court, the mode and style of his living and the probable expenses required during the period of his E judgeship/Chief Justiceship, it was reasonably believed that the appellant could not satisfactorily account for the possession of assets which were far disproportionate to his known sources of income. He was charged with the offence of criminal misconduct under clause (e) of s 5(1) of the Indian Prevention of Corruption Act 1947. F

Two months after the complaint against him was registered with the court, the appellant had retired on attaining the age of superannuation. When the matter came up for trial at the High Court of Madras, the appellant unsuccessfully moved the court to quash the criminal proceedings on a number of grounds. Section 124(4) of the Constitution of India provided that a judge of the G Supreme Court or High Court could be removed from office only on the ground of proved "misbehaviour" or incapacity.

It was contended by the State that "misbehaviour" did not include criminal misconduct. All five judges of the Supreme Court of India, including Verma J who wrote a dissenting judgment in a 4-1 decision, rejected the appellant's argument on this point. Verma J said at 294D: H

A "There can be no doubt that the expression 'misbehaviour' is of wide import and includes within its ambit criminal misconduct."

Even if criminal misconduct is included in the meaning of "misbehaviour", as used in s 87 of the Constitution of Zimbabwe, it does not follow that the procedure for the removal of a judge charged with a criminal offence from office must take precedence over the institution of criminal proceedings B against him for the same offence. Mr *Gauntlett*, for the applicant, could not point to a provision in the Constitution which expressly secured primacy of the procedure for the removal of an errant judge from office over the initiation of criminal proceedings by the Attorney-General. If the makers of the Constitution intended to make the removal of a judge from office a C condition precedent to the institution of criminal proceedings against him, they would have provided for it in clear terms.

The appellant in *Veeraswami's* case *supra* also argued that the institution of criminal proceedings against him as a judge before he was removed from office was a breach of the principle of judicial independence. Shetty J, writing D for the majority, rejected the argument in these terms at pp 250C-251E:

"A suggestion was also made that since 'misbehaviour' under clause (4) of Article 124 of the Constitution and 'criminal misconduct' under s 5(1) of the Act being synonymous, the constitutional process for removal of the judge must be gone through first and only after his removal the prosecution if need be recommended in the same process. Otherwise, it is said that it would lead to anomaly since there is no power either in the Constitution or under any other E enactment to suspend the judge or refuse to assign work to the judge pending his trial or conviction in the criminal court and the judge can insist on his right to continue till his removal even after his conviction and sentence.

It is inappropriate to state that conviction and sentence are no bar for the judge to sit in the court. We may make it clear that if a judge is convicted for the offence of criminal misconduct or any other offence involving moral turpitude, it is but F proper for him to keep himself away from the court. He must voluntarily withdraw from judicial work and await the outcome of the criminal prosecution. If he is sentenced in a criminal case he should forthwith tender his resignation unless he obtains stay of his conviction and sentence. He shall not insist on his right to sit on the Bench till he is cleared from the charge by a court of competent jurisdiction. The judiciary has no power of the purse or the sword. It survives only by public confidence and it is important to the stability of the society that G the confidence of the public is not shaken. The judge whose character is clouded and whose standards of morality and rectitude are in doubt may not have the judicial independence and may not command confidence of the public. He must voluntarily withdraw from the judicial work and administration.

The emphasis on this point should not appear superfluous. Professor Jackson says:

'Misbehaviour by a judge, whether it takes place on the Bench or off the H Bench, undermines public confidence in the administration of justice, and

---

2012 (1) ZLR p24

Sandura JA

also damages public respect for the law of the land; if nothing is seen to A be done about it, the damage goes unrepaired. This must be so when the judge commits a serious criminal offence and remains in office.'

(*Jackson's Machinery of Justice* by J R Spencer 8 ed pp 369-370).

The proved 'misbehaviour' which is the basis for removal of a judge under clause (4) of the Article 124 of the Constitution may also in certain cases involve an offence of criminal misconduct under s 5(1) of the Act (Prevention of Corruption B Act 1947). But that is no ground for withholding criminal prosecutions till the judge is removed by Parliament as suggested by counsel for the appellant. One is the power of Parliament and the other is the jurisdiction of a criminal court. Both are mutually exclusive. Even a Government servant who is answerable for his misconduct which may also constitute an offence under 1PC or under s 5 of the Act is liable to be prosecuted in addition to a departmental enquiry. C If prosecuted in a criminal court he may be punished by way of imprisonment or fine or with both, but in departmental enquiry the highest penalty that could be imposed on him is dismissal. The competent authority may either allow the prosecution to go on in a court of law or subject him to a departmental enquiry or subject him to both concurrently or consecutively. It is not objectionable to initiate criminal proceedings against a public servant before exhausting the disciplinary proceedings and, *a fortiori*, the prosecution of a judge for criminal misconduct D before his removal by Parliament for proved misbehaviour is unobjectionable."

I respectfully associate myself with these views. The submission made by the applicant, and accepted by Sandura JA, accords primacy to the procedure for the removal of a judge from office for criminal misconduct over the institution of criminal proceedings on the basis of an interpretation E of s 87 of the Constitution which fails to harmonise it with the provisions of s 76(4)(a) which

confers upon the Attorney-General the power to institute or not to institute criminal proceedings in any case in which he thinks it is desirable to do so. Such a construction clearly assumes that the makers of the Constitution had made a mistake in failing to provide for the primacy of the procedure for the removal from office of a judge charged with a criminal F offence over the institution of criminal proceedings against him.

But in *Gupta v Union of India* [1982] 2 SCR 365, Fazal Ali J at 749D750A, quoting what Das J said in *Bysack v Sham Sunder Haldar* [1953] SCR 533, warned:

> "'It must always be borne in mind, as said by Lord Halsbury in *Commissioner* G *for Special Purpose of Income Tax v Pemsel* [1891] AC 531 at 549, that it is not competent for any court to proceed upon the assumption that the legislature has made a mistake. The court must proceed on the footing that the legislature intended what it has said. Even if there is some defect in the phraseology used by the legislature the court cannot, as pointed out in *Crawford v Spooner* (6 Moo PC 1) aid the legislature's defective phrasing of an Act or add and amend, by construction, to make up deficiencies which are left in the Act'. H

2012 (1) ZLR p25

Sandura JA

> A Thus, this court has clearly held that, in construing a statutory or a constitutional provision, the court should not presume that the legislature has either committed a mistake or has omitted something which was very necessary. Das J very rightly remarked that it was not for the court but for others to remedy the defect, if any, found in a statutory provision."

Thus, where the language used is plain and unambiguous the court is not B entitled to go behind the language so as to add or supply omissions. Such a course of action would amount not to interpretation but to interpolation of the statutory or constitutional provisions and is against all the well established canons of interpretation of statutes. See *Gupta supra* at 756C-E.

The makers of the Constitution entrusted the Attorney-General with the C power to institute or not to institute criminal proceedings in any case and placed no limitations on the exercise of his discretion in the form of factors to be taken into account. To the contrary, the Constitution secured for him independence from any direction or control from any person or authority, including a court. It would therefore be a clear violation of the provisions of s 76(7) of the Constitution were this court to declare that the Attorney- D General cannot institute criminal proceedings against the applicant for criminal offences charged against him before the procedure for his removal from office had been gone through.

The argument was that the institution of criminal proceedings before the procedure for removal of a judge from office was gone into and completed violated judicial independence secured for the applicant in s 79B of the E Constitution.

There are two components of judicial independence. There is individual independence, which relates to the judge when he or she is performing adjudicatory functions of the State, that is to say, hearing cases and deciding upon the facts. There is the institutional independence, which secures the F judiciary office, or courts, from interference from the other organs of the State.

There is no doubt that judicial independence is a fundamental principle in any democratic system of government. That, however, does not mean that the judiciary is protected from all forms of relationships with other organs of the State. What is clear is that the judiciary is protected against those G relationships that may have the effect of interfering with its adjudicating authority and function. The judiciary is protected in the exercise of the authority and function conferred upon it by the Constitution to the exclusion of the other constitutional functionaries.

Section 79B of the Constitution, for example, makes it very clear that a judge shall not be directed or controlled by any person or authority whilst H he is exercising his adjudicating authority. The exception in s 79B of the

---

2012 (1) ZLR p26

Sandura JA

Constitution allowing for enactment of a written law placing a member A of the judiciary under the direction or control of another member of the judiciary reinforces the view that the independence protected relates to adjudication of cases as the power to direct judges in the execution of their

decision-making duties is regarded as a judicial power to be entrusted only to another member of the judiciary.

A careful reading of the provisions of s 79B embodying the principle of B judicial independence, raised by the applicant as a shield against the institution of criminal proceedings against him, suggests that it relates to individual independence of a judge when discharging adjudicating functions. Envisaged is a situation where there are times when a judge would not be exercising his judicial authority. C

It cannot be argued that when a judge commits a criminal offence at a time when he is not involved in the adjudication of a case he cannot be arrested and charged with that offence on account of the principle of judicial independence. Sole reliance on the power of removal to deal with such cases is clearly unrealistic. D

In *Gupta's* case *supra* Desai J at 1010H-1011G said:

> "Undoubtedly judiciary, the third branch of the Government, cannot act in isolation. They are ensured total freedom, of course, after entering the office, from any overt or covert pressure or interference in the process of adjudicating causes brought before them and to this end they are ensured tenure, pay, pension, privileges and certain basic conditions of service. The judiciary like any other constitutional E instrumentality has, however, to act towards attainment of constitutional goals. …
>
> It would thus unquestionably appear that the independence of judiciary is not to be determined in all its ramifications as some *a priori* concept but it has to be determined within the framework of the Constitution. True, that the thrust is to ensure that adjudications are untrammeled by external pressures or controls and it was conceded that independence of judiciary under the Constitution is F confined to the adjudicatory functions of the courts and tribunals and they are insulated from executive control in that behalf."

The allegations made against the applicant, on which the criminal proceedings were founded, were that he had sought to influence or direct his colleagues to order the release of his business partner's passport in an application by G the latter for alteration of his bail conditions imposed by a court in a case in which he was being tried on a murder charge. The allegation was that the applicant wanted to have a favour shown to his business partner.

The applicant's actions were said to constitute a contravention of s 4(a) of the Prevention of Corruption Act and an attempt to defeat the course of justice. At the time the applicant is alleged to have committed these offences H

Sandura JA

A he was not engaged in the adjudication of a case. He was not exercising his judicial authority. The allegations suggest instead that he would have been committing the very offences which were created by the legislature for the purpose of protecting judicial independence from corrupt practices.

The institution of criminal proceedings against the applicant by the Attorney- B General was not an intervention in any judicial process over which the applicant as a judge was presiding. It was, instead, an initiation of a different process altogether, namely, the trial of the applicant on the charges preferred against him.

The two proceedings, that is, the removal of a judge from office and prosecuting him for a criminal offence, are separate processes emanating C from the exercise of co-ordinate powers conferred upon two different constitutional functionaries. The purposes to be achieved are different. The object of one procedure is the conviction and sentencing of the applicant should the misbehaviour be proved beyond reasonable doubt; whilst that of the other is his removal from office.

D The above construction is consistent with what prevails in other jurisdictions. In *Chandler v Judicial Council* 398 US 74 (1970) at 139 Mr Justice Douglas said:

> "Federal judges are entitled, like other people, to the full freedom of the First Amendment. If they break a law, they can be prosecuted. If they become corrupt or sit in cases in which they have a personal or family stake, they can E be impeached by Congress."

At p 140 Mr Justice Black had this to say:

> "Judges in our system were to hold their offices during 'good behaviour', their compensation was not to be 'diminished during their continuance in office', and they were to be removed only after impeachment and trial by the United States F Congress. … Judges, like other people, can be tried, convicted, and punished for crimes."

Article 106 of the Korean Constitution, for example, provides that no judge shall be removed from office except by impeachment or a sentence of imprisonment, suggesting that the institution of criminal proceedings against a judge charged with a criminal offence can take place before the procedure G for his removal from office has been gone into.

In *Chandler's* case *supra* no suggestion was made that the prosecution of a judge for a criminal offence could not take place before the impeachment procedure had been gone into and completed.

The statement by the Chief Justices of Botswana, Malawi, Mauritius, H Namibia, South Africa, Swaziland, Tanzania, Uganda and Zambia, quoted

---

Sandura JA

by Sandura JA in his judgment, cannot be authority for the proposition A that the Constitution of Zimbabwe requires that the institution of criminal proceedings against a judge for a crime shall not be undertaken until the procedure for his removal from office under s 87 has been gone into and completed. There is clearly no provision supporting this construction in our Constitution. All that can be said is that the Constitution is silent on the matter. B The statement can only be taken to be an expression of what is desirable. That in the constitutional scheme is a matter for the Attorney-General to take into account in the exercise of his wide discretion whether to institute or not to institute criminal proceedings against a judge at a particular time. It is not the duty of this court to tell the Attorney-General how to exercise his discretion. C

I would accordingly support the order made only to the extent that it declares that the arrest, detention and remand of the applicant contravened the provisions of ss 13(1) and 18(1) of the Constitution of Zimbabwe and dismiss the application for an order to the effect that the arrest, detention and remand of the applicant violated his rights under ss 79B and 87 of the D Constitution of Zimbabwe. I agree with the order on costs.

Ziyambi JA, Gwaunza JA and Uchena AJA concurred with the judgment of MALABA JA.

Byron Venturas & Partners, applicant's legal practitioners E

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

* This important judgment should have appeared in the 2003 (2) ZLR. A headnote had been prepared, but for reasons that cannot now be clarified, the judgment was inadvertently omitted from those Reports when the volume was being typeset. The error is regretted. – Editor.

© 2015 Juta and Company (Pty) Ltd.

Document 3 of 75

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2012/Volume 1/MATUKIRE v MEDICINES CONTROL AUTHORITY OF ZIMBABWE 2012 (1) ZLR 29 (S)

MATUKIRE v MEDICINES CONTROL AUTHORITY OF ZIMBABWE 2012 (1) ZLR 29 (S)

Citation	2012 (1) ZLR 29 (S)
Case No	Judgment No. S-8-10
Court	Supreme Court, Harare
Judge	Sandura JA, Ziyambi JA & Garwe JA

Heard 12 January 2009*

Judgment 12 January 2009

Counsel *H Zhou*, for the appellant
L T Biti, for the respondent

Case Type Civil appeal

Annotations No case annotations to date

Flynote

Interpretation of statutes – *permissive powers – power given to regulatory authority to license pharmacists and to cancel or suspend licences – such power necessarily including power to issue warning that future breach of law may result in cancellation*

D **Medicine – pharmacist** – *breach of requirement to keep premises under continuous personal supervision – not necessary to for matter to be referred to Pharmacists Council in terms of Health Professions Act – permissible for Medicines Control Authority to deal with matter in terms of licensing laws*

E **Words and phrases** – *"continuous" – "supervision" – "continuous personal supervision"*

Headnote

The appellant was a pharmacist by profession and ran a pharmacy. He had a manager who was also a pharmacist. An inspector with the Medicines Control Authority of Zimbabwe visited the premises on a routine F inspection. He found the premises operating without a pharmacist, neither the appellant nor the manager being present. When the inspector revisited the pharmacy a day or two later, the appellant explained that he had been out at his bank for about 10 minutes. The appellant's response

Garwe JA

was tabled before the Licensing and Advertising Committee of the A respondent. After considering the matter the Committee decided to give the appellant a final warning to desist in future from leaving the pharmacy unsupervised in contravention of s 55(1)(b) of the Medicines and Allied Substances Control Act [*Chapter 15:03*]. The appellant in due course appealed to the Administrative Court, arguing that the respondent was B not empowered to conduct what was clearly a disciplinary hearing and issue a final written warning against the appellant. Instead, the respondent should have referred the case to the Pharmacists Council of Zimbabwe for the necessary disciplinary action to be taken in terms of the Health Professions Act [*Chapter 27:19*]. The court dismissed his appeal on the grounds that the respondent was empowered, in the exercise of its C discretion, to give a warning rather than initiate a criminal prosecution as provided in the Act. The court further held that the giving of a warning in these circumstances did not amount to a conviction for a criminal offence and that the Health Professions Act was not applicable to this case. On appeal to the Supreme Court:

Held, that whilst that the matter could have been referred to the Pharmacists D Council of Zimbabwe in terms of the Health Professions Act for the necessary disciplinary action to be taken against the appellant, it was clear that the respondent had exclusive jurisdiction on matters of licensing. The respondent was authorized, following an inquiry, either to suspend or to cancel a licence previously issued. It therefore had the E jurisdiction to investigate, inquire into matters related to the licensing of premises and after due consideration to make a determination as to whether the conduct which is the subject of the enquiry warrants the suspension or cancellation of a licence. There was no basis for arguing that the respondent should not have undertaken the inquiry that it did and that the matter should have been referred to the Pharmacists Council. F

Held, further, as to whether the respondent was empowered to give a final warning, that where a statutory body has been created for a particular purpose with defined powers, only such powers

can be implied which are reasonably ancillary to those defined powers to enable the statutory body to carry out the objects for which it was created. Those things which G can be construed as incidental to and may reasonably and properly be done under the main purpose, though they may not be literally within it, would not be prohibited. The power to suspend or cancel a licence is a drastic power that must necessarily incorporate the power to issue a warning that in the event of a recurrence the licence may in future be cancelled or suspended. Such a warning is not a penalty but part of H

Garwe JA

A the regulatory powers reposed within the authority to ensure that any conditions to which a licence may be subject are complied with.

Held, further, that there was no breach of the *nemo judex in sua causa* rule. The hearing was not a disciplinary hearing and the inspector did not take part in the Committee's deliberations.

B *Held*, further, that as to whether there was a breach of the requirement that a licensed pharmacy must be under the "continuous personal supervision" of a licensed pharmacist, the ordinary grammatical meaning of the words is that the person who is licensed for the premises must without break or interruption personally superintend the operations of the pharmacy. Such an interpretation does not result in an absurdity. Medicines and C similar substances can be very dangerous if they fall into the wrong hands or are dispensed without proper instructions. For this reason, it is inconceivable that a pharmacy could open for business for a day in the absence of a licensed pharmacist. Who would ensure that the dispensing of medicines is done correctly during that day? It is clearly understood D by persons who operate in this industry that there has to be a licensed pharmacist in attendance all the time. Should the licensed pharmacist not be available for any reason, arrangements must be made for another licensed pharmacist to stand in. As long as the licensed pharmacist has to go away from the premises of the pharmacy, then another licensed pharmacist has to stand in for him.

Cases referred to E

Makoka v Germiston City Council 1961 (3) SA 573 (A)

Legislation considered

F Health Professions Act [*Chapter 27:19*], ss 107 & 113

Medicines and Allied Substances Control Act [*Chapter 15:03*], ss 55(11)(b) & 61

Case information

H Zhou, for the appellant

G *L T Biti*, for the respondent

Judgment

Garwe JA: After hearing argument from both parties we dismissed the appeal and indicated that the reasons for our decision would follow in due course. These are the reasons.

The appellant, a pharmacist by profession, is the owner of Forestal Pharmacy H situate at Machipisa Shopping Centre in Highfied. At the relevant time the

Garwe JA

pharmacy was managed by one P Mapfumo ("Mapfumo"), also a registered A pharmacist.

In early May 2007, an inspector with the Medicines Control Authority of Zimbabwe visited the premises on routine inspection. He found the premises operating without a pharmacist. Neither the appellant nor Mapfumo were present. It is not clear whether the inspector returned to the premises the B same day or the following day, but when he did he found the appellant on the premises. Thereafter, he prepared a report on his observations and invited both the appellant and Mapfumo to comment. In his response, Mapfumo accepted that the observations made were correct and that

effort was to be made to regularize the anomalies observed. He further stated that, on the day in question, he had left the pharmacy under the supervision of the appellant C and that the appellant was better placed to explain why the pharmacy had been operating without a supervisor at the time of the first visit by the inspector. In his response, the appellant explained that at the time the inspector arrived at the pharmacy, he had gone out of the pharmacy to withdraw money from an automated teller machine. He did not say for how long he was away, but later indicated in his heads of argument before the Administrative Court D that he was away for ten minutes. The responses by both the appellant and Mapfumo were tabled before the Licensing and Advertising Committee of the respondent. After considering the matter, the Committee decided to give the appellant a final warning to desist in future from leaving the pharmacy unsupervised in contravention of s 55(1)(b) of the Medicines and Allied E Substances Control Act [*Chapter 15:03*]. In the case of Mapfumo it was resolved that he should sit for the forensic examination within three months. Letters to this effect were dispatched to both the appellant and Mapfumo.

Dissatisfied, both "appealed" to the Director-General of the respondent against the decision of the Committee. The "appeals" were unsuccessful, as a result of which the appellant appealed to the Administrative Court in F terms of s 62 of the Act. In noting his appeal the appellant also purported to appeal against the decision of the Committee directing Mapfumo to resit for the forensic examination within three months.

The Administrative Court reached the conclusion that it was not competent for the appellant to purport to appeal on behalf of Mapfumo and that, in G any event, Mapfumo had accepted that there had indeed been shortcomings in the dispensing of medicines and had undertaken to remedy these. The appeal on behalf of Mapfumo was therefore dismissed. The Administrative Court was further of the view that the rather than initiate a criminal prosecution as provided in the Act. The court was further of the view that the H

A giving of a warning in these circumstances did not amount to a conviction for a criminal offence and that the Health Professions Act [*Chapter 27:19*] was not applicable to this case. Against these findings the appellant has now appealed to this court.

The appellant has attacked the decision of the court *a quo* on three main B grounds. These are, firstly, that the court *a quo* misdirected itself in finding that the Health Professions Act was not applicable to this case and that only the Medicines and Allied Substances Control Act applied; secondly, that the court *a quo* erred in coming to the conclusion that the temporary absence of the appellant from the pharmacy constituted a breach of s 55(1) of the Act, which requires continuous supervision; and, thirdly, that the court *a quo* failed C to properly address its mind to the fact that the principles of natural justice were violated, in that the respondent was the complainant, the investigator and adjudicating authority in the same matter.

Whether the Health Professions Act applied to this case

It is the appellant's submission that the respondent has no general disciplinary D powers which would entitle it to impose penalties which it considers appropriate. In particular, the appellant submits that the respondent was not empowered to conduct a disciplinary hearing and thereafter issue a written warning. Instead, the respondent should have referred the appellant's case to the Pharmacists Council of Zimbabwe established in terms of s 45(1) of the Health Professions Act.

E In order to make a proper determination of this issue, it will be necessary to look at the relevant provisions contained in the two pieces of legislation. Further, it will be necessary to determine whether the inquiry undertaken by the respondent and the warning issued pursuant to that enquiry constituted a disciplinary hearing.

F Part XIX of the Health Professions Act provides for the discipline of health practitioners. Health practitioners include pharmacists – see Part V of the First Schedule as read with Part VIII of the Act. In terms of s107 of the Act, the Disciplinary Committee of the Pharmacists Council has the power to inquire into improper and disgraceful conduct on the part of a registered G pharmacist. The Disciplinary Committee also has authority to inquire into allegations of incompetence levelled against a member. In terms of s 113 of the Act, where the Disciplinary Committee decides that a

member is guilty of improper or disgraceful conduct or is grossly incompetent, it shall refer the matter to the Pharmacists Council for the removal of the name of the member from the register. Where the conduct of the member does not H warrant cancellation of registration, the Disciplinary Committee may do a

---

2012 (1) ZLR p34

Garwe JA

number of things, including censuring him or cautioning him and postponing A any further action for a period not exceeding three years. A person who is aggrieved by any decision taken against him by a council may appeal against the decision within 30 days of being informed of such decision.

The Medicines and Allied Substances Control Act, on the other hand, provides for the establishment of a Medicines Control Authority of Zimbabwe. In B terms of the Act, the authority has the responsibility to register all medicines, licensed premises and all persons who have been licensed.

Section 55 provides that no person shall practice as or carry on the business of a pharmacist or manufacture any medicine on any premises unless the premises are licensed for such business and the premises are under the C continuous personal supervision of a person who is licensed in terms of the Act. Any person who contravenes the section shall be guilty of an offence and liable to the penalties specified in the Act. In terms of s 61 of the Act, if the authority is of the view, *inter alia,* that the conditions subject to which a licence was issued have not been observed, the authority shall direct the Director-General of the Authority ("the Director-General") to give notice D thereof to the person by whom the application for the issue of a licence was made, specifying the ground upon which the opinion is based and calling upon such person to respond within one month. If, after due consideration of any comments, the authority is of the opinion that the licence should be cancelled or suspended, the authority may direct to the Director-General *inter alia* to cancel the licence and impose a period of disqualification not E exceeding three years or suspend the licence.

It is the appellant's submission that the respondent was not empowered to conduct what was clearly a disciplinary hearing and issue a final written warning against the appellant. The powers of the respondent are set out in the Act and nowhere is the respondent empowered to issue written warnings F at all. In these circumstances, so the appellant argues, the respondent should have referred the case to the Pharmacists Council of Zimbabwe for the necessary disciplinary action to be taken.

The respondent has argued that it has the power, following an inquiry, either to suspend or cancel a licence. The power to cancel or suspend is the greater G power and must necessarily incorporate the incidental power of warning against the possibility of actual cancellation or suspension. In other words, the grant of the greater includes the lesser.

Having carefully considered the submissions made by both parties on this aspect, I am satisfied that the appellant's submission in this regard must fail for reasons that follow. H

2012 (1) ZLR p35

Garwe JA

A Whilst it is correct that the matter could have been referred to the Pharmacists Council of Zimbabwe in terms of the Health Professions Act for the necessary disciplinary action to be taken against the appellant, it is clear, as the respondent has correctly observed in its heads of argument, that it has exclusive jurisdiction on matters of licencing. It has the power to regulate the manufacture, purchase, sale and distribution of drugs and to licence the B premises from which the business is to operate as well as the pharmacist who is to exercise continuous personal supervision. The respondent is authorized, following an inquiry, to either suspend or cancel a licence previously issued. There can be no doubt, therefore, that the respondent has the jurisdiction to investigate, to inquire into matters related to the licencing of premises and, C after due consideration, to make a determination as to whether the conduct which is the subject of the enquiry warrants the suspension or cancellation of a licence. There is, therefore, no basis upon which it can be argued that the respondent should not have undertaken the inquiry that it did and that the matter should have been referred to the Pharmacists Council of Zimbabwe.

The issue that arises is whether in the exercise of its discretion in terms of D the Act to suspend or cancel a licence the respondent was also empowered to give a final warning.

It is settled law that where a statutory body, such as the respondent in this case, has been created for a particular purpose with defined powers, only such powers can be implied which are reasonably ancillary to those defined E powers to enable the statutory body to carry out the objects for which it was created: *Principles of Legal Interpretation: Statutes, Contracts and Wills* by E A Kellaway at p 380.

It is also settled that those things which can be construed as incidental to and may reasonably and properly be done under the main purpose, though they may not be literally within it, would not be prohibited: Kellaway *op cit* at F p 386. See also *Makoka v Germiston City Council* 1961 (3) SA 573 (A) at 581.

I would agree with the respondent that the power to suspend or cancel a licence is a drastic power that must necessarily incorporate the power to issue a warning that in the event of a recurrence the licence may in future be cancelled or suspended. Such a power is implicit from the express powers G given to the respondent. The exercise of the greater power includes the lesser.

I would also agree with the remarks by the learned President that:

> "In exercising its discretion, the respondent opted not to initiate criminal prosecution or to interfere with the respondent's licence as provided for in s 61 of the Act. Instead, the respondent decided to advise the appellant of the need to carry out his duties in terms of the Act and that if in future he violates the Act H he would be referred for prosecution and his licence would be interfered with.

Garwe JA

> The respondent was just stating the position of the law. Surely if the Authority A can suspend, cancel or interfere with a licence issued in terms of s 61 of the Act, can one seriously argue that they cannot warn offending parties of such transgressions before taking such measures? Can one seriously argue that in doing so the Authority would have acted *ultra vires* the Act? The answer is no."

I am satisfied that the respondent was empowered to conduct the enquiry and that the issuing of a warning in these circumstances was not *ultra vires* B the powers conferred upon it by the Act. The warning was not a penalty, as suggested by the appellant, but part of the regulatory powers reposed within the authority to ensure that any conditions to which a licence may be subject are complied with.

Whether the principles of natural justice were violated C

It is the appellant's contention that the respondent violated the *nemo judex in sua causa* principle of natural justice. The respondent was the complainant, the investigator and the adjudicating authority in the matter in question.

The respondent, on the other hand, has argued that no principle of natural justice has been violated. In domestic enquiries of a disciplinary nature, such D as those contained in employment codes of conduct, there is no separation between those that control the prosecution and the adjudicators. At the end of the day, whether or not there has been a breach of the *nemo judex* principle depends on whether or not there has been bias.

I am not persuaded that there has been any violation of the *nemo judex* rule E in this case.

Section 61 of the Medicines and Allied Substances Control Act has made provision for the cancellation, suspension, alteration and variation of licences where the Authority is of the opinion, *inter alia,* that the conditions subject to which a licence was issued have not been observed. The section has outlined the procedure to be followed during the inquiry. After considering any response F given by the person affected, the Authority then makes a determination as to whether the licence should, *inter alia*, be cancelled or suspended. In terms of s 65 of the Act, the Authority is empowered to appoint such persons to be inspectors as it may consider necessary for the proper enforcement of the Act. One of the powers of the inspectors is to enter upon any premises which G have been licenced to ascertain whether the conditions subject to which a licence was issued are being complied with.

That is precisely what happened in this case. The inspector visited the pharmacy on a routine inspection. Amongst other things, he observed that there was no pharmacist in attendance, contrary to the provisions of s 55(1)(b) of the Act, which requires the continuous personal supervision of a registered pharmacist. H

Garwe JA

A He also observed that a number of issues related to the proper dispensing of medicines required attention. It was following these observations that the appellant was invited to comment, which he did. Instead of suspending or cancelling the licence, or referring the matter for criminal prosecution, the authority decided to give a warning to the appellant.

B There is no suggestion that the inspector who carried out the routine inspection and on whose report the appellant was asked to comment was involved in the actual deliberations of the Licencing and Advertising Committee. In these circumstances, the suggestion that the *nemo judex* rule was violated is not tenable. It must also be stressed that this was not a disciplinary hearing. This was an inquiry to ascertain whether or not the conditions upon which the C pharmacist's licence had been issued were being complied with.

The respondent has, quite rightly, in my view, drawn an analogy between what happened in this case and what happens in similar bodies such as the Law Society of Zimbabwe. The fact that the Law Society of Zimbabwe investigates and thereafter presides over a misconduct hearing involving a D legal practitioner would not, on that basis alone, mean that the *nemo judex* principle has been violated.

Whether the temporary absence of the appellant violated s 55(1) of the act

as already noted, it is not in dispute that the appellant was not in attendance E in the pharmacy at the time of the first visit of the inspector. He says he had gone to an automated teller machine to withdraw money. He did not say for how long he was away, but subsequently indicated in his heads of argument before the Administrative Court that he had been away for about ten minutes.

Section 55(1) of the Medicines and Allied Substances Control Act provides F as follows:

> "**55 Premises and persons to be licensed**
>
> (1) No person shall practise as or carry on the business of a pharmacist on any premises unless –
>
> (a) the premises are licensed … .
>
> (b) the premises are under the continuous personal supervision of a person who G is licensed in terms of this Part for those premises."

The issue that falls for determination is the interpretation to be given to the words "continuous personal supervision". The appellant submits that it does not mean that the licenced person must be physically present continuously. That, the appellant argues, would create an absurdity. What was intended is H that the person who exercises general direction or control must be qualified

Garwe JA

and that he must generally be in attendance to supervise the work. It does not A mean that if the person has to go away for a day the pharmacy must be closed.

The respondent argues that, because this is such a specialized field and because of the need to protect members of the public, it is easy to understand why there has to be a licenced pharmacist each time a pharmacy is open. For this reason, the practice of *locums* is widespread in this industry. B

It is trite that, in interpreting a legislative provision, words are to be given their ordinary grammatical signification unless that would result in an absurdity or defeat the intention of the legislature.

The word "continuous" is defined in the Concise Oxford Dictionary as "unbroken, uninterrupted in time or sequence". On the other hand, the word "supervise" is defined as "oversee, superintend execution or performance of C thing or action or work of person".

The ordinary grammatical meaning of the words is that the person who is licenced for the premises must, without break or interruption, personally superintend the operations of the pharmacy.

Such an interpretation does not result in an absurdity. As the respondent D correctly points out, medicines and similar substances can be very dangerous if they fall into the wrong hands or are dispensed without proper instructions. For this reason, it is inconceivable, as suggested by the

appellant, that a pharmacy could open for business for a day in the absence of a licenced pharmacist. Who would ensure that the dispensing of medicines is done E correctly during that day? I would accept the suggestion by the respondent that it is clearly understood by persons who operate in this industry that there has to be a licenced pharmacist in attendance all the time and for this reason should the licenced pharmacist not be available for any reason arrangements are made for another licenced pharmacist to stand in. This is the practice of *locums*. What this means is that for as long as the licenced pharmacist F has to go away from the premises of the pharmacy, then another licenced pharmacist has to stand in for him.

As all of the grounds of appeal lacked merit, we dismissed the appeal with costs. G

Sandura JA and Ziyambi JA concurred.

H Mukonoweshuro & Partners, appellant's legal practitioners

Honey & Blanckenberg, respondent's legal practitioners H

* *Editor's note:* this judgment, and the next three judgments in this volume, should in the normal course have been published in earlier editions of the Reports. However, although the court's decisions were handed down on the dates indicated, the judgments giving the reasons for the decisions did not become available until July 2013, too late for the judgments to be included in the appropriate volumes of the Law Reports, which volumes had already been printed: hence their inclusion in this volume.

© 2015 Juta and Company (Pty) Ltd.

Document 4 of 75

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2012/Volume 1/SHAMROCK HOLDINGS LTD v MINISTER OF ENVIRONMENT & TOURISM & ORS 2012 (1) ZLR 39 (S)

SHAMROCK HOLDINGS LTD v MINISTER OF ENVIRONMENT & TOURISM & ORS 2012 (1) ZLR 39 (S)

Citation	2012 (1) ZLR 39 (S)
Case No	Judgment No. S-21-10
Court	Supreme Court, Harare
Judge	Sandura JA, Cheda JA & Garwe JA
Heard	11 May 2009
Judgment	11 May 2009
Counsel	*I E G Musimbe*, for the appellant No appearance for the first respondent *W P Zhangazha*, for the second respondent *B W Elliot*, for the third respondent
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Estoppel – *issue estoppel – distinction between issue estoppel and res judicata*

Practice and procedure – *res judicata – principles – when plea may be upheld – issue estoppel – distinction between issue estoppel and res judicata*

Headnote

D The *exceptio rei judicatae* is based principally upon the public interest that there must be an end to litigation and that the authority vested in judicial decisions be given effect to, even if erroneous. It is a form of estoppel and means that where a final and definitive judgment is delivered by a competent court, the parties to that judgment or their privies are not E permitted to dispute its correctness. The requisites for a valid defence of *res judicata* in Roman-Dutch Law are that the matter adjudicated upon, on which the defence lies, must have been for the same cause between the same parties and that the same thing must have been demanded. The rule that the same thing must have been demanded in both actions has been held to mean that where a court has come to a decision on the F merits of a question in issue, that question, at any rate as a causa petendi of the same thing between the same parties, cannot be resuscitated in subsequent proceedings.

The principles of *res judicata* are almost analogous to those of issue estoppel. The only difference is that the doctrine of issue estoppel does not require G for its application that the same thing must have been demanded. Issue estoppel is premised on the public policy consideration that there must be finality in litigation. Parties cannot be permitted to begin fresh litigation because of new views they may entertain of the law of the case or new versions which they present as to what should be a proper apprehension by the court of the legal result, either of the construction of the documents H or the weight of certain circumstances. The rule is that, once an issue

---

has been raised and distinctly determined between the parties, then, as A a general rule, neither party can be allowed to fight that issue all over again. The same issue cannot be raised by either of them again in the same or subsequent proceedings other than in exceptional circumstances. Issue estoppel may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and, in B subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant, one of the parties seeks to re-open that issue. In this context, "issue", broadly speaking, is a matter of fact or question of law in dispute between two or more parties which a court is called upon by the parties to determine and pronounce upon in its judgment, and is relevant to the relief sought. C

Cases referred to

Arnold & Ors v National Westminster Bank plc [1991] 3 All ER 41 (HL)

Flood v Taylor 1978 RLR 230 (G)

Galante v Galante (1) 2002 (1) ZLR 144 (H) D

Horowitz v Brock and Others 1988 (2) SA 160 (A)

Savanhu v PTC S-124-97

Tsvangirai & Ors v Registrar-General 2002 (2) ZLR 653 (S)

Wolfenden v Jackson 1985 (2) ZLR 313 (S)

Legislation considered E

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

Case information

I E G Musimbe, for the appellant

No appearance for the first respondent

W P Zhangazha, for the second respondent

B W Elliot, for the third respondent F

Judgment

Garwe JA: After hearing counsel, we dismissed the appeal with costs on the legal practitioner and client scale and indicated that our reasons for doing so would follow in due course. These are the reasons.

This is an appeal against the judgment of the High Court upholding the G special plea of *res judicata* raised by the second respondent. Pursuant to this decision, the High Court dismissed the appellant's claim with costs and further ordered that the appellant grants the second respondent vacant possession of a property described as Unit 3 Matetsi Safari Area ("Matetsi Unit 3"). The appellant has attacked the decision of the court *a quo* on the basis that the court erred in upholding the special plea, more particularly, H

Garwe JA

A because there was no final judgment conclusively determining the dispute between the parties.

The background to the dispute was, to a large extent, common cause. The appellant was the holder of the exclusive right to conduct hunting safaris, game viewing and photographic safaris and, in pursuance thereof, to hunt wild B animals and thereafter to process, sell or otherwise dispose of the products of such animals. The agreement commenced on 1 January 1977 and was to subsist for a period of ten years unless terminated earlier. In February 2006, the Director-General of the second respondent advised the appellant that the agreement would be renewed for a further period of five years, as a result of which the appellant signed a form provided by the second respondent to C signify his acceptance of the offer and the terms applicable thereto. In June 2006, however, the respondent advised the appellant that the Government had decided to rescind the offer and instead to auction the rights in respect of Matetsi Unit 3. The appellant was advised that he was free to participate in the auction, which was to take place on 28 June 2006.

Dissatisfied with this development, the appellant filed, on the basis of D urgency, an application with the High Court to interdict and restrain the first and second respondents and the auctioneer from selling or disposing Matetsi Unit 3 pending the outcome of an application that was to be filed to, *inter alia*, compel the first and second respondents to abide by the agreement and renew the agreement. The issue that fell for determination during the E hearing of that urgent application was whether the appellant had satisfied the requirements for a temporary interdict and, in particular, whether he had established the existence of a *prima facie* right. Gowora J, who presided over the application [1], observed as follows on p 4 of the judgment:

> "My reading of this section is that the Authority has power to grant hunting rights in a safari area. Such power as it has is, however, exercised after consultation F with the Minister and with the concurrence of the latter. The applicant concedes this point. In the absence of the concurrence of the Minister, my view is that no proper offer has been made and it then begs the question as to whether or not there is *prima facie* right which the applicant can seek to rely on in having the interim relief granted.
>
> The first respondent contends that the applicant has not established a *prima* G *facie* right as relates to future rights in the unit, such as would entitle it to an interim interdict. There is no new agreement and the only basis upon which the applicant would claim a right would be if the agreement were renewed for the five years suggested by the letter from the Authority. The initial agreement was for a period of ten years, and that is the maximum duration provided for

Garwe JA

> in terms of the Act. An extension of the agreement which would be achieved A by a renewal would, therefore, be contrary to the requirements of the Act, *viz* s 37 of the Act. I find therefore that there was no new agreement between the parties, nor was there a renewal of the existing agreement."

Gowora J accordingly dismissed the application with costs. This was on 14 July 2006. B

For reasons that will become apparent shortly, it is important, at this stage, to stress the finding by Gowora J that, in the absence of the concurrence of the Minister, no proper offer had been made and therefore no *prima facie* right had been established.

Dissatisfied with the judgment, the appellant appealed to the Supreme Court against the finding that it had not established a *prima facie* right entitling it C to the interdict sought.

Whilst the appeal was pending, the appellant instituted an action on 27 July 2006 claiming an order of specific performance against the first and second respondents to renew the hunting rights for a further period of five years. In its declaration, the appellant now averred that the second respondent, *with* D *the concurrence of the first respondent* (i.e. the Minister) had renewed the lease for a further period of five years, thereby creating a legally binding agreement. The other facts upon which the appellant relied remained the same.

On 5 March 2007 this court, in *Shamrock Holdings (Pvt) Ltd v Parks and Wildlife Authority & Ors* S-66-06, dismissed the appeal with costs. At pp 6 E and 7 of the judgment Ziyambi JA remarked:

> "It was not alleged by the appellant that the Minister had given his concurrence to the renewal of the agreement of lease and indeed it was the respondents' case that no agreement was concluded because the Minister's concurrence was not given. This averment was made in the opposing affidavits of the first and second respondents and was controverted by the appellant, who filed no answering F affidavit. The basis of the appellant's case was that the Authority was acting on behalf of the Minister and that concurrence of the Minister was not necessary.
>
> Of course, this stance would be contrary to the express provisions of s 37 of the Act that the Authority's power to grant hunting rights, such as the one in this case, is subject to the concurrence of the Minister. A prudent person would enquire whether the concurrence of the Minister had been obtained in keeping with the G provisions of the Act. The fact that the appellant may have been unaware of the governing legislation does not assist it, as ignorance of the law is no excuse. Thus, in the absence of proof of the Minister's concurrence, the court *a quo* correctly found that there was no valid renewal agreement.
>
> The purported renewal would appear to be in conflict with para (b) of the proviso *supra* which prohibits the granting of hunting rights for a period in excess of ten years. A renewal of the old agreement for five years would, it seems to me, H

Garwe JA

> A amount to an extension of the period of agreement of ten years. I do not accept the contention by the appellant that this was a new agreement which was to endure for five years. The wording of the letters relied upon by the appellant clearly convey the fact that this was a renewal of the old, rather than a new, lease."

The learned Judge of Appeal concluded:

> "Accordingly, no *prima facie* right was established by the appellant which entitled B it to the remedy sought in the court *a quo*. The failure to establish a *prima facie* right was fatal to the application and the court *a quo* correctly dismissed it."

On 20 November 2007, the second respondent filed a special plea, in which it raised the defence of *res judicata* and, in its claim in reconvention, sought an order granting it vacant possession of Matetsi Unit 3 and the eviction C of the appellant and all those claiming possession through it. An order was subsequently made incorporating the special plea and claim in reconvention into the pleadings. Thereafter, at a pre-trial conference held to determine the issues for trial, it was agreed that the issue of *res judicata* be determined as a point *in limine*. That is the issue that came up for determination before D Chitakunye J on 15 October 2008.

At p 4 of the judgment, Chitakunye J remarked:

> "It was only upon a successful argument that there was a new lease or a renewed lease agreement that the appellant's rights therein would have needed to be protected. The lack of any such rights means that the respondents could proceed to auction or dispose of the hunting rights in Matetsi Unit 3, as they did.
>
> E The finding that there was neither a new lease agreement nor a renewed lease agreement was fatal to the plaintiff's present case. In this case, the plaintiff sought an order for the specific performance of an agreement this court has said was non existent and which finding the Supreme Court confirmed."

At p 9 of the judgment Chitakunye J concluded.

> F "*In casu* there are no further facts or material which is (*sic*) relevant to the issue at hand. In the earlier proceedings the plaintiff was required to establish *prima facie* right to the relief sought by way of establishing the existence of a lease agreement for the period after 1 January 2007 and it failed to do so. In the current proceedings plaintiff will be required to prove the existence of a valid agreement. Reliance will be placed on basically the same communication and G correspondence as in the previous proceedings. Indeed, the same section of the Parks and Wild Life Act will be in issue. It seems clear that all that the

plaintiff seeks is another opportunity to regurgitate the same argument with virtually the same result expected. It is in such situations that a party must be estopped."

The learned judge then dismissed the plaintiff's claim with costs and ordered the eviction of the appellant from Matetsi Unit 3. It is that decision that forms H the subject matter of this appeal.

Garwe JA

In its grounds of appeal, the appellant attacked the decision on the ground A that the court *a quo* erred in upholding the special plea of *res judicata,* more particularly in that:

1. There was no final judgment conclusively determining the dispute between the two parties.
2. The dispute as to whether a binding agreement existed and whether a B claim for specific performance was sustainable was not before Gowora J.
3. The court *a quo* erred in finding that the evidence to be led in respect of the action for specific performance was the same as that previously presented before the court during the application for an interdict.
4. The court *a quo* erred in its interpretation of s 37 of the Parks and Wild Life Act [*Chapter 20:14*] and should have found that the granting of a C lease to the appellant for a further period of five years was consistent with the provisions of the section.

There are two issues for determination before this court and these are: firstly, whether the special plea of *res judicata* was correctly upheld by the court *a quo;* and, secondly, whether the court *a quo* correctly applied the doctrine of D issue estoppel in coming to the conclusion that the appellant was estopped from bringing back to court for adjudication an issue that was previously determined by two competent courts in this jurisdiction.

The *exceptio rei judicatae* is based principally upon the public interest that there must be an end to litigation and that the authority vested in judicial decisions be given effect to, even if erroneous. It is a form of estoppel and E means that, where a final and definitive judgment is delivered by a competent court, the parties to that judgment or their privies are not permitted to dispute its correctness: *Wolfenden v Jackson* 1985 (2) ZLR 313 (S) at 316C-D. See also *Tsvangirai & Ors v Registrar General* 2002 (2) ZLR 653 (S) at 666C-D and *Flood v Taylor* 1978 RLR 230 (G) at 232C-D. F

The requisites for a valid defence of *res judicata* in Roman-Dutch Law are that the matter adjudicated upon, on which the defence lies, must have been for the same cause between the same parties and the same thing must have been demanded. The rule that the same thing must have been demanded in both actions has been held to mean that where a court has come to a decision G on the merits of a question in issue, that question, at any rate as a *causa petendi* of the same thing between the same parties, cannot be resuscitated in subsequent proceedings: *Horowitz v Brock and Others* 1988 (2) SA 160 (A) at 178-179.

In our law the principles of *res judicata* are almost analogous to those of issue estoppel. The only difference is that the doctrine of issue estoppel does H

Garwe JA

A not require for its application that the same thing must have been demanded: *Galante v Galante (1)* 2002 (1) ZLR 144 (H) at 152.

The doctrine of issue estoppel originated in English law but has been accepted as part of the law both in South Africa and in Zimbabwe.

Issue estoppel is premised on the public policy consideration that there must B be finality in litigation. Parties cannot be permitted to begin fresh litigation because of new views they may entertain of the law of the case or new versions which they present as to what should be a proper apprehension by the court of the legal result, either of the construction of the documents or the weight of certain circumstances. The rule is that, once an issue has been raised and distinctly determined between the parties, then as a general rule, C neither party can be allowed to fight that issue all over again. The same issue cannot be raised by either of them again in the same or subsequent proceedings other than in exceptional circumstances. Issue estoppel may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to

which the same issue D is relevant one of the parties seeks to re-open that issue: *Galante v Galante supra* at p 149-150 where Smith J cited with approval the remarks of Lord Keith of Kinkel in *Arnold & Ors v National Westminister Bank plc* [1991] 3 All ER 41 (HC) at 47 that:

> "If in litigation on one such cause of action any such separate issues whether a E particular condition has been fulfilled is determined by a court of competent jurisdiction, either on evidence or on admission by a party to the litigation, neither party can, in subsequent litigation between them on any cause of action which depends on the fulfillment of the identical condition, assert that the condition was fulfilled if the court has in the first litigation determined that it was not, or deny that it was fulfilled if the court in the first litigation determined that it was."

F On what constitutes "an issue", Smallberger JA remarked in *Horowitz v Brock & Ors supra* at 179H-180 as follows:

> "An issue, broadly speaking, is a matter of fact or question of law in dispute between two or more parties which a court is called upon by the parties to determine and pronounce upon in its judgment, and is relevant to the relief sought."

G It has been necessary to consider the case law in some depth in order to make a proper determination of the issues raised before this appeal. From the facts and the law, it is clear that this appeal cannot succeed and that the action for specific performance was intended to bring back before the court the question, previously decided, whether or not there was a valid agreement H between the parties.

2012 (1) ZLR p46

Garwe JA

In very clear terms, the High Court found, firstly, that, in the absence of the A concurrence of the Minister, no proper offer had been made and, secondly, that an extension of the agreement which would be achieved by a renewal would be contrary to the provisions of s 37 of the Parks and Wildlife Act [*Chapter 20:14*]. The court therefore concluded:

> "I find therefore that there was no new agreement between the parties nor was B there a renewal of the existing agreement."

This was a pronouncement by the High Court of Zimbabwe. It is common cause the appellant appealed against this finding to the Supreme Court. Whilst that appeal was pending, the appellant then filed an action for specific performance, this time alleging that the lease agreement had been renewed by the second respondent with the concurrence of the first respondent. C Thereafter the Supreme Court dismissed the appeal and on p 6 & 7 of the judgment remarked as follows:

> "… in the absence of proof of the Minister's concurrence, the court *a quo* correctly found that there was no valid renewal agreement."

The Supreme Court further found that – D

> "The purported renewal would appear to be in conflict with para (b) of the proviso which prohibits the granting of hunting rights for a period in excess of ten years. A renewal of the old agreement for five years would, it seems to me, amount to an extension of the period of the agreement to ten years. I do not accept the contention by the appellant that this was a new agreement which was to endure for five years. The wording of the letters relied upon by the appellant clearly E convey the fact that this was a renewal of the old, rather than a new, lease."

Nothing could be clearer than those two findings by the High Court and Supreme Court. There was no valid agreement between the two parties.

I would agree with the second respondent that the appellant is estopped from bringing back before the court the issue whether or not there was a valid agreement between the parties. I further agree that it matters not that the relief F sought in the two cases is different. The relief in both cases is predicated upon the existence of alleged contractual rights which the court has previously declared to be non-existent. For as long as there is a judgment declaring that there was no valid agreement between the parties, the appellant is estopped from alleging that there was a valid agreement because the Minister concurred. G I would further agree with the second respondent that this is a clear attempt by the appellant to enforce an agreement that has been declared invalid and a clear attempt to invite this court to decide on the correctness or otherwise of those judgments. In its earlier stance, the appellant had asserted that the concurrence of the Minister was not necessary. By now alleging that it has proof that the Minister concurred and that the lease can extend beyond ten H

Garwe JA

A years the appellant is, in fact, asking the court, once again, to delve into the issue whether or not there was a valid lease agreement. The appellant is clearly estopped from doing so. If this were allowed there would be no finality in litigation.

It is clear that the two matters involved the same parties, the same set of B facts and the relief sought in either case was predicated on the existence of a valid lease agreement. The fact that in the first case the appellant sought an interdict and in the second case specific performance, in my view, makes no difference. The cause of action in either case was the breach of contract. As to what constitutes breach of contract, see *Savanhu v Posts & Telecommunications Corporation* S-124-97 at p 8 of the judgment. Clearly C the defence of *res judicata* and the doctrine of issue estoppel would both apply in the circumstances of this case.

On the question of costs, it was clear that the action for specific performance was intended to get round the finding by the court that no valid agreement had been proved as it had not been alleged and shown that the Minister had concurred. This is precisely the kind of conduct various decisions of this D court and the courts in other jurisdictions have said is not permissible. It must have been clear to the appellant that the issues he was seeking to re-open had been adjudicated upon and that the court had made known its findings on those issues. In the circumstances, it was the considered view of this court that the respondents have needlessly been made to defend an action based E on the existence of an agreement which the court has previously held to be non-existent. In these circumstances, costs on the higher scale were warranted.

It was for the above reasons that, after hearing counsel, we dismissed the appeal and ordered the appellant to pay the costs on the scale of legal practitioner and client.

F SANDURA JA and CHEDA JA concurred

I E G Musimbe & Partners, appellant's legal practitioners

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

G *Coghlan, Welsh & Guest*, third respondent's legal practitioners

1 The judgment is *Shamrock Holdings (Pvt) Ltd v Parks and Wildlife Management Authority & Ors* HH-82-06, delivered on 14 July 2006. – *Editor.*.

© 2015 Juta and Company (Pty) Ltd.

Document 5 of 75

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2012/Volume 1/S v KADZINGA 2012 (1) ZLR 48 (S)

S v KADZINGA 2012 (1) ZLR 48 (S)

Citation	2012 (1) ZLR 48 (S)
Case No	Judgment No. S-1-11
Court	Supreme Court, Harare
Judge	Malaba DCJ, Ziyambi JA & Cheda AJA
Heard	15 November 2010

Judgment 15 November 2010

Counsel *D Halimani*, for the appellant
R K Tokwe, for the respondent

Case Type Criminal appeal

Annotations No case annotations to date

Flynote

Criminal procedure *(sentence) – offences under Criminal Law Code – murder – extenuating circumstances – what are – murder committed* C *during course of armed robbery – extenuating circumstances unlikely*

Headnote

Extenuating circumstances are any facts bearing on the commission of the crime which reduce the moral blameworthiness of the accused, as distinct from his legal culpability. In other words, an extenuating circumstance, being a fact associated with the crime, must upon its D consideration by a reasonable person serve to diminish in that person's mind the degree of the prisoner's guilt in the moral sense. Those who commit murder in the course of robbery are themselves responsible for the creation of circumstances relating to the commission of the crime, which circumstances, in many cases would not in the mind of a reasonable person reduce the degree of their moral blameworthiness for E the purposes of avoiding the mandatory sentence of death.

Cases referred to

S v Badala 1964 (1) SA 26 (A)

S v Chareka & Anor S-4-93 F

S v Chidziva S-83-99

S v Kuyeri S-188-95

S v Letsolo 1970 (3) SA 476 (A)

S v Mubaiwa & Anor 1992 (2) ZLR 362 (S)

S v Ndhlovu S-34-85 G

Case information

D Halimani, for the appellant

R K Tokwe, for the respondent

Judgment

Malaba DCJ: This is an appeal against the sentence of death imposed on the appellant by the High Court on 30 May 2006 following a conviction of murder with actual intent to kill. The appellant had been charged with H

Malaba DCJ

A the unlawful and intentional killing of Charles Anderson at Norfolk Farm, Bindura, on 2 June 2002. The trial court, having found that no extenuating circumstances existed, imposed the mandatory sentence of death. At the hearing of the appeal, Mr *Halimani*, who appeared on behalf of the appellant *pro Deo,* indicated that he had no meaningful submissions to make against the imposition of the sentence. Finding that there was no need to call upon B Mr *Tokwe* for the respondent, we dismissed the appeal and indicated that reasons for the decision would follow. These are the reasons.

The facts on which the charge of murder preferred against the appellant was based and found by the court *a quo* to have been proved by the state beyond reasonable doubt are accurately summarized in the respondent's heads of C argument. They are that on 2 June 2002 at about 12 pm the appellant, in the company of one Benedict Makumbe (who is still at large), went to the deceased's house at Norfolk Farm in Bindura with the intention of committing robbery. The appellant was armed with an AK 47 rifle loaded with live rounds.

On arrival at the deceased's residence, the appellant and his accomplice D found the deceased's employees, Michael Tom and Edmore Mapuranga. Michael was outside, whilst Edmore was inside the house, the doors to which were locked. The deceased was not at the farm at the time. The appellant threatened Michael with the firearm and placed him under their command. The appellant his accomplice took him to a window next to the front door to the house. The appellant broke the window with an iron bar to gain entry E whence he was able to open the door. In the house the appellant and his accomplice found Edmore, whom they threatened with the firearm. The appellant ordered the two employees to lie on the floor in the corridor next to the telephone receiver and covered them with a blanket. The appellant ordered his accomplice to keep guard on the employees whilst he cut the F telephone cable. He broke the security gates leading to the bedrooms using the iron bar and started ransacking the house, taking the items of property they wanted and putting them in bags.

As the robbery was going on, the deceased, in the company of his wife and two children, arrived at the gate to the homestead in a motor vehicle. The appellant had now ordered the employees to lie on the floor by the door leading G into the corridor under guard by his accomplice. Upon hearing the sound of the engine of the motor vehicle, Michael told the appellant that his employer had arrived. The appellant retorted, saying that he was not worried by the arrival of the employer, as he would shoot him if he came into the house.

On realizing that no-one was coming to open the gate for them, the deceased's H wife did so. She went ahead of the motor vehicle as it drove into the yard.

Malaba DCJ

The appellant heard the sound of the motor vehicle as it approached the A house. He moved into a toilet whence he could see what was happening outside. Whilst there he saw the deceased's wife approach the back of the house and going back to the motor vehicle. The deceased's wife had noticed that the lock on the front door had been tampered with. She had called out for the employees and got no response. She went back to the motor vehicle B and reported the results of her observations to the deceased.

The deceased armed himself with a shotgun and moved around to the back of the house. The appellant, who was armed with the AK rifle, saw the deceased as he went to the back of the house. He got ready to shoot the deceased as he entered the house. As the deceased entered the house, the appellant, without a warning, immediately opened fire and shot him on the head. He fired at C least three shots. The bullet that killed the deceased entered the head just below the right ear and exited from the left side.

The appellant came out of the house and demanded keys to one of the deceased's motor vehicles from the deceased's wife. The two loaded the loot into the motor vehicle and forced the two employees to get into it. The D appellant gave the keys to his accomplice to drive the car, whilst he walked ahead to open the gate. The appellant's accomplice, who probably had been overwhelmed by the deceased's death, simply drove through the open gate, leaving the appellant behind. The motor vehicle overturned about three kilometres from the deceased's homestead. The appellant's accomplice made E good his escape and remains at large to this day.

Meanwhile, the appellant left the scene on foot and met the deceased's neighbour. The appellant lied to him, saying he was a security guard at the farm and that he needed assistance to track robbers who had shot dead his employer. The neighbour responded by offering the appellant a lift in his car as they drove in the direction taken by the motor vehicle driven by F the appellant's accomplice. When they got to where the motor vehicle had overtured, the appellant disembarked from the neighbour's vehicle and walked towards Chiweshe Communal Lands. He was subsequently arrested on the same day and the rifle recovered from him. It was later discovered by the police that the rifle had been reported as having been taken by the use of G violence from a government Minister's

security guard, who had given the appellant and his accomplice a lift on his way to Bindura two days before the death of the deceased.

It is clear that no court acting reasonably could possibly find extenuating circumstances from the facts. Extenuating circumstances are any facts bearing on the commission of the crime which reduce the moral blameworthiness H

Malaba DCJ

A of the accused, as distinct from his legal culpability. In other words, an extenuating circumstance, being a fact associated with the crime, must, upon its consideration by a reasonable man, serve to diminish in his mind the degree of the prisoner's guilt in the moral sense. See *S v Badala* 1964 (1) SA 26 (A), *S v Letsolo* 1970 (3) SA 476 (A), *S v Chidziva* S-83-99, and B *S v Kuyeri* S-188-95.

When considered carefully, all the facts bearing upon the commission of the crime in this case aggravate rather than reduce the appellant's moral blameworthiness. The appellant armed himself with a firearm loaded with live bullets and proceeded to the deceased's farm house with the intention of committing robbery. He was prepared to use the firearm to overcome any C perceived interference with his criminal conduct.

There is no doubt that the appellant welcomed a situation in which he would have to use the firearm. When the deceased's employee warned the appellant of the arrival of his employer and *ipso facto* the imminence of a possible confrontation, he was not loath to say that he was going to shoot the deceased D if he came into the house. To successfully carry out his murderous intention the appellant took up position in a strategic place in the toilet in readiness to shoot the deceased as he entered the house and did exactly what he had told the deceased's employee a few minutes earlier he would do. He shot the deceased, who had the right to enter his house, in the head at close range, without any prior warning. He could safely have given the warning from the E toilet, affording the deceased the opportunity to surrender. The facts show that the appellant had premeditated the killing and had no intention of saving the deceased's life. It was a killing committed in cold blood.

This court has warned in numerous cases that those who commit murder in the course of robbery are themselves responsible for the creation of F circumstances relating to the commission of the crime which in many cases would not in the mind of a reasonable person reduce the degree of their moral blameworthiness for the purposes of avoiding the mandatory sentence of death. The appellant's case falls inyo that category of cases where there is nothing in the circumstances of the commission of the murder in the course of robbery that reduces the prisoner's degree of moral guilt. See *S v Ndhlovu* E S-34-85, *S v Mubaiwa* 1992 (2) ZLR 362 (S) and *S v Chareka & Anor* S-4-93.

The court *a quo* was correct in holding that there were no extenuating circumstances and imposing the death sentence on the appellant.

ZIYAMBI JA and CHEDA AJA concurred

H *Pro Deo*

© 2015 Juta and Company (Pty) Ltd.

Document 6 of 75

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2012/Volume 1/CHIWAWA v MUTZURIS & ORS 2012 (1) ZLR 52 (S)

CHIWAWA v MUTZURIS & ORS 2012 (1) ZLR 52 (S)

Citation 2012 (1) ZLR 52 (S)

Case No	Judgment No. S-4-11
Court	Supreme Court, Harare
Judge	Sandura JA, Garwe JA & Cheda AJA
Heard	26 January 2010; CAV
Judgment	24 February 2011
Counsel	*H Zhou*, for the appellant *R M Fitches*, for the respondent
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Prescription – interruption *of – by service of process – need for claim to be prosecuted to successful conclusion – unsuccessful conclusion – prescription not interrupted*

Headnote

In July 2003 the appellant entered into an agreement of sale of a property. D On her version, she became entitled to transfer of the property, having previously paid the purchase price in full. On 11 June 2004, the appellant filed a court application in which she sought an order enforcing the contract. That application was dismissed on 26 May 2005 on the basis that there were material disputes of fact which could not be resolved E on the papers. On 29 November 2006, the appellant instituted an action before the High Court, seeking an order compelling the respondents to transfer the property to herself. The respondents defended that action and raised a number of defences, including that of prescription. The High Court took the view that, since the application filed in 2004 had been F dismissed, the running of prescription had not been interrupted. The court held that prescription is not interrupted where a creditor does not obtain judgment in his favour on the process issued. In terms of s 19(3) of the Prescription Act [Chapter 8:11], the interruption of prescription by the service on the debtor of any process whereby the creditor claims G payment of the debt shall lapse and the running of prescription shall not be deemed to have been interrupted, if the creditor does not successfully prosecute his claim under the process in question to final judgment. On appeal, the appellant argued that the adverb "successfully" qualifies the prosecution of the case to its final conclusion and not the outcome of the case. H

2012 (1) ZLR p53

Garwe JA

A *Held*, that the use of the word "successfully" in subs (3)(a) means that the creditor is required to successfully prosecute his claim to final judgment before prescription shall be deemed to have been interrupted. He is not simply required to prosecute his claim to final judgment. Section 19(3)(b) puts the matter beyond argument. It provides that if the creditor B *successfully* prosecutes his claim to final judgment but abandons the judgment or the judgment is set aside then prescription shall not be deemed to have been interrupted. Any other meaning would lead to an absurd result, for there would be no finality to litigation and the limitation imposed by the statute would be rendered nugatory if a litigant who loses a case can arrest prescription indefinitely by bringing suits within C three years of each unfavourable judgment as long as he can avoid the plea of *res judicata*.

Cases referred to

Melamed & Anor v BP Southern Africa (Pty) Ltd 2000 (2) SA 614 (W)

Sadomba v Farai Uzumba (Pvt) Ltd 1982 (2) ZLR 142 (H)

D *Titus v Union & SWA Ins Co Ltd* 1980 (2) SA 701 (Tk)

Legislation considered

Prescription Act [*Chapter 8:11*], s 19

Case information

E *H Zhou*, for the appellant

R M Fitches, for the respondent

Judgment

Garwe JA: In this appeal the appellant seeks an order setting aside the order of the High Court granting absolution from the instance and substituting F that order with one dismissing, with costs, the application for absolution from the instance.

The background to this matter is as follows. In July 2003 the appellant entered into an agreement of sale of a property known as Stand 12886 Salisbury Township of Salisbury. During the same month, the appellant obtained from the relevant authorities a tax clearance certificate in respect of the same G property. On her version, she became entitled to transfer of the property at this stage, having previously paid the purchase price in full.

On 11 June 2004, the appellant filed a court application in which she sought an order enforcing the contract. That application was dismissed on 26 May 2005 on the basis that there were material disputes of fact which could not H be resolved on the papers.

Garwe JA

On 29 November 2006, the appellant instituted an action before the High A Court, seeking an order compelling the respondents to transfer the property to herself. The respondents defended that action and raised a number of defences. Of relevance to the present appeal was the defence that the appellant's claim had prescribed by the time the summons was issued in November 2006.

At the hearing of the matter before the High Court one of the issues that fell B for determination was the interpretation to be given to s 19 of the Prescription Act [*Chapter 8:11*]. Section 19 of the Act reads in relevant part:

> "**19 Judicial interruption of prescription**
>
> (1) … .
>
> (2) The running of prescription shall, subject to subsection (3), be interrupted C by the service on the debtor of any process whereby the creditor claims payment of the debt.
>
> (3) Unless the debtor acknowledges liability, the interruption of prescription in terms of subsection (2) shall lapse and the running of prescription shall not be deemed to have been interrupted, if the creditor –
>
> (a) does not successfully prosecute his claim under the process in question to D final judgment, or
>
> (b) successfully prosecutes his claim under the process in question to final judgment but abandons the judgment or the judgment is set aside."

The court *a quo* was of the view that the cause of action arose in July 2003. In terms of the Prescription Act, the appellant should have instituted proceedings within three years. In instituting proceedings in November 2006, E the appellant's claim became time-barred. The court was of the further view that, since the application filed in 2004 had been dismissed, the running of prescription had not been interrupted. The court took the view that prescription is not interrupted where a creditor does not obtain judgment in his favour on the process issued. Consequent upon these findings, the court *a quo* granted F the application for absolution from the instance and ordered, *inter alia*, that the appellant was to pay the costs of suit.

Dissatisfied with the above finding, the appellant filed an appeal with this court. Although the appellant raised several issues in her grounds of appeal, in her heads of argument she has made submissions on one issue only – namely, whether prescription was judicially interrupted by the application filed in G June 2004. The appeal before this court therefore concerns the interpretation to be given to s 19 of the Prescription Act and, in particular, to the phrase –

"does not successfully prosecute his claim under the process to final judgment".

The submissions made before the court *a quo* remain the same before this court. The appellant argues that the adverb "successfully" qualifies the H

2012 (1) ZLR p55

Garwe JA

A prosecution of the case to its final conclusion and not the outcome of the case. The respondent, on the other hand, contends that the word must be interpreted to mean that a creditor has to obtain a judgment in his favour on the process issued if prescription is to be interrupted.

The interpretation to be given to the phrase in question has arisen in several B cases in this jurisdiction, as well as in South Africa.

In *Titus v Union & SWA Insurance Co Ltd* 1980 (2) SA 701 (TkS) Munnik CJ stated thus at p 704C-G:

> "… if one has regard, as one must have, to every word used in a statute, then it seems to me that the whole purpose of s 15(2) was that, if a creditor fails in his claim, in other words if he does not successfully prosecute his claim under C the process in question to final judgment, then the provisions come into force concerning the interruption of prescription lapsing and the running of prescription not being deemed to have been interrupted. The practical effect of this is that, should a plaintiff, e.g., have absolution granted against him at the end of his case, then he cannot be said to have successfully prosecuted his claim to final judgment or, if an exception is taken to his claim and he cannot amend but has D to issue a fresh summons or a fresh declaration, then the process by which he commenced the proceedings is deemed not to have interrupted prescription and the running of prescription is deemed not to have been interrupted thereby. In other words, to put it colloquially, he is not allowed to have two bites at the cherry. I am fortified in this view by the words which follow after the words, 'final judgment' in s 15(2), *viz* 'or if he does so prosecute his claim (which words 'so prosecute' must obviously mean prosecute his claim successfully) but abandons E the judgment or the judgment is set aside', which clearly means on appeal for some good reason or in some action on the basis of fraud for example. It is not unreasonable to assume that what the legislator had in mind was the following: it is necessary that there should be finality in litigation. The plaintiff is given a reasonable time within which to institute his action, thereafter he is in the hands of the administration of the courts …"

F In *Melamed & Anor v BP Southern Africa (Pty) Ltd* 2000 (2) SA 614 (W), commenting on a similar provision in the Prescription Act 68 of 1969 of South Africa, Blieden J stated at p 621:

> "With special reference to s 15(2) of the Act, I am in respectful agreement with what was said by Smallberger J in *van der Merwe v Protea Insurance Co Ltd* 1982 (1) SA 770 (E) at 773C-D:
>
> > G 'It seems to me that the whole purpose of s 15(2) is that, if a creditor fails to prosecute successfully his claim under the process which interrupts prescription, either in the court in which such process commences legal proceedings, or on appeal to a higher tribunal, or, having been successful in the initial prosecution of his claim, abandons the judgment in his favour, or it is set aside on appeal at the instance of the debtor, the running of prescription H is deemed not to have been interrupted. (*Evins v Shield Insurance Co Ltd*

2012 (1) ZLR p56

Garwe JA

> 1980 (2) SA 814 (A) at 827G-828A; *Titus'* case *supra* at 704C [*Titus v* A *Union & SWA Insurance Co Ltd* 1980 (2) SA 701 (Tk)]'

The facts in *van der Merwe's* case provide a good illustration of a situation where s 15(2) is relevant. Here the plaintiff commenced an action in the magistrate's court for damages which he claimed to have sustained because of the bodily injuries suffered by him in a motor collision which he said was caused by the insured driver's negligence. On his coming to the conclusion that the *quantum* B of his claim exceeded the jurisdiction of the magistrate's court, he withdrew his action there and issued a new summons out of the Supreme Court. This latter action was, however, only commenced after the period of prescription had already elapsed. The court found that by withdrawing his action in the magistrate's court the plaintiff had not successfully prosecuted his claim to final judgment and that his right of action in the Supreme Court had accordingly prescribed. C

Referring to the words in the subsection, Smallberger J said (at 793A-C):

> 'The "process in question" is clearly that by which prescription was originally interrupted. It is that process which must be successfully prosecuted to final judgment by the creditor, and not any other. The reference to "final judgment", in the context, contemplates judgment in the court in which process is instituted or, if

the creditor is unsuccessful in such court, any higher tribunal in which the creditor is ultimately successful on appeal D in relation to the "process in question." When a creditor is successful in the court in which the process in question commences legal proceedings prescription stands interrupted until the judgment is abandoned or set aside on appeal.'"

Attention is also drawn to the remarks of Squires J in *Sadomba v Farai Uzumba (Pvt) Ltd* 1982 (2) ZLR 142 (H) at 149F-H. E

I agree entirely with the remarks in the above cases. The use of the word "successfully" in subs (3) (a) is significant. The creditor is required to successfully prosecute his claim to final judgment before prescription shall be deemed to have been interrupted. He is not simply required to prosecute his claim to final judgment. F

Paragraph (b) of subs (3) of s 19 has without doubt put the matter beyond argument. It has provided that if the creditor *successfully* prosecutes his claim under the process in question to final judgment but abandons the judgment or the judgment is set aside then prescription shall not be deemed to have been interrupted. As the respondents' have correctly pointed out in their G heads of argument, one can only abandon a judgment given in one's favour. Similarly, in the context of subs (3)(b), only a judgment in one's favour can be set aside on appeal or review.

I am satisfied that, on a correct reading of the section and regard being had to the cases cited above, the correct interpretation is that there must be a successful prosecution to final judgment, in the sense that the creditor must H

Garwe JA

A obtain a judgment in its favour. The suggestion by the appellant that the section simply means that the creditor must pursue the matter to final judgment ignores the use of the word "successfully" and renders the word superfluous.

I am satisfied that the learned judge *a quo* was correct when she remarked as follows at p 8 of the judgment:

B "I understand this to mean that the creditor has to obtain judgment in his favour on the process issued under subs (2). Any other meaning would lead to an absurd result for there would be no finality to litigation and the limitation imposed by the statute would be rendered nugatory if a litigant who loses a case can arrest prescription indefinitely by bringing suits within three years of each unfavourable judgment, as long as he can avoid the plea of *res judicata*."

C The appeal is accordingly dismissed with costs.

SANDURA JA and CHEDA AJA concurred.

Nyamusamba & Partners, appellants' legal practitioners

D *Granger & Harvey*, respondent's legal practitioners

© 2015 Juta and Company (Pty) Ltd.

Document 7 of 75

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2012/Volume 1/PIONEER TRANSPORT (PVT) LTD v DELTA CORPORATION & ANOR 2012 (1) ZLR 58 (H)

PIONEER TRANSPORT (PVT) LTD v DELTA CORPORATION & ANOR 2012 (1) ZLR 58 (H)

Citation 2012 (1) ZLR 58 (H)

Case No Judgment No. HH-18-12

Court High Court, Harare

Judge Gowora J

Heard 18 October 2011; *CAV*

Judgment 1 January 2012

Counsel *A Moyo*, for the applicant
K Ncube, for the first respondent
No appearance for the second respondent

Case Type Court application

Annotations No case annotations to date

Flynote

Arbitration – *award – setting aside of – agreement between parties that decision of the arbitrator be final – no bar to proceedings before High Court to set aside award* D

Arbitration – *award – setting aside of – award contrary to public policy – applicant has to establish that the award is contrary to public policy even if award is incorrect in order to succeed.*

Arbitration – *award – setting aside of – failure of applicant to comply with award before commencing proceedings – no need for applicant to do so* E

Practice and procedure – *parties – "clean hands" – requirement to come to court with – applicability – application to set aside arbitral award – applicant not having complied with award – no requirement to comply with award before approaching court for relief under Arbitration Act [Chapter 7:15]* F

Headnote

Article 34 of the First Schedule to the Arbitration Act [Chapter 7:15] allows for the setting aside of an arbitral award by the High Court in very restricted circumstances. The court is empowered to set aside an arbitral award if the applicant who wishes to have it set aside establishes that G the award is in conflict with the public policy of Zimbabwe.

In an application in terms of art 34 to set aside an arbitral award, the applicant raised three main points. He alleged, firstly, that the arbitrator had acted outside the provisions of the enabling agreement between the parties; secondly, that he had wrongly rejected the argument that the respondent's claim had prescribed; and thirdly, that the arbitrator H

Gowora J

A had failed to have regard to certain bilateral and reciprocal obligations which, the applicant alleged, existed in terms of the agreement, as well as the principles of unjust enrichment. In respect of each of these points, the applicant submitted that the public policy of Zimbabwe had been infringed and that the award, as a consequence, should be set aside. In response thereto, the respondent drew attention to the agreement, which B was concerned with the supply of heavy vehicles by the applicant for use by the respondent for delivery purposes, and submitted that none of the respondent's points were in any way in conflict with the public policy of Zimbabwe. It was the respondent's argument that the applicant wanted the award set aside upon the simple basis that the arbitrator (so it C was alleged) had come to the wrong conclusion on the facts and on the law and that the applicant's case was no more than a disguised review.

In addition, it its opposition on the merits, the respondent also took two points *in limine*. It argued firstly that the applicant should not be heard until it had complied with the arbitrator's award. Until it had done so, its hands were dirty. In its second point *in limine*, the respondent D referred to clause 18 of the agreement between the parties. That clause provided that the decision of the arbitrator would be binding on each party in respect of any dispute arising out of or in connection with the agreement. Accordingly, so argued the respondent, the applicant could not have recourse against the award in the present proceedings.

E *Held,* that in regard to the respondent's first abjection *in limine*, the applicant could not be expected to comply with the arbitrator's award before commencing proceedings in the High Court. To do so would defeat the object of article 34 of the Model Law which bestows upon a party the right to apply for the setting aside of an arbitral award upon the grounds set out therein.

F *Held,* further, that in regard to its second objection, the respondent could not avail himself of the provisions of clause 18 of the agreement between the parties. Notwithstanding that clause, once the parties had referred the dispute to arbitration and the award had been made, the jurisdiction of the High Court was unfettered. It was seized with an application for G setting aside the award and it had jurisdiction to decide the matter on its merits.

Held, further, and on the facts, that the applicant had failed to establish that the award given in favour of the respondent, even if incorrect, was contrary to the public policy of Zimbabwe in any of the respects alleged. That being the case, the application to set aside the award must be dismissed H with costs on the ordinary scale.

2012 (1) ZLR p60

Gowora J

Legislation considered A

Arbitration Act [*Chapter 7:15*], First Schedule, arts 8 & 34

Cases referred to

Associated Newspapers of Zimbabwe (Pvt) Ltd v Minister of State for Information and Publicity and Ors 2004 (1) ZLR 538 (S) B

CFU & Ors v Min of Lands & Ors 2010 (2) ZLR 576 (S)

Delta Ops (Pvt) Ltd v Origen Corp Ltd 2007 (2) ZLR 81 (S)

Recoy Invstms (Pvt) Ltd v Tarcon (Pvt) Ltd 2011 (2) ZLR 65 (H)

Telcordia Technologies Inc v Telcon SA 2007 (3) SA 266 (SCA)

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

Case information

A Moyo, for the applicant

K Ncube, for the first respondent

No appearance for the second respondent

Judgment

Gowora J: On 1 January 2003 the applicant and the first respondent executed an agreement for the "supply of primary beverage transport services". In D terms of clause 8 of the agreement the first respondent, Delta, appointed the services of the applicant, Pioneer, to distribute and deliver products on its behalf to various destinations. In order to perform its obligations under the agreement, Pioneer undertook to supply vehicles to Delta for use in the distribution aforesaid. To that end Pioneer had to make available to Delta E twelve mechanical horses which would be used to draw thirty four trailers, these being supplied by Delta. The agreement also provided for the supply of additional horses by Pioneer on an *ad hoc* basis as the exigencies of the situation would have demanded. As sometimes happens, the parties had a falling out. The agreement, in terms of clause 18 thereof, provided for the settlement of disputes through an arbitration process. In due course the F second respondent was appointed as arbitrator to the dispute and the matter referred to him. The parties were called before him and, on 16 January 2010 ,he issued an award. The applicant has through these proceedings brought an application to have the award set aside by this court in terms of Chapter VII Article 34 of the First Schedule to the Arbitration Act [*Chapter 7*:*15*]. G The applicant also seeks costs against the first respondent.

The founding affidavit has been deposed to by a Mr John Groves. He states that he is employed as a managing director by the applicant and that he is authorised to depose to the affidavit. He states

therein that the application was being brought to court in accordance with the provisions of s 2 of Article 34. The dispute is centred around the effect to be given to clause 9 (f) of the H

Gowora J

A agreement, in terms of which, upon termination of the agreement, Pioneer was supposed to return the trailers to Delta, and such return to be in "good working condition" and order, fair wear and tear excepted.

The deponent states that on 26 September, Delta commenced arbitration proceedings in terms of a statement of claim filed of record. Pioneer opposed B the claim and the matter was set down for hearing before the arbitrator. Both parties adduced *viva voce* evidence. According to the deponent to the affidavit, the crisp issue before the arbitrator was the duration of the agreement. The arbitrator found that the claim by Delta had not prescribed at the time that it submitted the dispute to arbitration. The deponent contends therefore that the arbitrator acted outside the enabling provisions of the agreement. C He contends further that the finding by the arbitrator that the agreement between the parties terminated on 30 November 2005 was not rationally linked to either the evidence adduced by the parties or submissions made by the same on the papers or during the hearing. He contends further that in finding as he did that the agreement terminated on 30 November instead of 31 December, as provided for in clause 2 of their agreement, the arbitrator D had created a new contract for them.

In addition to the above, the applicant contended that the mandate of the arbitrator was limited to the duration of the agreement, and that consequently he was supposed to ascertain the obligations of the parties as at the date of termination of the agreement. However, contends the applicant, the E arbitrator seemed to have extended the applicant's obligations under the contract beyond the lifespan of the agreement. It is further contended that the applicant's liabilities ought to have been ascertained as at that date. According to the applicant, the award is not limited to the termination date as found by the arbitrator, that is 30 November 2005, but goes beyond that. Therefore, the applicant contends, even on his own version, the arbitrator F has acted outside the provisions of the contract. This, he suggests is contrary to the Zimbabwean substantive law on the privity of contracts and therefore contrary to public policy. The deponent also avers that by awarding specific performance in favour of a party who had, in terms of the contract bilateral obligations which it had itself not performed and was not in a position to G perform, the arbitrator had unjustly enriched one of the parties at the expense of the other, contrary to the positive law in Zimbabwe regarding bilateral obligations and further that this was contrary to public policy. In the event, the applicant prayed for the setting aside of the arbitral award.

The first respondent has opposed the application. It has raised a number of points *in limine.* Firstly, the first respondent contends that the applicant H has approached the court with dirty hands and ought not to be accorded a

Gowora J

hearing by this court until such time as it would have purged its default. The A first respondent contends that the filing of an application for review has not suspended the operation of the award by the arbitrator but that the applicant has not complied with the award. A letter was addressed to the applicant's legal practitioners by the respondent's legal practitioners, putting them on terms to abide by the arbitration award by a specified date. To date there has B been no compliance and the respondent is of the view that the applicant has approached the court with dirty hands and should not, as a consequence, be heard by the court.

Effectively, therefore, this court must find that the applicant has dirty hands and should as a consequence refuse to hear the applicant until such time as C it would have complied with the award. The first respondent argued that the decision of the Supreme Court in *Associated Newspapers of Zimbabwe (Pvt) Ltd v Minister of State for Information and Publicity & Ors* 2004 (1) ZLR 538 (S) is apposite herein. This is what Chidyausiku CJ had to say:

> "… That case does not seek to define the extent of that principle. It certainly is not an authority for the proposition that denial of relief will be confined only D to those litigants whose conduct lacks probity or honesty or is tainted with moral obliquity. In *S v Nial* 1982 (1) ZLR 142 (H) and *S v Nkosi* 1963 (4) SA 87 (T) the court refused to hear appeals of the appellants who had absconded or failed

> to comply with bail conditions. Defiance of a court order does not involve dishonesty or moral obliquity, yet litigants in defiance of court orders, more often than not, are denied relief by the court until they have purged their E contempt. In my view, there is no difference in principle between a litigant who is defiance of a court order and a litigant who is in defiance of the law. The court will not grant relief to a litigant with dirty hands in the absence of good cause being shown or until such defiance or contempt has been purged."

The applicant, on the other hand, denies that it has dirty hands as contended by the first respondent, and suggests that the contention by the first respondent F that it, the applicant, should have first complied with the award before instituting these proceedings is ill-conceived. It disputes the application of the dirty hands principle to this dispute and to the refusal by itself to first comply with the award before applying for the award to be set aside. It contends that to deny the applicant audience and opportunity to be heard G would defeat the very basis of Article 34 of the Model Law upon which the applicant seeks recourse. It contends, further, that if the applicant were requested by the court to comply with the arbitral award first and then seek an order for its setting aside, any court order granted to it thereafter would be of academic interest, especially in circumstances such as this where the first respondent had sought and obtained an award for specific performance. H

2012 (1) ZLR p63

Gowora J

A The application has been brought under Article 34 of the Model Law which has been incorporated in our Arbitration Act. I am in agreement with the contention by the applicant that the right of an aggrieved party under Article 34 is not qualified except for the provision that a party is not entitled to bring an application thereunder after the lapse of three months after the award has been made. The Act bestows upon a party the right to apply for the setting B aside of an award on the grounds set out therein. To require a party to comply with the award before launching an application under the Article would be tantamount, in my view, to denying such party the right to have recourse in terms of the Article. In the circumstances of this case, the award against the applicant was one for specific performance.

C I am also of the view that the first respondent is taking a simplistic and narrow view of the *dicta* in *Associated Newspapers of Zimbabwe v Minister of State for Information and Publicity & Ors* s*upra*. In that case, what was at issue was whether a party could be heard by a court whilst refusing to comply with a statutory provision of the Act which required that media houses be D registered. There was, in that case, an open and clear refusal to comply with a statutory provision applicable to the litigant to permit it to operate as a media house. The applicant was, despite the requirement, operating without a licence or permit as required under the enabling Act. So, too, was the situation in *Commercial Farmers Union &Ors v Minister of Lands and* E *Rural Resettlement & Ors* 2010 (2) ZLR 576 (S). Chidyausiku CJ had this to say at 594F:

> "Apart from this there is the principle that a litigant who is acting in open defiance of the law cannot approach a court for assistance. See *Associated Newspapers of Zimbabwe (Pvt) Ltd v Minister of State for Information and Publicity and Ors* 2004 (1) ZLR 538 (S). Indeed, if this point had been raised as a preliminary F point, the probabilities are that this application would have been dismissed on that point alone. A former owner who is in occupation of acquired land in open defiance of the law cannot approach the courts for assistance."

Again, as in *ANZ v Minister of State for Information and Publicity & Ors* s*upra*, the issue before the court was the clear and open defiance by the applicant in complying with a statutory provision of an Act of Parliament. G *In casu*, the applicant has taken on review an arbitral award in terms of a right accorded under an Act, which does not require compliance with the award before approaching the court for redress. The situation of the applicant herein is distinguishable from the authorities referred to above. Therefore, in the circumstances of this case, I am not persuaded to find that the applicant H has dirty hands and that it is not entitled to be heard.

2012 (1) ZLR p64

Gowora J

In relation to the second point *in limine,* the first respondent contends that A clause 18 of the agreement provides that the parties irrevocably agreed that the decision of the arbitrator in any arbitration proceedings brought under the agreement would be binding upon each of them and that this was in respect of any dispute arising out of or in connection with the agreement, including any dispute regarding its existence, validity or termination. Accordingly, the B first respondent contends,

the parties are bound by the provisions of clause 18 of the agreement and consequently, the applicant cannot have recourse against the award by virtue of these proceedings.

The first respondent contends further, that, assuming that the parties do have recourse against the award notwithstanding the provisions of clause 18, the application filed *in casu* does not disclose a cause of action as contemplated C in Article 34 of the First Schedule to the Arbitration Act. The first respondent contends that, in terms of Article 34(5), it is only if the award was induced or effected by fraud that it can be said to have been contrary to public policy. However, so the argument goes, the applicant has made no such allegation. Accordingly, so contends the first respondent, there is no cause of action D exhibited on the papers.

A party to an agreement, which provides for relief by way of an award by an arbitrator, has a right to have the award set aside as provided for in Article 34. It has been given legislative imprimatur under the Act, and the respondent has not pointed out any authority which allows parties to an agreement to override provisions that have been spelt out in an Act of Parliament. In E this connection I would want to quote from comments I made in *Recoy Investments (Pvt) Ltd v Tarcon (Pvt) Ltd* 2011 (2) ZLR 65 (H) at 69 to the following effect:

> "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 F 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* 2009 (4) SA 68 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 G other party has two options:
>
> (i) It may apply for a stay of the proceedings in terms of s 6 of the Arbitration 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.' H

Gowora J

> A The definitive statement of the law in this regard is to be found in *Rhodesian 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 B and less costly procedure of applying to the court to stay proceedings but you must file 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.""

The High Court, being a court of superior jurisdiction, has the power to hear any matter and any party unless its jurisdiction has been specifically ousted C by statute. In addition, Article 8 of the Arbitration Act permits the parties who have submitted a dispute for arbitration, and which process has now been brought before this court for the setting aside of any award resulting from such process, to apply to the court for a stay of those proceedings. The powers granted to the court under such application are as follows:

> "**Arbitration agreement and substantive claim before court**
>
> D (1) A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, stay those proceedings and refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.
>
> (2) Where proceedings referred to in paragraph (1) of this article have been E brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court."

A reading of Article 8 above makes it clear that the court must stay proceedings upon the application of a party who wishes that the matter proceed to arbitration for resolution on the dispute. That, in my view, appears to be the F only reason for the court's jurisdiction to be temporarily suspended. Once the parties have referred the dispute to arbitration and an award has been made, the jurisdiction of the court to decide on the award is unfettered. This court is however seized with an application for the setting aside of an arbitral award. I therefore hold that this court has the jurisdiction to determine this matter on its merits.

G Article 34 of the First Schedule to the Arbitration Act [*Chapter 7*:*15*] allows for the setting aside of an arbitral award by this court in very restricted circumstances. *In casu*, the applicant contends that the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or that it contains decisions or matters beyond the scope of the H submission to arbitration and that the award itself is contrary to the public

---

policy of Zimbabwe. Clause 18.1 of the service contract made a provision A for the reference of any dispute thereunder to arbitration and that such arbitration proceedings would be final and binding upon the parties herein.

The exercise of power by the High Court under Article 34 has already been discussed in the case of *Zimbabwe Electricity Supply Authority v Maposa* 1999 (2) ZLR 452 (S) at 466F-467A, where Gubbay CJ said the following: B

> "Under Article 34 or 36, the court does not exercise an appeal power and either uphold or set aside or decline to recognise and enforce an award by having regard to what it considers should have been the correct decision. Where, however, the reasoning or conclusion in an award goes beyond mere faultiness or incorrectness and constitutes a palpable inequity that is so far reaching in its defiance of logic or accepted moral standards that a sensible and fair-minded C person would consider that the conception of justice in Zimbabwe would be intolerably hurt by the award, then it would be contrary to public policy to uphold it.
>
> The same consequence applies where the arbitrator has not applied his mind to the question or has totally misunderstood the issue, and the resultant injustice D reaches the point mentioned above.
>
> Although no moral turpitude whatsoever attached to the conduct of the arbitrator, I am satisfied that his award bears the adverse characteristics I have referred to. It is my belief that, in the circumstances pertaining, the award made results in so palpable and substantial an injustice to ZESA that for this court to uphold it would be to sanction a conflict with the public policy of Zimbabwe." E

The principle enunciated in this judgment was confirmed in *Delta Operations (Pvt) Ltd v Origen Corporation* 2007 (2) ZLR 81 (S). It is therefore trite that, under the law, the court is empowered to set aside an arbitral award if the applicant who wishes to have it set aside can establish that the award is in conflict with the public policy of Zimbabwe. The applicant has attacked the F award on three prongs: firstly, that the arbitrator acted outside the provisions of the enabling agreement; secondly, that the claim was prescribed; and, thirdly, that the order for specific performance was contrary to the public policy of Zimbabwe regarding bilateral and reciprocal obligations and the principle of unjust enrichment. G

According to the applicant, the award should therefore be set aside on the following grounds:

1. That the arbitrator acted outside the provisions of the enabling agreement;
2. That the claim was prescribed in terms of s 14 of the Prescription Act; and H

A 3. That the order for specific performance in the circumstances of this case was contrary to the public policy of Zimbabwe regarding bi-lateral reciprocal obligations and the principles of unjust enrichment.

In relation to the first issue, the applicant contended that the arbitrator had acted outside the provisions of the enabling agreement. It is contended that B the first respondent had an onus to establish the duration of the agreement between the parties. Contrary to the provisions of the contract, so the applicant contends, the arbitrator placed the onus on the applicant to disprove the contentions of the claimant. The applicant contends that before the arbitrator, it put up the case that the agreement commenced on 1 January 2003 and terminated on 31 December 2004 and that the respondent, had contrary to C that assertion, contended that the agreement had not terminated up to the time that it instituted proceedings. The applicant contends that the arbitrator disagreed with the versions that both parties placed before the arbitrator and that, in approaching the matter as he did, he created a new contract between the parties based on what he termed practical considerations. The applicant contends in this regard that the arbitrator unilaterally extended the duration D of the contract where he held the date of termination as 30 November 2005. The applicant contends, therefore, that the award is liable to be set aside on the grounds that it is in conflict with the public policy of Zimbabwe. The applicant suggests that there was ambiguity in the contract and that in fact

the arbitrator did confirm that the contract was ambiguous and that therefore he E should have invoked the *contra proferentem* rule in favour of the applicant and this error on his part constituted a gross error on his part which further rendered the award unenforceable. He suggests that the arbitrator must have found that clause 8(d) was ambiguous and contrary to the clear provisions of clauses 1 and 2 of the agreement which stated the commencement and termination dates. He suggests that the contract was prepared by Delta and, F as it was ambiguous in relation to clause 8(d), the arbitrator should have been guided by the *contra proferentem* rule and found that the contract had terminated as provided for in clause 2. He stated that the arbitrator failed to apply the clear and positive principles of Zimbabwean law in resolving the dispute and that in the circumstances the award was contrary to the public G policy of Zimbabwe. The first respondent has contended that it is not for this court to decide whether or not the arbitrator was correct to find that the agreement would have terminated on the date that the arbitrator said it terminated. It was suggested by the respondent that what this court must ask itself is whether the conclusions reached by the arbitrator offends the public policy of Zimbabwe in the sense of being so far reaching and outrageous H in its defiance of logic or accepted moral standards that a sensible and fair-

minded person would consider the concept of justice in Zimbabwe would A be intolerably hurt by the award. See *ZESA v Maposa supra*.

The critical issue for determination before the arbitrator was the duration of the contract. It is trite that the original UNCITRAL Model did not define the concept of public policy. It is accepted, however, that the concept covers fundamental principles of law and justice in substantive as well as procedural B law. *In casu*, the standard set in the *Maposa* case has not been met. The applicant has chosen not to place the record of proceedings before for the court, resulting in the court being unable to judge for itself whether or not the conclusions of the arbitrator are so outrageous in defiance of logic and accepted moral standards as to lead a fair minded person to believe that justice in Zimbabwe would be intolerably hurt by the award in favour of C the first respondent. The applicant has not, in the affidavit on which the application is premised, even alleged that the conclusions reached by the arbitrator defied logic to such unacceptable standards. Instead, the applicant has sought to deal with the matter as if it were an appeal or application for review. In *ZESA v Maposa supra* the court stated:

> "An award will not be contrary to public policy merely because the reasoning D or conclusions of the arbitrator are wrong in fact or law. In such a situation the court would not be justified in setting the award aside. Under Article 34 or 36 the court does not exercise an appeal power and either uphold or decline to recognise an award having regard to what it considers should have been the correct decision."

Whether or not the arbitrator arrived at the wrong decision is not an issue that E this court is empowered in terms of Article 34 to decide. What the applicant should have established is that the decision and conclusions reached, based on the standard set in the *Maposa* case, was so outrageous in its defiance of logic and reasoning that any fair minded person would have a conception that justice in Zimbabwe would be hurt by that award. This is not the case F of the applicant. There is no suggestion anywhere in the heads of argument pointing me to an aspect of the award that breached the rules of natural justice. In any event, there is no principle that says that an arbitrator can have his award set aside on the basis that he erred or was wrong. If it is there, I have not been made aware of it. In *Telcordia Technologies Inc v Telcom SA* 2007 (3) SA 266 Harms JA stated: G

> "… An arbitrator 'has the right to be wrong' on the merits of the case, and it is a perversion of the language to label mistakes of this kind as a misconception of the nature of the inquiry – they may be misconceptions about meaning, law or the admissibility of evidence, but that is far cry from saying that they constitute a misconception of the nature of the inquiry. To adopt the quoted words of Hoexter JA, it cannot be said that the wrong interpretation of the Integrated H

> A Agreement prevented the arbitrator from fulfilling his agreed function or from considering the matter left for him for decision. On the contrary, in interpreting the Integrated Agreement the arbitrator was fulfilling the function assigned to him by the parties, and it follows that the wrong interpretation of the Integrated Agreement could not afford any ground for review by the court."

The next point to consider is whether or not the claim before the arbitrator had B prescribed and that the award by the arbitrator therefore, in the circumstances, was contrary to the public policy of Zimbabwe. The deponent to the founding affidavit contends that the agreement terminated on 31 December 2004. Prescription then started running on 1 January 2005 and completed its course on 31 December 2008. The claim was instituted on 26 September, C well after it had become prescribed. He states that the date of termination of the agreement cannot be in doubt as the first respondent sought a renewal in a letter dated 12 September 2005. It is further contended by the applicant that the new contract, save for alterations to the dates for commencement and termination, is in exactly the same terms as that concluded on 1 January 2003. The applicant has argued that the arbitrator correctly identified the D critical issue for determination as being the duration of the agreement and that, once this had been established, the issue of liability would be settled. It was, in the view of the applicant, up to the claimant to establish the duration of the agreement but that surprisingly the onus appeared to have been placed on the applicant.

E The applicant further contends that it is against the public policy of Zimbabwe to enforce obligations which have become extinguished through prescription. Therefore, the applicant contends, the relief granted to the first respondent was contrary to the provisions of ss 14 and 15 of the Prescription Act [*Chapter 8*:*11*].

Further to this, the applicant is alleged to have admitted liability in terms of F two documents admitted as exhibits before the arbitrator. These documents, according to the first respondent, served to interrupt any alleged prescription as claimed by the applicant. In addition to this, the first respondent contended that despite the protestations by the applicant, the parties had not executed a subsequent agreement and yet they continued to deal with each, leading to G the conclusion that the contract did not terminate on 31 December 2004, as alleged by the applicant but continued beyond the stipulated date as found by the second respondent. The respondent denied that the second respondent had sought refuge in clause 8 (d) of the contract and it denies further that this clause contradicts clauses 1 and 2 of the same. In the premises, the first respondent denied that there had been a contravention of ss 14 and 15 of H the Prescription Act.

2012 (1) ZLR p70

Gowora J

Clauses 1 and 2 of the agreement provide for a commencement as well as A a termination date. However, clause 8(d) also speaks of the duration of the agreement, notwithstanding the provisions of the two clauses referred to above. This is what it provides:

> "Notwithstanding the date of signature of this agreement, this agreement shall be deemed to have commenced on the commencement date and shall be relevant B after two years. After this review period, the agreement shall continue indefinitely save that either party may withdraw from this agreement on giving three months' notice in writing to the other."

In addition, the evidence adduced before the arbitrator seemed to suggest that the parties continued trading with each other long after the agreement would have been terminated. C

If indeed the arbitrator came to the conclusion that the matter had not prescribed when in fact it had, such a finding is not, in my view, a breach of s 14 of the Prescription Act. The Act does not create a criminal offence in the event that a debt that has prescribed is found by a court or tribunal not to have prescribed. As to the alleged date of termination of the agreement, the first respondent denies that the agreement terminated on 31 December D 2004 and contends that the finding by the second respondent cannot be faulted. The first respondent contends that the allegations by the applicant in regard to this aspect amount to an appeal. It also contends that the evidence adduced before the arbitrator confirmed that the agreement continued beyond 31 December, as the applicant did not return any of the trailers by that date. E The first respondent makes reference to evidence given by one Dawson of the applicant, who stated that the parties carried on dealing with each other until mid 2007. This witness is alleged to have confirmed under cross examination that no trailers were handed back to the first respondent on 31 December 2004. Despite an allegation in the opposing papers over this issue ,the applicant did not find it necessary to adduce evidence by way of affidavit F to contradict the averment. One Kevin Motsi, of the applicant, is also alleged to have given evidence that he had been employed by the applicant in 2005 and that at the time the applicant was towing the first respondent's trailers. The relationship according to him, had continued until 2007.

The applicant states that the claim presented to the arbitrator was for specific G performance and that is what the first respondent got in the award from the arbitrator. However, argues the applicant, the agreement relied upon imposes bi-lateral and reciprocal obligations on the parties. Specific reference is made to clause 14 in this regard. Specifically, the applicant contends that the maintenance of the trailers was a recoverable cost from Delta and that this would depend upon the mileage covered on a monthly basis. The applicant H

Gowora J

A suggests that the arbitrator must have found that, due to the deteriorating economic situation in Zimbabwe, the parties were unable to perform on the contract as from 2005. The applicant contends further that the maintenance of the trailers was intrinsically linked to the first respondent's ability to provide the stipulated monthly mileage in respect of each horse, in accordance with the provisions of clause 14 of the agreement, for the applicant to recover B the full maintenance costs for the availed trailers in accordance with the costing module. The applicant contends that it had furnished to the arbitrator schedules which showed that from December 2004 the parties had operated on an *ad hoc* basis, as opposed to the strict terms of the agreement, and that in view of that evidence, the arbitrator had found that the first respondent C was not providing the requisite mileage after 31 December 2004.

Therefore, contends the applicant, in ordering specific performance retrospectively as he did, the arbitrator acted outside the positive law of Zimbabwe regarding the enforcement of bi-lateral obligations between the parties. Put differently, the applicant contends that it is against the law of contract of Zimbabwe to direct a party to specifically perform on a contract D where the other party thereto was unable, and remained unable, to perform in terms of that contract.

In addition, it is contended that the order for specific performance amounts to unjustified enrichment in that the first respondent was now unjustly enriched retrospectively in respect of a contract which itself did not specifically E perform. This was due to the fact that, in order to comply with the award, the applicant would have to incur pecuniary loss in multi-currency as opposed to the Zimbabwe dollar which was the currency for performance and payment under the agreement. Accordingly, the order for specific performance would again be contrary to the public policy of Zimbabwe and the relief should not have been granted to the first respondent in the first place.

F The first respondent contended that the applicant had been expected to return the trailers in good working order, fair wear and tear excepted. The tyres were however required to have, upon the return of the trailers, the same amount of rubber as at the date of take over by the applicant. Further, it is denied that the second respondent ordered specific performance retrospectively. It is G averred that all the second respondent did was to give effect to the contract and determine the obligations of the applicant in terms of clause 9(f) of the service contract. It is consequently denied that the order for specific performance was contrary to public policy as the applicant did not allege undue influence, fraud or a breach of the rules of natural justice. It is averred that there were no bilateral obligations as at the date of termination of the contract as the H applicant had the obligation to restore the trailers in good working condition

Gowora J

and order. The first respondent's obligation had been defined in clause 9(c) A to ensure that all the trailers were validated by a certificate of fitness. By providing the certificates the first respondent contends that it had complied with its obligations under the contract.

In so far as the jurisdiction of the second respondent is concerned, the first respondent contends that it was wide and was not limited to ascertaining the B obligations of the parties as at the date of the termination of the agreement but included any questions regarding the existence, validity or termination of the same. The first respondent accepts that the claim it filed with the arbitrator was for specific performance and that this was in terms of the agreement between the parties. The respondent is of the view that the applicant is raising issues that are specifically dealing with an appeal which issues should not C be entertained by this court. The point is also made that the applicant had not filed a counter application before the arbitrator to the effect that the first respondent had not performed its obligations in terms of the contract. The court is being urged as a result not to have regard to any suggestion that the maintenance of the trailers was a recoverable

cost in terms of the contract D as that was not one of the factors for consideration under Article 34. It is contended that the applicant's real grievance is that the second respondent came to a wrong conclusion on the facts and the law. It is denied that the award unjustly enriched the first respondent at the expense of the applicant.

The nature of a contract is that two or more parties thereto reciprocally promise, or one of them promises to the other or others, to give some particular thing E or to do or refrain from doing some particular act. There is consequently, a presumption that in every bilateral or synallagmatic contract the common intention is that neither should be entitled to enforce the contract unless he has performed or is ready to perform his own obligations. The parties to this dispute entered into a contract in terms of which each of them assumed obligations to the other and in return also acquired rights flowing from the F assumption of such obligations. In terms of clause 8(d) of the contract herein, Pioneer was to assume the responsibility for the maintenance, licensing and annual certificates of fitness in relation to the trailers supplied to it by Delta. In the event that Pioneer incurred any additional expenses in relation to this obligation arising from the structural defects from the trailers, then Delta G would consider meeting part of a particular expense. On termination of the agreement, the clause, in para (f), provided that Pioneer would return the trailers in good working condition, fair wear and tear excepted.

I am somewhat hampered by not having been provided with the record of the proceedings. The first respondent has however availed copies of two letters which had been placed before the arbitrator and specifically dealt with the H

Gowora J

A issue of prescription. The first is an e-mail written by Kelvin Motsi of the applicant on 24 October 2007 and is addressed to the first respondent. The pertinent part of the e-mail reads as follows:

> "As per last mail below and discussion with Delta yesterday we are still working on your trailers and all efforts are being made to make such trailers available. Trailers T6554 and T6555 went to VID this weekend and did not pass the B inspection, the issues raised have been rectified now and the trailers(sic) due for inspection again today.
>
> T6244 and T6245 are also getting ready for VID. As per our discussion once back from VID and passed (*sic*) we will advise your (Delta) workshops for a handover.
>
> I fully understand the pressure you are going through to supply the country. We at Pioneer are putting in 100% to try and get these trailers ready under the C difficult conditions of getting in the spares and other items required to bring them up to spec. if you have other ideas on how best we can source these items then we are open to discuss.
>
> I however also do not take lightly the comments raised against myself on this issue, the reasons for the delays are not known by me alone. May I propose we sit round a table and air out all issue involved and identify responsibility to both D parties in the smooth handover of such trailers and relations going forward."

The second is a letter dated 27 March 2008 addressed to a Mr M Sekerani of Delta by Mark Dawson from Pioneer. It is appropriate to quote the full text of the letter.

> "With great embarrassment I write to you yet again apologising (*sic*) for the delay in the return of your trailers to you. We wish to state that we are not in any way E trying to ignore or escape our obligation to you and are fully aware that we are testing your patience and leniency on this issue. We are still trying to recover from a huge hole that was left by previous employees as well as a huge skills gap that has emerged due to a skills flight of artisans.
>
> We however intend to be delivering one trailer per week to you as from this week, whereas previously we had committed to two per month.
>
> F To achieve this we have employed two coach builders from Deven Engineering who will start on our payroll on 1 April. We have imported a sand blaster from South Africa. We are also importing paint from South Africa.
>
> We thank you for the loan of the paint and will return what we have borrowed next week.
>
> We thank you for your leniency so far and look forward to making good our G obligation to you."

I am persuaded that, from the tenor of the two letters that were submitted to the arbitrator by the first respondent, it was never in doubt that the applicant was aware of its obligations under the contract and that it had expressed every intention to fulfil those obligations. The e-mail from Motsi and the H letter from Dawson both clearly spelt out the acceptance by the applicant

Gowora J

of returning the trailers to the first respondent in good working condition. A If the applicant had not accepted the obligation or had misunderstood the obligation, it would not have taken upon itself the expense of hiring coach builders and a sand blaster to work on the trailers. It had also ensured that each of the trailers, prior to delivery to Delta, had to pass a fitness test with VID. This, in my view, was clearly in accordance with the requirement in B the contract that the trailers be returned to Delta in good working condition, fair wear and tear excepted.

I do not understand the applicant to suggest that the trailers should not have been returned. The argument is that the second respondent should not have required that the applicant be made to perform in terms of the contract when the first respondent had itself not performed its own part of the contract. The C obligation of the first respondent was to provide the applicant with trailers to enable the latter to utilise them in the distribution of products on behalf of Delta. The parties' reciprocal obligations during the life of the contract are not in dispute. Once the agreement is terminated, the *status quo ante* had of necessity to be restored. This necessitated the return by the applicant of the first respondent's trailers in good working condition, fair wear and tear D excepted. I am of the view that the reasoning by the arbitrator in requiring the applicant to comply with this contractual obligation cannot be faulted. I am unable to accept as cogent the argument by the applicant that the agreement had envisaged bilateral obligations on the parties and that in awarding specific performance in the first respondent's favour the arbitrator had imposed an E obligation upon one party when the other party to the contract was clearly not in a position to perform its own part of the obligation.

I accept that during the currency of the agreement the first respondent was obliged to allocate trailers for the facilitation of the transportation of its goods by the applicant. Charges raised by the applicant for this service would permit the applicant to ensure that its horses and the first respondent's trailers F would be maintained in a roadworthy condition and be certified fit by VID. Upon termination of the agreement however it was the responsibility of the applicant to return the first respondent's trailer in good working condition, fair wear and tear excepted. I cannot see how, by giving effect to the letter of the agreement regarding the obligation imposed upon the applicant to G return the trailers in good and working condition, it can be suggested that the arbitrator imposed an obligation upon one party to the agreement.

The first respondent contends further that it has been advised by its legal representatives that no appeal lies against an arbitral award. It contends that the applicant wants the award set aside on the premise that the arbitrator came to a wrong conclusion on the facts and on the law. The applicant is however H

Gowora J

A camouflaging these proceedings to have the appearance of a review when what the applicant seeks is an appeal. There is not a single ground for review on the papers. Accordingly, the first respondent prays that the application be dismissed on that ground alone, specifically that the applicant does not have a cause of action.

B Finally, the first respondent avers that the applicant has embarked on vexatious and frivolous litigation and that in order for the court to show its displeasure, it is only proper that the applicant be mulcted with an appropriate order of costs on a punitive scale.

The record of proceedings of the arbitration process was not before the court. C The submission from the applicant's counsel was that it was understood that it was the responsibility of the second respondent, the arbitrator, to furnish the record to the registrar of this court. As matters stand, the arbitrator did not appear or file any documents. The arbitration process is completely separate from the court system and, without any effort expended by the applicant to D secure the provision of the record of proceedings by the arbitrator, I am not aware how else this was to be achieved. The applicant has failed to establish that the award given in favour of the first respondent was contrary to public policy in any of the respects alleged. I am therefore not persuaded that there is any merit in the application.

E As for the costs, the first respondent prayed for a punitive order of costs. I have not been addressed on the reasons why the first respondent considers the application frivolous and meriting

an award of costs on the higher scale. The mere fact that a party has decided to take on review a decision it is not happy with does not, in my vew, reflect a frivolous attitude. The first respondent F needed to show that the applicant did not have faith in its litigation and had instituted such litigation *mala fide,* with an intention other than a desire to have the award properly set aside. There is no abuse of court process alleged on the papers and in the event I am not persuaded that an order of costs on the higher scale is warranted.

G The application is dismissed with costs on the ordinary scale.

Kantor & Immerman, legal practitioners for the applicant

H *Gill, Godlonton &Gerrans*, legal practitioners for the first respondent

© 2015 Juta and Company (Pty) Ltd.

Document 8 of 75

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2012/Volume 1/CABAT TRADE & FINANCE (PTY) LTD & ANOR v MDC-T 2012 (1) ZLR 76 (H)

CABAT TRADE & FINANCE (PTY) LTD & ANOR v MDC-T 2012 (1) ZLR 76 (H)

Citation	2012 (1) ZLR 76 (H)
Case No	Judgment No. HB-201-11
Court	High Court, Bulawayo
Judge	Kamocha J
Heard	12 October 2010; CAV
Judgment	5 January 2012
Counsel	*R M Fitches*, for the plaintiffs *L Uriri*, for the respondent
Case Type	Civil trial
Annotations	No case annotations to date

Flynote

Practice and procedure – *pleadings – plea in bar or abatement – purpose of – allows defendant to achieve prompt resolution of factual issue which founds a legal argument which disposes of claim*

Headnote

Under r 137(1) of the High Court Rules 1971, as an alternative to pleading D to the merits, a party may take a plea in bar or in abatement where the matter is one of substance which does not involve going into the merits of the case and which, if allowed, will dispose of the case. The plea in bar is not predicated on a denial of any facts set out in the declaration as that would involve going into the merits of the case made by the E plaintiffs in their declaration. The plea proceeds on the basis that the allegations in the plaintiff's declaration are correct but that the matter should nevertheless be disposed of for one reason or another that does not appear ex facie the

pleadings. The purpose of a special plea is to permit the defendant to achieve a prompt resolution of a factual issue which founds a legal argument which disposes of the plaintiff's claim. F An example would be where the defendant claims that a contract is void for illegality. Ideally a plea of illegality should be raised before the trial and not in limine.

Legislation considered G

Exchange Control Regulations 1996 (SI 109 of 1996), ss 10(1) & 11

High Court Rules 1971 (RGN 1047 of 1971), r 137(1)(a)

Cases referred to

Abreu v Campos 1975 (1) RLR 198 (A); 1975 (3) SA 73 (RA)

Adler v Elliot 1988 (2) ZLR 283 (S) H

Kamocha J

A *Barker v African Homesteads Touring & Safaris (Pvt) Ltd & Anor* 2003 (2) ZLR 6 (S)

Brown v Vlok 1925 AD 56

Doelcam (Pvt) Ltd v Pichanick & Ors 1999 (1) ZLR 390 (H)

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

Schuddingh v Uitenhage Municipality 1937 CPD 113

B *York Estates Ltd v Wareham* 1949 SR 197; 1950 (1) SA 125 (SR)

Case information

R M Fitches, for the plaintiffs

L Uriri, for the respondent

Judgment

C **Kamocha J:** The plaintiffs' claim in this matter was for payment of the sum of ZAR4 627 863.93, being the purchase price of goods sold by the first plaintiff to the defendant at the defendant's special instance and request in or about February/March 2008 which was manufactured and delivered by the second plaintiff to the defendant on or about 18 March 2008 and which was invoiced on 18 March 2008 and payable within 30 days of date of invoice.

D In the alternative, the claim was for payment of the sum of ZAR4 627 863.93, being the amount by which the defendant had been unjustly enriched at the expense of the second plaintiff as the result of the second plaintiff manufacturing and delivering goods valued at ZAR4 627 863.93 to the defendant at the defendant's special instance and request on or about 18 March 2008.

In their amended declaration the plaintiffs had this to say.

Main claim: *Actio venditi*

In or around April 2008 at Bulawayo, the defendant, represented by Mr Eddie Cross, duly authorized, and Mr Simon Spooner, duly authorized by Mr F Cross, entered into an oral agreement with the second plaintiff represented by Mr Laurence Zlattner, in terms whereof the second plaintiff undertook, at the defendant's behest, to manufacture 200 000 garments, commonly known as "T-shirts" and as many head scarves, commonly known as "doeks or bandanas" as could be manufactured from the material on hand, but at G least 30 000 (hereinafter referred to as "the goods") which the first plaintiff sold to the defendant for defendant to use in its then forthcoming election campaign, for the agreed sum of ZAR4 965 723 including VAT. Given the size of the order, the the second plaintiff agreed to manufacture the total order in batches, to accommodate the defendant's express stipulation that the total order be ready for the defendant to use in its then forthcoming election H campaign as aforesaid. It was an express, alternatively implied, term of the

---

Kamocha J

parties' agreement that, given the size of the order, the defendant would pay A on tender of delivery of each batch of goods supplied. To comply with its contractual obligation, the defendant expressly agreed to effect payment to the first plaintiff.

By its agreement aforesaid, the defendant became contractually liable to pay the first plaintiff the contract price in South Africa, and simultaneously B incurred contractual liability to the second plaintiff for the manufacture of the goods.

In accordance therewith, the second plaintiff duly manufactured the said goods and delivered to the defendant goods in batches to the value of ZAR4 672 215.37, including VAT, comprising 149 887 articles or approximately 74 per cent of the contract goods, payable on tender of delivery C and demand, but the defendant, in breach of its contractual obligation, notwithstanding having accepted delivery, had allegedly refused to pay, despite demand. The defendant's failure to pay for the goods thus far delivered to it constituted a material breach of an express, alternatively, implied term of agreement, entitling the plaintiffs to claim the full contract price *ex vendito*. D

At the defendant's request, the second plaintiff had withheld delivery of the balance of the manufactured goods, namely 30 000 single jersey T-shirts, being finished goods ready for dispatch, to the value of ZAR 772 800 and 5 393 single jersey T-shirts, being finished goods ready for dispatch, to the value of ZAR143 885.24 and 7 368 single jersey T-shirts, being goods comprising "work in progress" to the value of ZAR196 578.24, pending the E defendant's advice of readiness to receive such goods, which goods subject to such stipulation, the second plaintiff thereby again tendered against payment by the defendant of the total balance due of ZAR340 463.48.

Pursuant to the plaintiffs' performance of the agreement as aforesaid, the second plaintiff rendered to the defendant the invoice for the manufacture F of the goods, dated 18 March 2008 for ZAR 4 627 863.93, including VAT, being the amount due for the goods (a) manufactured and delivered; and (b) manufactured but in respect of which delivery had been withheld but tendered, for the reasons given.

The said invoice constituted the plaintiffs' demand and expressly stipulated G that interest accrues at 8 per cent per annum within 30 days of the date of the invoice. Accordingly, the defendant was allegedly liable for interest on the total sum due, *ex mora rei*, from 17 April 2008 to the date of final payment.

In the result the plaintiffs prayed for judgment and costs against the defendant in the sum of ZAR 4 627 863.93, together with interest at 8 per cent per annum from 17 April 2008 to the date of payment. H

Kamocha J

A **Alternative claim: Unjust enrichment**

It was alleged that alternatively and in any event, that by reason thereof, the defendant had been unjustly enriched at the second plaintiff's expense in that:

Pursuant to the contract entered into as averred, in performing its obligations thereunder, the second plaintiff allegedly used its resources and incurred the B following liabilities in producing the contract goods: *inter alia*, manufacturing costs, wages, the cost of engaging a sub-contractor in Harare, namely, Kataura Enterprises (Pvt) Ltd, to assist in fulfilling the contract order, deferring its normal customers and rescheduling other deliveries, to give priority to the defendant, and the costs of purchasing raw materials as well as machinery C which had to be secured through deposits and the expectation of payment by the defendant.

By taking delivery, without payment, of approximately 92 per cent of the contract goods, and using them for its intended election campaign purposes, and by assuming the contractual obligation, the defendant had been enriched D at the plaintiff's expense.

The plaintiffs had been allegedly impoverished by the enrichment of the defendant, the causal connection being the contractual obligation referred to above in particular the costs and liability incurred by the plaintiffs in expectation of payment by the defendant. The said enrichment was unjustified.

E The the second plaintiff rendered to the defendant its invoice dated 18 March 2008 for ZAR4 627 863.93, including VAT, being the amount due for the goods manufactured and delivered and manufactured, but in respect of which delivery had been withheld but tendered, for the reasons given. The said invoice constituted the plaintiffs' demand and expressly stipulated that F interest accrues at 8 per cent per annum within 30 days of the date of the invoice. Accordingly, the defendant was allegedly liable for interest on the total sum due *ex mora rei* from 17 April 2008 to the date of final payment.

Having regard to the terms of the founding contract, the defendant had accordingly been allegedly unjustly enriched at the plaintiffs expense in the G sum of ZAR4 627 863.93 together with interest at 8 per cent per annum from 17 April 2008 to the date of final payment, and costs of suit.

Wherefore, in the alternative, the second plaintiff prayed for judgment and costs against the defendant on the basis of unjust enrichment in the sum of ZAR4 627 863.93 together with interest at 8 per cent per annum from 17 H April 2008 to the date of final payment.

Kamocha J

Defendant's plea A

The defendant denied that it had authorized Mr Eddie Cross or Mr Spooner to enter into the alleged contract. It averred that neither Mr Cross nor Mr Spooner had authority to enter into contracts on its behalf. It denied that it had purchased anything from the first plaintiff and denied liability to pay VAT in South Africa. B

It averred that any valid order would have been written not oral and would have been authorized by the defendant's Director General.

It denied being party to the agreement between the plaintiffs and Mr Cross and Mr Spooner and further denied that it had expressly agreed to effect payment to the first plaintiff the contractual price in South Africa as such C agreement would have been illegal.

It pleaded that it had not received the goods and averred that a goods received voucher would have been issued to the second plaintiff had the goods been received.

It went on to state that annexure "A" to the further particulars supplied by the D plaintiff alleged that some deliveries were made on 25 June 2008 and on 13 August 2008, when in fact it had very publicily resiled from the Presidential run-off election on 20 June 2008. Therefore, if the plaintiff continued to manufacture after 20 June 2008 then it voluntarily assumed the risk that it would receive no payment.

In the event of there being a valid contract for the plaintiffs to supply the E defendant with election campaign materials a material term of the contract would have been that the plaintiffs had to deliver well before the election and any delivery after the election would have been a material breach.

The defendant denied that it had contracted to pay for goods and further denied that it had requested the second plaintiff to withhold delivery of further items F nor that it had received any delivery from the plaintiff and insisted that there had been no contract between the parties. It denied having agreed to any interest rates and averred that the interest claimed was usurious and illegal.

It was finally averred that the plaintiffs should have made the demand to Mr Cross and Mr Spooner since they were the parties to the contract and prayed G for the dismissal of the plaintiffs' claims with costs.

In relation to the alternative claim, the defendant maintained that it had not taken delivery of any goods pursuant to any contract of sale and averred that it had not been unjustly enriched in the alleged amount or at all. It reiterated that the interest claimed was illegal and prayed for the dismissal of the alternative claim with costs. H

Kamocha J

A **Plaintiffs' replication to defendant's plea on the merits**

The plaintiffs maintained that Mr Cross and Mr Spooner had the authority of the defendant to enter into a contract on its behalf. In the event that it was found that they had no authority to represent the defendant it was averred that they had ostensible authority to do so by reason of the following facts:

> B "On or about November 2007, in anticipation of the 28 March 2008 Zimbabwe Presidential Elections, Mr Cross, who at the material time was a member of the defendant's National Executive Committee, and, by widely disseminated public knowledge, was a senior member of the defendant's hierarchy, acting on behalf of the defendant, allegedly entered into a similar contract with the second plaintiff for the manufacture and supply of garments that the second plaintiff manufactures within its normal business. The order was for 60 000 T-shirts, C 60 000 bandanas and 40 000 wraps, known colloquially as 'Zambias'.
>
> That the contract/order was performed by the second plaintiff and paid for by the defendant without demur or deviation. Such payment was allegedly effected through the defendant's hierarchical process. At no time did the defendant deny Mr Cross's authority to represent it in that transaction. In upholding the said earlier contractual obligation entered into by Mr Cross, and by making such D payment, the defendant thereby represented to the second plaintiff by its conduct, that Mr Cross was duly authorized to enter into such agreements on behalf of the defendant."

It was alleged that the second plaintiff was induced, to its prejudice, by the said representation to believe that Mr Cross was duly authorized to enter into the subsequent agreement on behalf of the defendant, concluded in April E 2008, which pertained to the re-run of the said Presidential Election, and, acting on the strength of that belief, the second plaintiff, to its detriment and prejudice, entered into the agreement concluded in April 2008, and the said transaction was confirmed and ratified by Mr Cross. The second plaintiff transacted the April 2008 contract, to its detriment, on the basis of F the aforesaid representation, inducement and belief.

In the result, the defendant was estopped from denying that Mr Cross and Mr Spooner had the authority to represent it, more particularly, as the payment for the March election and June re-run were matters not only of enormous public interest and debate, but the payment for the contract transacted by Mr Cross had been obviously released as a result of processing through the G defendant's payment process. Moreover, it was alleged that Mr Cross and Mr Spooner had in fact admitted that they had been duly authorized.

The plaintiffs alleged that an arrangement had been made whereby the goods were collected by the defendant as and when they were manufactured and required by the defendant. The the second plaintiff would advise the H defendant when goods were ready for delivery and the defendant would

---

in turn collect them as it wished to. As and when significant volumes had A been manufactured, the second plaintiff would advise the defendant, thereby tendering delivery, whereafter the defendant would determine when to collect in whole or in part.

The plaintiffs averred that they had documentary evidence of the goods collected and such documents had been repeatedly made available to the B defendant. In addition, contemporaneous electronic mail correspondence between Mr Cross, Mr Spooner and Chris Mbanga, affirmed that there had been complete verification of the numbers and that distribution was complete.

In respect of goods for which delivery thereof had been tendered, but collection by the defendant had not been effected, such goods still awaited collection. C

It was the plaintiffs' averment that the goods had been manufactured and delivery thereof tendered to the defendant in terms of the contract long before the defendant decided on 20 June 2008 to withdraw from the Presidential run-off election. The fact that the defendant effected ten collections after that date was wholly in the defendant's hands and did not mean that manufacture was after that date; in fact, manufacture had been effected long before that D date and delivery tendered in accordance with the on-going interactions with the defendant's representatives.

It was contended that the fact that the defendants collected goods on 25 June 2008 and 13 August 2008 constituted their acknowledgement that they were bound by the terms of the contract which they were still implementing. The E plaintiffs denied any voluntary assumption of risk as inferred by the defendant.

Finally, it was alleged that Mr Spooner had requested the second plaintiff to diminish the original order, which the plaintiff did, and to hold certain manufactured stocks of which delivery had been tendered pending later collection. It was, accordingly, submitted that the parties had indeed entered F into a contract through their duly authorized representative.

Defendant' s special plea in bar

After receiving the plaintiffs' claims the defendant filed its special plea in bar of the claim. It denied that it was obliged to the plaintiffs either in contract or in delict. G

The defendant stated that it was a political association with its headquarters in Zimbabwe and was accordingly a Zimbabwean based association.

It stated that the contract alleged by the plaintiffs would have been tainted with illegality for want of compliance with the Exchange Control Act [*Chapter 22:05*] as read with the Exchange Control Regulations, 1966 (SI H

Kamocha J

A 109 of 1996), as the alleged contract would have required payment to be made by the defendant to first plaintiff outside Zimbabwe.

The defendant did not have any free funds nor did it then hold any money in a foreign currency account.

It was contended that the alleged contract was void for illegality and the B plaintiff's claims *ex contractu* should be dismissed.

Defendant's amended exception

Further, the defendant excepted to the second plaintiff's declaration pertaining to the alternative claim on the ground that it disclosed no cause of action or, alternatively, on the ground that it was vague and embarrassing and bad C in law in particular.

It was alleged in the amended exception that the plaintiff had not stated in its declaration on which specific ground of enrichment it sought to sue. It claimed that the cause of action had not been properly identified. In the result, the claim was vague and embarrassing.

D In the alternative to the above, it was alleged that to the extent that the plaintiff claims in its response to the initial exception that it sought to found its claim on a general action for unjust enrichment, the plaintiff had failed to make the allegations necessary to found its claim on such an action. To found its claim on a general action for unjust enrichment, the second plaintiff must have alleged that: E

(a) The the defendant was enriched;

(b) The plaintiff was impoverished by the enrichment of the defendant;

(c) The enrichment was unjustified;

(d) The enrichment does not come within the scope of one of the classical F enrichment actions.

In casu, the second plaintiff had averred that it had delivered goods worth ZAR3 762 215.37 to the defendant, yet it sought to recover the sum of ZAR4 965 723, together with interest thereon at 8 per cent per annum.

Paragraph B7 of the plaintiff's declaration averred that the plaintiffs were claiming the full contract price *ex vendito*. By claiming the same amount G in unjustified enrichment as it claims *ex vendito*, the second plaintiff was attempting to claim a profit. That was unacceptable and rendered the plaintiff's claim bad in law as well as vague and embarrassing.

It alleged that the plaintiff had not given any admissible quantifiable figure of money that it sought to claim in unjustifiable enrichment. The amount H sought was based on evidence from a contract in violation of ss 4, 10 and 11

Kamocha J

of the Exchange Control Regulations and thus the court had no evidence on A which it could be requested to find for the plaintiffs. The claim was therefore allegedly vague and embarrassing and bad in law.

It was alleged that the plaintiff sought to enforce a contract under the law of unjustified enrichment when it performed under a contract. Its declaration in para C1 incorporated averments made in contract and at para C7 it couched B its enrichment action "having regard to the founding contract aforesaid". The plaintiff insisted on the founding contract's validity and that it be enforced by way of unjustified enrichment. That was approbation and reprobation, vague and embarrassing and incurably bad in law.

It was submitted that the plaintiff's declaration in its alternative claim was C bad in law and lacking in averments necessary to sustain the identified cause of action as stated above, in that the plaintiff did not unequivocally allege that there had been unjustified enrichment. In fact, the plaintiff insisted that there was a contract in force, meaning that the enrichment would therefore be justified. The approbation and reprobation rendered the claim vague and embarrassing and bad in law. D

In paras B1 and B2 of its declaration the plaintiff specifically stated that goods allegedly delivered were for use in the Presidential election campaign for the election due on 29 June 2008. As such, delivery of any goods after 29 June 2008 would mean that such goods would not have enriched the defendant's estate as they could no longer be used and therefore could not be claimed E in an action based on unjustified enrichment. The plaintiff's averments to that extent, therefore, failed to sustain the cause of action in that they do not support any averment that the defendant was enriched.

The plaintiff had not alleged that the enrichment did not come within the scope of one of the classical enrichment actions. That allegation was necessary F before any purported reliance on the general unjustified enrichment action, consequently, the averments in the plaintiff's declaration failed to sustain the cause of action by failing to make that allegation. Failure in that regard rendered the claim vague and embarrassing.

Finally, the defendant stated that in para 4 of the amended declaration it was alleged that the defendant had used the goods "for its intended election G campaign purposes." That was an admission that the goods had been consumed. Accordingly, it was submitted, that that was bad in law and embarrassing to allege in the same breath that the defendant had been enriched.

In the premises, the defendant prayed that the alternative claim be dismissed with costs on the Law Society tariff. H

Kamocha J

A **Plaintiffs' replication to defendant's special plea in bar**

The plaintiffs alleged that the defendant's denial of an obligation "in delict" was vague and embarrassing, superfluous, disclosed no offence (*sic*) and was itself excipiable by reason of the fact that the plaintiffs had not claimed in delict. In any event, the defendant's denial of a contracted obligation B was vague and embarrassing to the plaintiffs given that such denial avoids traversal of the alternative claim based on the general action against unjust enrichment. The said vague traversal allegedly militated against r 104(4) of the rules of this court which stipulated that a party denying an allegation shall not do so evasively, but shall answer the point of substance.

The plaintiffs' claim that as a political party the defendant had access to C external donor funds at the material time.

They went on to allege that the illegality was not a matter to be raised by special plea and denied that the contract was illegal for want of compliance with Exchange Control Regulations of 1996. More particularly, *inter alia*, by reason of s 45 thereof, and more particularized by the plaintiffs, the defendant D had allegedly agreed that the first plaintiff would be an *ad stipulator*, hence the defendant could not raise a contrary stance.

As the payment was at the defendant's express request and behest, as particularized in the declaration and further particulars, the defendant was estopped from asserting to the contrary. It was averred that the legality or E otherwise of the contract was a matter of law. It was further denied that the contract was void for illegality and was averred that the defendant could not

approbate and reprobate the existence of the contract by denying its existence, and simultaneously purporting a challenge to its legality.

In the result it was prayed that at the hearing of evidence on the special plea, it be dismissed with costs on the Law Society tariff.

F Plaintiffs' response to the defendant's exception

The plaintiffs, in their response to the defendant's exception, alleged that the exception was an abuse of court process, by reason of the fact that Zimbabwe law recognized a general action for unjust enrichment, and by reason of the fact that the alternative claim was based on the general action for unjust G enrichment. Hence, the second plaintiff denied that the alternative claim was vague and embarrassing or bad in law.

In response to para B2(a), (b) and (c) the plaintiff repeated that the averments in those paragraphs were bad in law and constituted an abuse of court process in that the defendant had failed to identify a straight forward cause of action H in that the plaintiffs' allegations were necessary to found a *condictio indebiti*,

Kamocha J

which is an entirely separate cause of action, and ignored their alternative A cause of action, as pleaded, namely, the general action for unjust enrichment, accepted as being part of Zimbabwe law since 1996.

The plaintiff averred that goods to the value of ZAR3 672 215.37 were manufactured and delivered to the defendant, which goods comprised approximately 74 per cent of the defendant's contractually stipulated order. B The difference between the figure of ZAR3 672 215.37 and the total amount claimed related to the balance owing as had been averred in para B3 of the main claim, and was due.

In answer to para B3.2, the plaintiffs averred that the paragraph repeated and compounded the alleged misunderstanding of the law and their claim for the general action for unjust enrichment, rather than a *condictio indebiti*. It was C contended that rather it was the defendant's exception that was bad in law. The reference to specific performance was vexatious in that it ignored the cause of action, as expressly stated as being the *actio venditi*. Further, the reference to the purported "guise" was equally vexatious in that it misidentified the cause of action, being the general action for unjust enrichment. D

Their explanation for not averring that delivery was in error was that their alternative claim did not sound in the *condictio indebiti*, as no question of error arose, neither did it sound in *condictio sine causa*, hence there was no necessity to allege that the delivery was not due. The averments for the main claim for the full contract price *ex vendito* had been incorporated by reference in the alternative claim for the general action for unjust enrichment. E

In answer to the suggestion that the defendant had used the goods for its intended election campaign purposes, the plaintiffs were admitting the goods had been consumed accordingly. It was bad in law and embarrassing to allege in the same breath that the defendant had been enriched. The plaintiffs averred that accepting delivery and consuming the goods constituted an admission F of unjust enrichment, as there was no denial of the averment that the goods were used. In addition, it constituted unjust enrichment for the purposes of the general action or unjust enrichment, as those facts pertained to the element of the said cause, that the defendant had been enriched by such impoverishment, and that the enrichment was unjustified.

The plaintiffs concluded by praying that the defendant's exception be G dismissed with costs on the Law Society tariff.

Plaintiffs' exception to the defendant's exception

The plaintiffs excepted to the defendant's exception (to the plaintiffs' alternative claim of unjust enrichment) as being bad in law, vague and embarrassing, disclosing no defence to the plaintiffs' alternative claim thus: H

Kamocha J

A It was alleged that para 2 thereof incorrectly stated the requirements for a *condictio indebiti* as being the requirements for the general action for unjust enrichment. As a proposition of law, that was incurably bad, at variance with established superior court authority.

The requirements stated in para 2(a), (b) and (c) seriatim were the requirements B for the *condictio indebiti*, which pertained to when enrichment arose from a payment in error. The general action for unjust enrichment was not available if one of the classical enrichment actions such as the *conductio indebiti*, was available. Since the plaintiffs did not aver performance to be in error, they did not rely on the *condictio indebiti.*

It was alleged that para 3.1 was argumentative in that it obfuscated the C value of the goods delivered and ignored the pleaded facts pertaining to the balance of the claim.

Paragraph 3.2 allegedly ignored the cause of action, as it was expressly stated as being the *actio venditi* and not specific performance. In addition, the reference to the purported guise "misidentified" the cause of action D being the general action for unjust enrichment, established in Zimbabwe law since 1996.

It was averred that it was bad in law to allege that a party was claiming under a cause of action not even pleaded, as the defendant had allegedly by the assertion that "the plaintiffs' claim that it had performed under a contract and now seeks to recover the full contract price under the *condictio indebiti*". E The plaintiffs had not claimed under the *condictio indebiti* at all.

It was further alleged that para 4 compounded the defendant's misunderstanding of the alternative claim in that the paragraph alleged that there was no averment that delivery had not been done in error nor that it had been due, the reason for that being that the plaintiffs were not claiming delivery F in error, nor were they claiming a *condictio sine causa* or *causa data non secuta,* which would be appropriate for performance which was not due.

In alleging in para 4 that: "Confusingly paragraph C 7 of those that the defendant had been unjustly enriched in the same amount as the contract price *ex vendito"* the defendant had confused the import of the plaintiffs' G alternative claim.

In as far as para 5 was concerned it was alleged that its meaning was obscure. To the extent that the meaning could be understood, it was bad in law, contradictory, vague and embarrassing, and disclosed no defence to the claim, by reason of the fact that *per contra*, the averment of accepting goods without paying for them, and consuming them, constituted an admission of H unjust enrichment, as there was no denial of the averment that the goods

---

Kamocha J

were used. In addition, it was alleged that it constituted unjust enrichment A for the purposes of the general action for unjust enrichment, as those facts pertained to the elements of the said cause, namely that the plaintiff had been impoverished, that the defendant had been enriched by such impoverishment, and that the enrichment was unjustified.

In the result the plaintiffs prayed that the exception to the defendant's B exception be upheld and the defendant's exception be held to be bad in law, vague and embarrassing, disclosing no defence to the plaintiffs' alternative claim. The plaintiffs prayed for costs on the Law Society tariff.

Plaintiffs' application to strike out

The plaintiffs applied to strike out para 5.2 of the defendant's plea and para 1 C of the defendant's special plea in bar, filed of record on 30 November 2009, as being bad in law, vague and embarrassing, disclosing no defence to the plaintiffs' claim for the following reasons:

Ex facie para 5.2 of the plea, the defendant having denied the existence of the contract in paras 3, 4.2, 5.4 and 6.1, yet approbates and reprobates by relying D on the merits, and resorting to argumentative and irrelevant conjecture. As the averments in that paragraph allegedly disclose no defence, are irrelevant, and constituted approbation and reprobation, para 5.2 of the plea ought to be struck out as it is conjectural argumentative and irrelevant.

Further, it was alleged that *ex facie* para 1 of the special plea, the defendant's E denial of an obligation "in delict" was vague and embarrassing, superfluous, disclosed no offence, and was in itself excipiable by reason of the fact that the plaintiffs had not claimed in delict. Accordingly the alleged offending averment ought to be struck out.

Further, *ex facie* para 3 of the special plea, the defendant relied on illegality. F That was a matter of substantive law which ought to be raised in a plea on the merits rather than by way of special plea, as the averment of illegality was neither a plea in bar nor in abatement. Hence the paragraph ought to be struck out.

It was prayed that the above mentioned paragraph be struck off on the Law G Society tariff.

I now turn to deal with the defendant's special plea in bar as provided for in Order 21 r 137(1)(a) of the High Court Rules, which recites as follows:

> "**137 Alternatives to pleading to merits:**
>
> (1) A party may – H

Kamocha J

> (a) take A a plea in bar or in abatement where the matter is one of substance which does not involve going into the merits of the case and which if allowed, will dispose of the case."

What comes out from the above is that the requirements of a special plea are that: B

(a) the matter must be one of substance;

(b) which does not involve going into the merits of the case; and

(c) which, if allowed, disposes of the case.

In *Brown v Vlok* 1925 AD 56 at 58 Innes CJ had this to say:

> "Now a plea in bar is one which, apart from the merits, raises some special C defence not apparent from the declaration – for in that case it would be taken by way of exception – which either destroys or postpones the operation of the cause of action."

The plea in bar is not predicated on a denial of any facts set out in the declaration, as that would involve going into the merits of the case made by the plaintiffs in their declaration. The plea proceeds on the basis that the D allegations in the plaintiffs' declaration are correct, but should nevertheless be disposed of for one reason or another that does not appear *ex facie* the pleadings. In *Scuddingh v Uitenhage Municipality* 1937 CPD 113 at 119 the court had this to say in respect of a plea in bar:

> "It [a special plea] is the type of plea the object of which is to avoid the necessity of going into the merits of the plaintiff's claim because of the existence of certain E circumstances not apparent from the declaration which either bar or postpone the claim made."

The courts have stated repeatedly that the purpose of a special plea is to permit the defendant to achieve a prompt resolution of a factual issue which founds a legal argument which disposes of the plaintiffs' claim as called for F by r 137(1)(a) above. See, for instance, *Doelcam (Pvt) Ltd v Pichanick & Ors* 1999 (1) ZLR 390 (H).

The issue that the defendant raised in this matter is that of illegality. In that the plaintiffs were attempting to enforce a contract tainted with illegality for want of compliance with the Exchange Control Act [*Chapter 22:05*] as read with the Exchange Control Regulations, 1996 (SI 109 of 1996), as the G contract would have required payment to be made by the defendant to the first plaintiff outside Zimbabwe.

Ideally, a plea of illegality should be raised before the trial and not *in limine*, as stated in *Abreu v Campos* 1975 (1) RLR 198 (A) at 204H–205A. In *Adler v Elliot* 1988 (2) ZLR 283 (S) illegality was raised as an exception as it H appeared on the papers. Illegality was also raised as an exception that the

Kamocha J

summons disclosed no cause of action in *York Estates Ltd v Wareham* 1949 SR 197; A
1950 (1) SA 125 (SR) where the summons had set out the factual basis that was then used to argue the point of illegality. In *Barker v African Homesteads Touring & Safaris (Pvt) Ltd &*

Anor 2003 (2) ZLR 6 (S), illegality for contravening s 8 (now s 11) of the Exchange Control Regulations raised *in limine* was upheld both by the High Court and on appeal in the Supreme B Court, resulting in the plaintiffs' claim being dismissed. Consequently, the submission by the plaintiffs that illegality should not have been raised as a special plea and can only be raised on the merits is clearly untenable.

The relevant provisions of the Exchange Control Regulations (SI 109 of 1996) recite thus:

> "10 (1) Unless otherwise authorized by an exchange control authority, no C person shall, in Zimbabwe –
>
> (a) make any payment to or for the credit of a foreign resident; or
>
> (b) …; or
>
> (c) place any money to the credit of a foreign resident; or
>
> (d) …" D

Section 11 of the said Regulations provides as follows:

> "11 (1) Subject to subsection (2), unless otherwise authorized by an exchange control authority, no Zimbabwean resident shall:
>
> (a) make any payment outside Zimbabwe; or
>
> (b) incur any obligation to make a payment outside Zimbabwe. E
>
> (2) Subsection (1) shall not apply to –
>
> (a) any act done by an individual with free funds which were available to him at the time of the act concerned; or
>
> (b) any lawful transaction with money in a foreign currency account."

It is common cause that the first plaintiff, Cabat Trade & Finance (Pty) Ltd, is a foreign resident. The transaction which entailed making a payment to F it contravened the provisions of s 10(1)(a) and (c) *supra*. The transaction does not end there in its contravention of the Regulations, but further violates s 11(1)(a) and (b) *supra*, in that the defendant is not an individual but a political association with *locus standi* and power to sue and to be sued with its headquarters in Zimbabwe and is therefore a Zimbabwean resident. G Similarly, the first plaintiff is not an individual but a company incorporated with limited liability according to the laws of the Republic of South Africa. It is therefore a South African resident – a foreign resident.

The contract entailed making payment by the respondent or placing any money to the credit of the foreign resident – the first plaintiff – in violation of s 10(1)(a) and (c). H

Kamocha J

A The first plaintiff cannot have recourse to the provisions of s 11(2)(a) as those provisions are only available to individuals with free funds which were available at the time of the act concerned, not companies and political associations. In *Barker v African Homesteads Touring & Safaris (Pvt) Ltd & Anor* 2003 (2) ZLR 6 (S) the Supreme Court held that violation of s 11(1)(a) B and (b) of the regulations as read with s 11(2) barred both actual payment and an agreement to make payment outside Zimbabwe without authorization by the Exchange Control Authority, except where that was done by an individual with free funds available to him or her at the time of the act concerned. In the absence of such authorization, the court held the contract illegal and unenforceable. Hence, both the making of the contract and the performance C undertaken were unlawful. Sandura JA had this to say at 10D-E:

> "In the present case, as the alleged agreement to pay the sum of US$32 500 to Barker in Australia had not been authorized by the exchange control authority, *cadit quaestio*. That is the end of the matter. The agreement is illegal and unenforceable."

The above applies with equal force *in casu* as the agreement to pay the sum D of ZAR4 965 723 together with interest at 8 per cent per annum from 17 April 2008 to the date of final payment to Cabat Trade & Finance (Pty) Ltd in South Africa had not been authorized by the Exchange Control Authority it is illegal and unenforceable.

The plaintiffs are seeking to enforce an illegal agreement which is prohibited E by law by the maxim *ex turpi causa non oritur actio*. This maxim admits of no exception. In *Dube v Khumalo* 1986 (2) ZLR 103 (S) at 109D-G the Supreme Court held that:

> "The first [rule] is that an illegal agreement which has not yet been performed, either in whole or in part, will never be enforced. This rule is absolute and admits no exception."

F The plaintiffs seek to enforce an illegal agreement which the courts have repeatedly stated can never be enforced.

The plaintiffs sought to rely on the provisions of s 45 of the Regulations but that section only relates to debts lawfully incurred or contracts lawfully entered into. Those provisions do not avail the agreement under consideration G which was illegal and unenforceable.

The plaintiffs had claimed the amount of ZAR4 965 723 together with interest at the rate of 8 per cent per annum from 17 April 2008 to the date of final payment in the alternative on the basis of the doctrine of unjust enrichment. In my view, that also cannot avail the plaintiff as unjust enrichment cannot H be used to enforce an illegal agreement or achieve anything of that nature.

Kamocha J

The plaintiffs also submitted that estoppel operated against the respondent A in this matter. The submission is also devoid of any merit as the plaintiffs are seeking to enforce a contract prohibited by law. See *York Estates Ltd v Wareham* 1949 SR 197; 1950 (1) SA 125 (SR) at 128 where the court stated that it was bound to refuse to enforce a contract even though no objection to illegality of the contract is raised by the parties. It went on to state that it B would not enforce such a contract even though the plaintiff is innocent and the defendant is setting up illegality.

Moreover, the defendant cannot be prevented from relying on the illegality or unenforceability as a defence, no matter how unfair that may be to the plaintiff.

In the light of the foregoing I would allow the plea in bar which disposes C of the case. The need to deal with the defendant's exception, the plaintiffs' exception to the defendant's exception and the plaintiffs' application to strike out does not arise.

In the result, it is ordered that the plaintiff's main and alternative claims be and are hereby dismissed with costs on the ordinary scale. D

Joel Pincus, Konson & Wolhuter, plaintiffs' legal practitioners

Honey & Blanckenberg, defendant's legal practitioners E

© 2015 Juta and Company (Pty) Ltd.

Document 9 of 75

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2012/Volume 1/KINGDOM BANK WORKERS' COMMITTEE v KINGDOM BANK FINANCIAL HOLDINGS 2012 (1) ZLR 93 (H)

KINGDOM BANK WORKERS' COMMITTEE v KINGDOM BANK FINANCIAL HOLDINGS 2012 (1) ZLR 93 (H)

Citation	2012 (1) ZLR 93 (H)
Case No	Judgment No. HH-302-11
Court	High Court, Harare
Judge	Patel J
Heard	6 September 2011; *CAV*
Judgment	10 January 2012
Counsel	*M Nkomo*, for the applicant *H Zhou*, for the respondent

Case Type Opposed application

Annotations Link to case annotations

Flynote

Appeal – *noting of – effect – whether suspends judgment appealed against – appeal from arbitrator to Labour Court – award not suspended –* D *appeal from Labour Court to Supreme Court – decision appealed against suspended*

Arbitration – *award – registration – labour matter – no relief beyond registration provided for by Labour Act*

Employment – *Labour Court – appeal – appeal to Labour Court – decision* E *or arbitral award not suspended by noting of appeal – appeal from Labour Court to Supreme Court – decision of Labour Court suspended by noting of appeal*

Interpretation of statutes – *headings – extent to which may be use to resolve ambiguity*

Headnote

F The applicant sought the registration of an arbitral award made in its favour, as well as an order for the payment of the sum awarded. The respondent had previously filed an appeal-cum-review of the award before the Labour Court. The Labour Court dismissed both the appeal and review. G The respondent then appealed to the Supreme Court against the Labour Court's decision. The appeal was still outstanding. The respondent argued that the registration of the award was premature, as it would render the appeal academic and cause irreparable prejudice to the respondent if the award were to be enforced. The applicant argued that the noting of the appeal did not suspend the award and that it was entitled to register H and enforce the award, unless and until the respondent took appropriate

Patel J

steps to stay its execution. At the hearing, the following issues arose A for determination:

(a) the grounds upon which the court could exercise its discretion to decline registration of an award in terms of s 98 of the Labour Act [*Chapter 28:01*];

(b) whether the remedies sought by the applicant beyond registration B are competent under s 98; and

(c) whether the noting of the appeal to the Supreme Court had the effect of suspending the award.

Under s 92E(2) of the Act, an appeal in terms of subs (1) shall not have the effect of suspending the determination or decision appealed against; and under s 92E(3), pending the determination of an appeal, the Labour C Court may make such interim determination in the matter as the justice of the case requires.

Held, that any relief beyond registration is not competent under subss (14) and (15) of s 98 of the Act.

Held, further, that an appeal to the Labour Court against an arbitrator's decision under s 98(10) is an appeal in terms of the Act. The provisions D of s 92E are unambiguous and unequivocal and apply to every appeal in terms of the Act, including an appeal under s 98(10). Section 92E precludes the suspension of the decision appealed against. The common law presumption against the operation and enforceability of judgments appealed against has thus been explicitly ousted by s 92E in the case of D arbitral awards rendered under s 98.

Held, further, that the appeals to the Labour Court provided by ss 92E(1) and 98(10) are not materially different. Under s 92E(1), an appeal to the Labour Court may address the merits of the decision appealed against, in addition to any question of law, while an appeal against an arbitrator's award under s 98(10) is confined to questions of law. F

Held, further, that the heading of s 92F reads "Appeals against decisions of Labour Court" and differs from the heading of s 92E which reads "Appeals to the Labour Court generally". While

headings cannot control the plain words of a statute, they may be regarded as preambles in order to explain ambiguous provisions or words in the statute. This G approach is consistent with the provisions of s 7 of the Interpretation Act [*Chapter 1:01*].

Held, further, that the language of subss (1) and (2) of s 92E encompasses every appeal made in terms of the Act, including one from the Labour Court to the Supreme Court. However, s 92E(3) appears to be limited to the interlocutory powers of the Labour Court in relation to appeals H

A pending before it. This would indicate that the appeals referred to in subs (1) and (2) of that section are also appeals before the Labour Court, as distinct from appeals before the Supreme Court. This apparent ambiguity can only be resolved by having regard to the context of ss 92E and 92F. Given the factors of their juxtaposition and the contemporaneity of their enactment, it is virtually impossible to disregard their headings. Taking B those headings into account, it becomes clear that s 92E is confined to appeals made to the Labour Court generally, while s 92F deals specifically with appeals from the Labour Court to the Supreme Court. An appeal under s 92F is thus not an appeal "in terms of this Act" for the purposes of s 92E. Consequently, an appeal from the Labour Court to the Supreme C Court would, in accordance with the general common law rule, operate to suspend that decision, subject to the right of the successful party to apply for execution pending appeal.

Held, further, that the application for the registration of the award under s 98(14) and (15) of the Act was therefore premature and could not be granted at this stage. The applicant must await the outcome of the D respondent's appeal to the Supreme Court.

Cases referred to

Bank of England v Vagliano Brothers [1891] AC 107

Dhlodhlo v Deputy Sheriff, Marondera, & Ors 2011 (1) ZLR 416 (H)

E *Net One Cellular (Pvt) Ltd v Net One Employees & Anor* 2005 (1) ZLR 275 (S)

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

R v Hare [1934] 1 KB 354

Tel-One (Pvt) Ltd v Communication & Allied Svcs Workers' Union 2007 (2) ZLR 262 (H)

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

Legislation considered

Interpretation Act [*Chapter 1:01*], ss 2(1) & 7

Labour Act [*Chapter 28:01*], ss 92E(1), 92F, 98(10), (14), (15)

Case information

G *M Nkomo*, for the applicant

H Zhou, for the respondent

Judgment

Patel J: The issues herein arise from the implementation of a 2010 collective bargaining agreement in the banking sector. The dispute between the parties H relates to the increments payable to the applicant's members. The dispute

was referred to an arbitrator, who made an award on 25 June 2010 in favour A of the applicant, holding the respondent guilty of an unfair labour practice and ordering it to pay the sum of US$491 645.

The applicant now seeks the registration of the award. It also seeks an order for the payment of the sum awarded, and an order for the attachment and execution of the respondent's property in the event of non-payment. B

On 5 July 2010, the respondent filed an appeal-cum-reXview of the award before the Labour Court, on the grounds of bias and gross irrationality. The Labour Court dismissed both the appeal and review on 14 March 2011. Its decision was then appealed to the Supreme Court on 7 June 2011 in Case No. SC 118/2011. C

The respondent contends that the registration of the award is premature, as it will render its appeal academic and cause irreparable prejudice to the respondent if the award were to be enforced. The applicant counters that the noting of the appeal does not suspend the award and that it is entitled to register and enforce the award, unless and until the respondent takes appropriate steps to stay its execution. D

The submissions

At the hearing of this matter, counsel were directed to address three specific issues: the grounds upon which this court may exercise its discretion to decline registration of an award in terms of s 98 of the Labour Act [*Chapter 28:01*]; whether the remedies sought by the applicant beyond registration are E competent under s 98; and whether the noting of the appeal to the Supreme Court has the effect of suspending the award.

Mr *Zhou* submits that any violation of acceptable notions of elementary justice is contrary to public policy and an award that violates such notions is unenforceable. See *ZESA v Maposa* 1999 (2) ZLR 452 (S); *Pamire & Ors v Dumbutshena NO & Anor* 2001 (1) ZLR 123 (H). The award *in casu* was F outrageous and grossly irrational for several reasons. Firstly, the arbitrator made the award before determining the legality of the collective bargaining agreement of 17 February 2010 upon which it was premised. Secondly, the increments claimed by the applicant had already been paid to its members before that date, and the arbitrator arrived at the sum awarded without any G proper quantification having been done. Lastly, the effect of the award is to irreparably stress the financial position of the respondent without regard to its financial resources and ability to pay, thereby defeating the mutually beneficial structure of the employer-employee relationship. See *Tel-One (Pvt) Ltd v Communication & Allied Services Workers Union of Zimbabwe* 2007 (2) ZLR 262 (H) at 266. Mr *Nkomo* accepts that registration of the H

Patel J

A award may be declined if it is found to be untenable on the ground of public policy, *viz.* gross irrationality. However, there is nothing irrational in the arbitrator's decision. The sum awarded represented the arithmetical computation of the amounts owed to the applicant's members. Moreover, the figures were drawn from the applicant's statement of claim and those B figures were not challenged by the respondent. The latter then accepted that an oral hearing was not necessary and the arbitrator proceeded to determine the matter on the papers.

Both counsel accepted, quite correctly in my view, that any relief beyond registration is not competent under subss (14) and (15) of s 98 of the Labour Act. Mr *Nkomo* accordingly withdrew the relief sought by the applicant in C paras 2 and 3 of the draft order.

As regards the suspension of decisions appealed against, Mr *Nkomo* maintains that the effect of s 92E of the Labour Act is all-inclusive. Any appeal in terms of the Act, including one to the Supreme Court under s 92F, does not suspend the decision that is appealed against. Mr *Zhou* submits that the D effect of an appeal to the Supreme Court is to suspend not only the decision of the Labour Court but also the arbitral award upheld by that court. He relies in this respect on the decisions in *Net One Cellular (Pvt) Ltd v Net One Employees & Anor* 2005 (1) ZLR 275 (S) at 282B, and in *Dhlodhlo v Deputy Sheriff for Marondera & Ors* 2011 (1) ZLR 416 (H) at 426-427.

E **Relevant appeal provisions**

The relevant provisions of the Labour Act governing appeals are contained in ss 92E and 92F. They provide as follows:

> "**92E Appeals to the Labour Court generally**

(1) An appeal in terms of this Act may address the merits of the determination or decision appealed against.

(2) An a F ppeal 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.

92F Appeals against decisions of Labour Court

(1) An G appeal on a question of law only shall lie to the Supreme Court from any decision of the Labour Court.

(2) Any party wishing to appeal from any decision of the Labour Court on a question of law in terms of subsection (1) shall seek from the President who made the decision leave to appeal that decision.

(3) If the President refuses leave to appeal in terms of subsection (2), the party H may seek leave from a judge of the Supreme Court to appeal."

Patel J

Suspension of arbitral awards A

As regards the *Net One Cellular* case s*upra,* the most important point to note is that the appeal provisions of the Labour Act at the time that this case was determined were radically different from those currently in force. At that time, appeals to the Labour Court were governed by s 97 of the Labour Act. Section 97(1) listed the specific determinations and conduct appealable B to the Labour Court. Section 97(2) provided that any such appeal could address the merits of the decision appealed against and/or seek a review of that decision. Section 97(3) then declared that an appeal would not have the effect of suspending the decision in question. The salient distinctive feature of s 97 is that it was confined to the appeals specifically enumerated in subs (1). Appeals against arbitral awards were not covered and were therefore subject C to the general common law rule suspending any decision appealed against.

Section 97 was repealed in its entirety by Act No. 7 of 2005 and replaced by the present s 92E, which is significantly broader in its scope of coverage. Having regard to these amendments, it is reasonably clear that the decision of the Supreme Court in the *Net One Cellular* case *supra*, insofar as it pertains D to the suspension of arbitral awards on appeal, has been superseded by legislative intervention. In any event, that decision is distinguishable on its facts which involved an award that had already been registered by this court.

The decision of this court in *Dhlodhlo's* case s*upra* is more recent and impacts directly on the prevailing appeal provisions of the Labour Act. Gowora J (as she was then) noted the existence of s 92E(3) but held that E there was no equivalent provision in relation to the decision of an arbitrator. Consequently, she concluded that an arbitral award, being in the domain of public law, continues to be regulated by the common law principle that an appeal against a judgment operates to suspend it. With great respect, I am constrained to disagree with that conclusion. F

Section 98 regulates references to compulsory arbitration under Parts XI and XII of the Labour Act. Section 98(10) provides that:

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

Section 92E(1) is very broadly framed to encompass appeals *in terms of this* G *Act*. The ambit of appeals which do not suspend the decisions appealed against is now considerably wider than the category of appeals delineated under the repealed s 97. It is abundantly clear that Parliament intended to modify the common law position generally. It is equally clear that an appeal against an arbitrator's decision under s 98(10) is an appeal in terms of the Act. I fully agree with Mr *Nkomo* that the provisions of s 92E are unambiguous and H

Patel J

A unequivocal in their scope and effect. Subject to what follows later in this judgment, they apply to every appeal in terms of the Act, including an appeal under s 98(10), and they operate to pre-empt and preclude the suspension of the decision appealed against. The common law presumption against

the operation and enforceability of judgments appealed against has been explicitly B ousted by section 92E in the case of arbitral awards rendered under s 98.

Contrary to Mr *Zhou's* contentions in this regard, I do not think that the appeals envisaged in ss 92E(1) and 98(10) are materially different. Section 92E(1) simply makes it clear that an appeal to the Labour Court may address the merits of the decision appealed against, in addition to any question of law, while an appeal under s 98(10) is confined to questions of law. However, that C does not render any such appeal one that is not in terms of the Act. Moreover, although s 98 is a special provision dealing specifically with compulsory arbitration, that does not necessarily suffice to invoke the maxim *generalia specialibus non derogant* so as to exclude the operation of s 92E, particularly as the latter is a later provision, endowed with the benefit of the maxim *lex* D *posterior priori derogat*.

The golden rule of statutory interpretation dictates that the words of a statute must be given their ordinary grammatical meaning unless to do so would lead to an absurdity. I see no absurdity whatsoever in construing s 92E to embrace appeals against arbitral awards under s 98(10). Moreover, to use the words of Lord Halsbury LC in *Bank of England v Vagliano Brothers* E [1891] AC 107 at 120, cited in *PTC v Mahachi* 1997 (2) ZLR 71 (H) at 75, it is very clear to me that the presumption against any alteration of the common law has been excluded by the irresistible clarity of the provisions under consideration. In the premises, I am amply satisfied that an appeal against an award under s 98(10) is an appeal in terms of the Act within the F meaning of s 92E and, as such, it does not have the effect of suspending the award in question.

Suspension of labour court decisions

Section 92F of the Labour Act provides for appeals to the Supreme Court from decisions of the Labour Court, albeit only on questions of law. Mr *Nkomo* G submits that s 92E is categorical in its application to any and every appeal in terms of the Act, including one from the Labour Court to the Supreme Court. Consequently, the appeal against the Labour Court's decision *in casu* does not suspend that decision or preclude the registration of the arbitral award upheld by it. Mr *Zhou* persists with his reliance on the *Net One Cellular* case s*upra* to challenge the enforceability of the award. However, as I have H already explained, that decision is distinguishable on its facts and, in any

---

Patel J

event, it has been superseded by the legislative amendments to the appeal A provisions of the Act. Moreover, I find it extremely difficult to grasp and digest Mr *Zhou's* contention that an appeal to the Supreme Court is made in terms of the rules of that court and not in terms of the Labour Act.

The heading of s 92F reads "Appeals against decisions of Labour Court" and differs from the heading of s 92E which reads "Appeals to the Labour B Court generally". Does the wording of these headings impinge on the ambit of s 92E in order to answer the question whether an appeal under s 92F is an appeal in terms of the Act within the contemplation of s 92E?

It is necessary in this context to have regard to the relevant provisions of the Interpretation Act [*Chapter 1:01*]. Section 7 of the Act is particularly C germane to the question at hand. It states that:

> "In an enactment –
>
> (*a*) headings and marginal notes and other marginal references therein to other enactments; and
>
> (*b*) notes, tables, indexes and explanatory references inserted therein as part of any compilation or revision in terms of the Statute Law Compilation and D Revision Act [*Chapter 1:03*];
>
> shall form no part of the enactment and shall be deemed to have been inserted for convenience of reference only."

Section 2(1) of the Interpretation Act spells out its general scope of application, while s 2(2) provides as follows:

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

The traditional common law rule of statutory interpretation is that a heading does not form part of the operative provision. See *R v Hare* [1934] 1 KB 354 at 355. However, the context of the provision under scrutiny may dictate otherwise. The modern tendency is to accept that, while headings cannot

F control the plain words of a statute, they may be regarded as preambles in order to explain ambiguous provisions or words in the statute. See *Maxwell on Interpretation of Statutes* 11 ed at pp. 48-49.

The approach adopted by Bennion *Statutory Interpretation* (1984) at p 590 goes significantly further. The learned author accepts that the plain literal G meaning of the words in a statute cannot be overridden purely by reason of a heading. However, he takes the view that, in accordance with the informed interpretation rule, modern judges consider it not only their right but their duty to take account of headings. He accordingly opines that:

> "A heading within an Act, whether contained in the body of the Act or a Schedule, is part of the Act. It may be considered in construing any provision of the Act, H

Patel J

> A provided due account is taken of the fact that its function is merely to serve as a brief, and therefore necessarily inaccurate, guide to the material to which it is attached."

I must confess that I find this robust approach very attractive, particularly if one accepts that the entire statute is passed by Parliament, including headings inserted for reference purposes. Be that as it may, it is difficult to reconcile B it fully with the provisions of s 7 of the Interpretation Act. In contrast, the flexible approach as to the significance of headings propounded in *Maxwell supra* is not in any way inconsistent with that section. I therefore take the view that it may be legitimately adopted and applied in conformity with s 2(2) of the Interpretation Act.

C Turning to s 92E of the Labour Act, the language of subss (1) and (2) evidently encompasses every appeal made in terms of the Act, including one from the Labour Court to the Supreme Court. However, subs (3) of s 92E appears to be limited to the interlocutory powers of the Labour Court in relation to appeals pending before it. This would indicate that the appeals referred to in subss (1) and (2) of that section are also appeals before the Labour Court, D as distinct from appeals before the Supreme Court. It seems to me that this apparent ambiguity can only be resolved by having regard to the context of ss 92E and 92F.

In my view, there are two features that have a direct bearing on the contextual setting of these two provisions. The first is that the latter immediately follows E the former. The second is that they were both introduced and inserted at the same time by s 32 of Act No. 7 of 2005. Given these factors of their juxtaposition and the contemporaneity of their enactment, it seems virtually impossible to disregard their headings. Taking those headings into account, it becomes clear that s 92E is confined to appeals made to the Labour Court generally, while s 92F deals specifically with appeals against decisions of F the Labour Court to the Supreme Court. It follows that the two provisions must be interpreted and applied separately and independently from one another. I am fortified in differentiating them in this manner by dint of the fundamental hierarchical distinction between the two courts. The Supreme Court is a constitutionally established court of general appellate jurisdiction, G while the Labour Court is creature of statute with limited jurisdiction in the sphere of labour relations only. In the premises, I am inclined to hold that an appeal under s 92F is not an appeal "in terms of this Act" for the purposes of s 92E. Consequently, an appeal from a decision of the Labour Court to the Supreme Court would, in accordance with the general common law rule, operate to suspend that decision, subject to the right of the successful party H to apply for execution pending appeal.

Patel J

Disposition A

In light of the foregoing construction of the relationship between ss 92E and 92F, the answer to the question posed at the outset must be answered in the affirmative. Thus, the appeal to the Supreme Court by the respondent against the decision of the Labour Court, upholding the arbitrator's award *in casu*, operates to suspend that decision as well as the award. It follows B that the present application for the registration of the award under s 98(14) and (15) of the Labour Act is premature and cannot be granted at this stage. The applicant must await the outcome of the respondent's appeal to the Supreme Court.

In the circumstances, I do not deem it necessary to consider the remaining question as to whether or not the award is so grossly irrational or so violative C of elementary notions of justice as to be unenforceable on the ground that it is contrary to public policy. This is an aspect that will presumably be fully canvassed and determined in the pending appeal.

As regards costs, it seems to me that this is a proper case for not applying the general rule of costs following the cause. The principal issue raised herein D is one of appreciable public importance with respect to which the law was not clearly settled. In the result, the application is dismissed, with each party bearing its own costs.

Donsa-Nkomo & Mutangi Legal Practice, applicant's legal practitioners E

Kantor & Immerman, respondent's legal practitioners F

© 2015 Juta and Company (Pty) Ltd.

Document 10 of 75

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2012/Volume 1/FREE METHODIST CHURCH OF ZIMBABWE v DUBE & ORS 2012 (1) ZLR 103 (H)

FREE METHODIST CHURCH OF ZIMBABWE v DUBE & ORS 2012 (1) ZLR 103 (H)

Citation	2012 (1) ZLR 103 (H)
Case No	HH-315-11
Court	High Court, Harare
Judge	Patel J
Heard	13 September 2011; 14 September 2011; 15 September 2011; *CAV*
Judgment	10 January 2012
Counsel	*C Daitai*, for the plaintiff *S Mushonga*, for the defendants
Case Type	Civil trial
Annotations	No case annotations to date

Flynote

Property and real rights – *spoliation – order – requirement for grant of – delay in seeking order – whether fatal*

Headnote

D The doctrine of spoliation is encapsulated in the maxim spoliatus ante omnia restituendus est, that is, he who is despoiled must be restituted before all else. It is a fundamental and well established principle of our law that no one is permitted to forcibly or wrongfully dispossess another of his movable or immovable property without his consent. Whenever E this occurs, the courts will summarily restore the status quo ante. The claimant need only prove that he was in peaceful and undisturbed possession of the property and that he has been unlawfully deprived of

such possession. In spoliation proceedings, the fact that the spoliator owns or has beneficial rights in the property despoiled is wholly irrelevant. Delay per se does not preclude the grant of a mandament van spolie. F The court has a discretion to decline the remedy where, on account of the delay in seeking it, no relief of any practical value can be granted at the time of the hearing. An additional aspect to be considered is whether the claimant's failure to apply for relief immediately constitutes such acquiescence in what has been done by the spoliator as to deprive the G claimant of the right to seek restoration of the status quo ante.

Cases referred to

Chisveto v Min of Local Govt 1984 (1) ZLR 248 (H)

de Beer v Firs Invstms Ltd 1980 (3) SA 1087 (W)

de Villiers v Holloway (1902) 12 CTR 566

H *Jivan v National Housing Comr* 1977 (3) SA 890 (W)

2012 (1) ZLR p104

Patel J

Mans v Loxton Municipality and Another 1948 (1) SA 966 (C) A

Nino Bonino v de Lange 1906 TS 120

Setlogelo v Setlogelo 1914 AD 221

Universal Merchant Bank Zimbabwe Ltd v The Zimbabwe Independent & Anor 2000 (1) ZLR 234 (H)

van t'Hoff v van t'Hoff & Ors (1) 1988 (1) ZLR 294 (H) B

Case information

C Daitai, for the plaintiff

S Mushonga, for the defendants

Judgment

Patel J: This case involves a long-standing factional fight between the members of a religious group relating to questions of leadership and C proprietary rights. The plaintiff seeks restoration of possession in respect of the church premises in Masvingo. It also seeks an order restraining any disruption of, or interference with, its lawful activities. The defendants assert their autonomy from the plaintiff and are vehemently opposed to the relief claimed by the plaintiff. D

The issues for determination herein, as agreed at the trial, are as follows: (i) whether Bishop Abner Chauke has authority to represent the plaintiff; (ii) whether the fifth defendant (the circuit church) has *locus standi in judicio*; (iii) whether the plaintiff, through Rev Shinasi Gezani, was in peaceful occupation and possession of the disputed church premises; (iv) whether the plaintiff and Gezani were lawfully evicted and dispossessed of the church E premises; (v) whether the defendants should be interdicted from interfering with the plaintiff's lawful activities.

Evidence for the plaintiff

Bishop Abner Daniel Chauke was appointed as the bishop of the plaintiff church in 2000. He heads the church under its 2004 Constitution (the Book F of Discipline). He testified as follows. The defendants are members of the plaintiff church and are presently in occupation of the church premises at Stand No. 12489 Runyararo, Masvingo. These premises are the headquarters of the plaintiff and comprise several buildings designed and used for church purposes. Until September 2006, the plaintiff was in peaceful occupation G of the premises and had full access to all its buildings and facilities. In 2006 Rev Gezani was transferred from Gweru to Masvingo. He stayed there peaceably for about two weeks until he was forcibly evicted on 22 September 2006 without any court order. The police were called but were unable to resolve the situation. Since then Gezani and the witness have been barred from entering the church premises. The matter was taken up with H

2012 (1) ZLR p105

Patel J

A the Free Methodist World Conference, which is based in Indianapolis USA and is the legislative assembly incorporating all Free Methodist churches across the world. The World Conference despatched two regional bishops to conciliate but the defendants refused to listen to them. The plaintiff then engaged lawyers who wrote to the defendants on 9 May 2007. There was subsequent litigation in the Masvingo magistrates court and in the High B Court. The present action was filed on 24 September 2009. The witness was consecrated as bishop at Lundi Mission in January 2000 and is the head of the General Conference of the Free Methodist Church in Zimbabwe. On 10 October 2009, the World Conference affirmed this position and repudiated the defendants' claims. On 5 September 2009, the Board of Administration C of the General Conference granted him authority to institute this action. There was an earlier resolution to that effect on 7 July 2009, but that meeting did not have the requisite quorum. All three constituent conferences of the plaintiff church (Lundi, Ralph Jacobs and Chiredzi) were represented at the subsequent meeting in September 2009 by their elected representatives. The meeting was duly constituted by 11 out of 13 members, in conformity with D the two-thirds quorum prescribed by the Book of Discipline. The Board of Administration is composed of four members from each constituent conference, consisting of two lay and two ministerial delegates. The quorum need not comprise an equality of lay and ministerial delegates, and voting only requires such parity if one-quarter of the delegates so require. The fifth E defendant (the circuit church) is not a recognised legal entity and does not own the church premises in Masvingo. The land in question was purchased in 1998 or 1999, and the receipts for the land and buildings are in the name of the plaintiff and not the fifth defendant. According to the Book of Discipline, all church property belongs to the plaintiff and vests in the Board of Trustees of the General Conference.

F Under cross-examination, the witness explained that he was first appointed as bishop in January 2000 for a four-year term under the Provisional Constitution of the church. In August 2004 he was appointed for a second four-year term under the Book of Discipline, which was adopted by the General Conference earlier that year. Thereafter, in August 2008, he was elected for a further third G term by the General Conference. There is nothing in the Book of Discipline to restrict the number of terms of appointment. In August 2006, the General Conference dissolved the Ralph Jacobs Conference and suspended several of its members. The World Conference questioned this decision on 21 March 2007 and called for a full quorum. The Board of Administration was then reconstituted in 2008 or 2009 and took a further decision to suspend H the members in question. This was approved by the World Conference on

---

Patel J

10 October 2009. The minutes of the jury hearing on 10 March 2006 show A that the first defendant was found not guilty of the charges laid against him. However, the minutes are not a proper record as they were not signed by the chairman, who died before they were presented. The decision to replace the suspended members was passed on to the Lundi Conference held in September 2006, where Rev Gezani was appointed as pastor of the church B in Masvingo. In that respect, the letter of complaint from the fifth defendant dated 12 September 2006 is meaningless as it was addressed to the fifth defendant itself. As regards the resolution of the Lundi Conference held on 11 July 2009, passing a vote of no confidence in the witness, this meeting was not properly constituted or chaired and had no power to pass any such vote. Only the World Conference and the International Council of Bishops could C hold a bishop accountable for misbehaviour. At the end of his testimony, as requested by the court, the witness produced two organograms showing the structural organisation of the Free Methodist Church in Zimbabwe.

Rev Shinasi Gezani became a pastor and member of the Ralph Jacobs Conference in 1991. His evidence was that in 2006 he was appointed as pastor to Masvingo by the MEG Board chaired by Bishop Chauke. Two of D the fifth defendant's leaders were represented at that MEG Board meeting. On 8 September 2006, he was welcomed at the church premises and given the keys to the pastor's house. He moved in and conducted his pastoral duties for two weeks without any protest from the defendants. Thereafter, on 22 September 2006, four young men came saying that they had been sent E by the first and second defendants to remove his property. They took his belongings and threw them outside the church premises. He and his family were then forcibly evicted. Bishop Chauke was also barred from using the bishop's office and the Bible school at the same premises. Thereafter, the witness stayed at a farm nearby and eventually at Lundi Mission, which is 112 km

away from the Masvingo church, where he has continued with his F pastoral duties with about 25 out of 55 of the fifth defendant's members.

Hasani Dumela is a member of the Lundi Conference and has been the Secretary of the Board of Administration of the General Conference since 2004. His evidence was that the first defendant, together with his wife and Rev Ndlovu, were suspended as pastors. They then appealed to the World G Conference, which responded on 10 October 2009 supporting the suspension and expulsion of all three pastors. On 22 September 2006, the witness went to the Masvingo church and saw Rev Gezani's property on the roadside. He spoke to one, Godi, who said that he had been sent by the first and second defendants to evict Gezani and his family. He then called Bishop Chauke to assist Gezani and his family and they were relocated. He later tried to H

A access the Masvingo church premises but was denied entry by the second defendant. Consequently, the bishop's office and the Bible school have not functioned properly. He produced a letter from the Head Steward of the fifth defendant dated 9 May 2009 barring entry to Bishop Chauke and his followers, according to a court ruling. He was unable to find any such ruling at the Masvingo magistrates court. He has never seen the alleged record of B the vote of no confidence in relation to Bishop Chauke passed at the Lundi Conference on 11 July 2009 and no meeting was held by the Lundi Conference on 11 July 2009. As Secretary, he would have been informed and aware of any annual conference that is convened. Under cross-examination, he was shown the minutes of that Lundi Conference showing a large attendance of C members. The minutes are signed by one W Chuma as the Secretary, but Chuma is not the Secretary of the Lundi Conference. The minutes reflect the proceedings of a district conference, as distinct from those of an annual conference, which would only be attended by 20 delegates.

Evidence for the defendants

D Rev Kabelo Dube, the first defendant, is a pastor of the fifth defendant, which is a member of the plaintiff church. He became a pastor when he was posted to Masvingo in 1996. He testified as follows. He was suspended in December 2005 on charges of insubordination. He appealed to the World Conference and the matter was reconsidered. A jury was then appointed to sit on 10 March 2006 and found him not guilty. The chairman of the jury died E before he could sign its minutes and there was no follow-up communication between the jury and the Board of Administration. Following his suspension, he vacated the pastor's house at the Masvingo church on 31 August 2006. He gave the house and church keys and one gate key to the stewards, and the Bible School keys with one gate key to Bishop Chauke. On 8 September 2006, Bishop Chauke called him late at night regarding access to the Masvingo F church premises. He went to the premises and used the bishop's keys to gain entry. He then helped to move Gezani's belongings into the dormitory and returned home at midnight. Thereafter, he has never had any dealings with access to or control of the premises. He did not instruct Godi, a youth church member, to impede Gezani's occupation of the premises. When he resumed G his pastoral duties in Masvingo in April 2007, he did not take control of any keys and continued to reside outside the church premises. The trustees of the fifth defendant and its stewards are the persons in control of the church premises. According to the Provisional Constitution of the Free Methodist Church, the bishop's term of office is four years and limited to not more than two consecutive terms. The Book of Discipline must be read together H with the Provisional Constitution, because certain provisions in the latter,

particularly as regards the bishop's term of office, are not included in the A former. Bishop Chauke should therefore have stepped down after his second term in 2008. As regards the resolution authorising this action, the first defendant eventually conceded that the lack of a lay-cum-clergy parity did not matter as long as the quorum element was satisfied. At the relevant time, the full complement of the Board of Administration was 13 with a two-thirds B quorum of nine. At the meeting in question, 11 members were present and voted for the resolution. The minutes of an extraordinary meeting of the Ralph Jacobs Conference held on 9 September 2006 were produced through the first defendant. Although he did not attend this meeting, he agreed with the grievances set out in the minutes, which grievances have yet to be resolved.

Under cross-examination, the first defendant acknowledged that the Ralph C Jacobs Conference should ordinarily have 10 delegates and be chaired by the Bishop. However, the extraordinary meeting in September 2006 was not chaired by the bishop and there were no delegates from Gweru or Zvinavashe. The first defendant complained about Bishop Chauke to the International Council of Bishops in 2009 and the matter is still being D considered. He accepted that until the Council takes steps to remove him, Chauke is still the bishop of the church in Zimbabwe. He further accepted that this was specifically confirmed by the World Conference and that the World Conference also confirmed and supported his expulsion. As regards Rev Gezani's removal from the church premises, he conceded that he would have been in lawful and peaceful occupation until his eviction on E 22 September 2006. He was not aware of any court order authorising that eviction. As for the church premises in Masvingo, he admitted that although the local church is the immediate owner, the national church remains the ultimate owner of the premises.

Rev Khanya Nare, the second defendant, is a member of the plaintiff and the fifth defendant. His evidence was that the Masvingo church premises are owned F by the fifth defendant, as it was allocated that stand and paid for it. In his view, Bishop Chauke's third term of office is unconstitutional and undermines the leadership of the church. He did not accept Rev Gezani's pastoral appointment in 2006 because he was appointed by the Lundi Conference and not the Ralph Jacobs Conference. After his arrival in Masvingo, Gezani stayed in G the dormitory for the first week and occupied the pastor's house during the second week. The second defendant was not involved in Gezani's eviction and has never had any direct or indirect control over the church premises. He participated in drafting the letter of complaint from the fifth defendant dated 12 September 2006, which was authored at the extraordinary meeting held in Bulawayo on 9 September 2006. Under cross-examination, he conceded H

A that although the church premises were purchased by the local church, they belong to the national church as its headquarters and main place of business. As regards Gezani's eviction from the premises, the extraordinary meeting had resolved that he should leave but not how he should be removed. He accepted that the World Conference had recognised Bishop Chauke as the B bishop, but he did not agree with that position.

Nehemiah Samuel Zanamwe is a trustee and senior steward of the fifth defendant. At a meeting of the fifth defendant held on 28 February 2010, another steward was authorised to act for the fifth defendant in this matter. This was because the witness was away at that time. He has since been authorised to appear at the trial. However, there was no further resolution C of the fifth defendant to that effect. He was not present at the extraordinary meeting held on 9 September 2006, but he supported its views because Bishop Chauke had arbitrarily suspended 3 pastors without consulting the local churches. Of the ten delegates of the Ralph Jacobs Conference only three had been suspended. Therefore, the bishop could still have convened that conference in 2006. He did query this with Bishop Chauke by letter D on 5 June 2006, but there was no reply from him. The witness took the view that the Masvingo church premises are owned by the fifth defendant. This is because the land was purchased at the local level and the premises were constructed with foreign donations to the fifth defendant. The local congregation did not accept Rev Gezani's pastoral appointment because he E had been appointed at the Lundi Conference and not at the Ralph Jacobs Conference. The congregation had decided not to let him into the church premises. He gained entry with the first defendant's assistance but without the blessing of the congregation. He changed the locks to the pastor's house in order to occupy it. The witness did not personally see this but received a full report from Godi (Godwin Masiyambiri). He reacted by giving his F letter of 5 June 2006 to Bishop Chauke to Godi who was to present it to Gezani and ask him to leave. Gezani then left the pastor's house and the church premises voluntarily. Under cross-examination, the witness stated that he had instructed the church secretary to write the letter of 9 May 2009 denying access to Bishop Chauke and his followers. The court ruling referred G to in that letter was the ruling of the Masvingo magistrates court declining jurisdiction in the plaintiff's application for repossession of the premises. The witness was not present when Gezani voluntarily left the premises but Godi told him what took place. However, he could not explain the discrepancy in paragraph 7(d) of the fifth defendant's plea to the effect that Gezani refused to leave the premises. He was also unable to explain the contents of Godi's H affidavit in the fifth defendant's application for joinder herein. Paragraphs

Patel J

3 and 4 of that affidavit indicate that Godi moved Gezani's property out of A the premises and that Godi was assisted by his friends in removing Gezani. The witness conceded that when Gezani was removed from the premises there was no court order authorising his removal.

Bishop's authority to represent plaintiff

The first issue that arises for determination is the legitimacy of Bishop B Chauke's standing as bishop of the plaintiff church. At the constitutional level, as appears from its prefatory pages, the Book of Discipline was presented to the General Conference of North America by the Provisional General Conference of Zimbabwe on 24 June 2003. It was then adapted and adopted for the Zimbabwe General Conference at some stage in 2004. It C seems reasonably clear that its detailed provisions were intended to replace and supersede the Provisional Constitution as the only Constitution of the Free Methodist Church in Zimbabwe. That being so, it must stand alone and cannot be construed in conjunction with the Provisional Constitution. Unlike Article VI.C.5 of the latter, which limits the bishop's tenure of office to two consecutive terms, the Book of Discipline is conspicuously silent on the point D in its relevant provisions. Whether this was a deliberate omission on the part of Bishop Chauke and his Board of Editors is a moot point. Be that as it may, it seems to me that his third term of office as bishop is constitutionally unimpeachable in the absence of any restriction in the Book of Discipline. It is also common cause that Bishop Chauke's status was explicitly affirmed by the President of the Free Methodist World Conference in October 2009. E

The next issue relates to the votes of no confidence in Bishop Chauke passed by the Ralph Jacobs and Lundi Conferences in September 2006 and July 2009. As appears from the minutes of the 2006 meeting, and as was conceded by the first defendant, this meeting was not chaired by the bishop, as is stipulated by para. A591(11) of the Book of Discipline, and there were no delegates F from Gweru or Zvinavashe. It was therefore not properly constituted. The minutes of the 2009 meeting, as was explained by the Secretary to the Board of Administration, reflect the proceedings of a larger district conference, as distinct from those of an annual conference which should have been chaired by the bishop. Consequently, it must be accepted that neither meeting had G the power to pass the purported votes of no confidence in the bishop.

As regards authority to represent the plaintiff in these proceedings, the relevant resolution of the Board of Administration in September 2009 clearly authorised Bishop Chauke to that effect. In this respect, the objection put forward by the defendants as to the lack of equality between lay and clerical members is not sustained by the Book of Discipline. Para. A282 provides that H

Patel J

A each constituent conference is entitled to the same number of lay members and ministerial delegates in the General Conference. However, this does not impact on the requisite quorum to enable any conference to conduct its business. The meeting in question was duly constituted by 11 out of its full complement of 13 members, in conformity with the two-thirds quorum B prescribed by para. A288. As was eventually conceded by the first defendant, this quorum need not comprise an equality of lay and ministerial delegates. Moreover, in terms of para. A289, voting only requires such parity if one-quarter of the members present so require. In the premises, it follows that Bishop Chauke was duly authorised to represent the plaintiff in this matter.

C **Fifth defendant's** *locus standi*

Part B of Chapter IV of the Book of Discipline deals with local church administration. It provides for the conduct of meetings and the establishment of various boards with specific functions. However, it is not clear from these provisions whether a local church is endowed with legal personality and capacity separate and distinct from the national church. The matter was not D adequately canvassed in evidence at the trial or in the closing submissions filed of record. Indeed, Mr. *Daitai* has expressly abandoned the plaintiff's insistence that the fifth defendant has no *locus standi in judicio*.

As for Zanamwe's authority to represent the fifth defendant at the trial, it is clear from the resolution of February 2010 that it was not him but another E steward that was authorised to act for the fifth defendant. However, this issue is not critical to the principal issues for determination and Mr. *Daitai* has quite correctly conceded that it is not decisive in this matter.

Whether plaintiff in peaceful occupation of church premises

It is common cause that until September 2006 the plaintiff, through Bishop F Chauke and the Secretary to the Board of Administration, had full access to the church premises in Masvingo. The plaintiff was using the premises as its headquarters and for the operation of the bishop's office and the Bible school. Moreover, as from 8 September to 22 September 2006, Rev Gezani, who had been appointed by the plaintiff as pastor to Masvingo, had access G to the premises and the plaintiff's house. The precise circumstances of his arrival are not entirely clear, but the fact of his entry and access are not disputed. Subsequently, he conducted two Sunday services as the pastor and the defendants attended these services without any complaint or protest. It is therefore abundantly clear that Gezani and the plaintiff, through Bishop Chauke and the Board Secretary, were in peaceful and undisturbed occupation H of the premises until 22 September 2006.

Patel J

Whether plaintiff lawfully evicted from church premises A

All the witnesses in this matter have confirmed that there was no court order authorising the eviction of Rev Gezani from the church premises. By the same token, contrary to the import of Zanamwe's letter in May 2009, there was no court order or ruling allowing the defendants to bar the plaintiff and its functionaries from entering and utilising the premises. As for Zanamwe's B evidence that Gezani voluntarily moved out, this is flatly contradicted by para 7(d) of the fifth defendant's plea, to the effect that Gezani refused to leave the premises. It is also discredited by paras 3 and 4 of Godwin Masiyambiri's affidavit in the fifth defendant's application for joinder therein, which clearly indicate that he and his friends forcibly moved Gezani and his property out of the premises. It follows that Gezani and the plaintiff were unlawfully C evicted from, and thereafter unlawfully dispossessed of, the church premises.

Spoliation

Mr *Mushonga* contends that the plaintiff's claim for restoration of the church premises must be rejected for four reasons. Firstly, the stand in question was purchased and developed by the fifth defendant, which therefore has D stronger beneficial and possessory rights over the premises. Secondly, the pastoral appointment of Rev Gezani was effected improperly because it was not sanctioned at the Ralph Jacobs Conference. Thirdly, the plaintiff's claim against spoliation was instituted long after the events of September 2006 and must therefore be dismissed because of the excessive delay. In this regard, reliance is placed upon *Jivan v National Housing Commission* E 1977 (3) SA 890 (W). Fourthly, Gezani's removal from the premises was an act of instant repossession and justified by way of counter-spoliation in favour of the fifth defendant. In support of this contention, Mr. *Mushonga* cites *Mans v Loxton Municipality and Another* 1948 (1) SA 966 (C) and *de Beer v Firs Investments Ltd* 1980 (3) SA 1087 (W). F

The doctrine of spoliation is encapsulated in the maxim *spoliatus ante omnia restituendus est*, to wit, he who is despoiled must be restituted before all else. It is a fundamental and well established principle of our law that no one is permitted to forcibly or wrongfully dispossess another of his movable or immovable property without his consent. Whenever this occurs, the courts G will summarily restore the *status quo ante*. See *Nino Bonino v de Lange* 1906 TS 120 at 122. The claimant need only prove that he was in peaceful and undisturbed possession of the property and that he has been unlawfully deprived of such possession. See *Chisveto v Minister of Local Government and Town Planning* 1984 (1) ZLR 248 (H) at 250 and *van t'Hoff v van t'Hoff & Ors (1)* 1988 (1) ZLR 294 at 296. H

Patel J

A In the instant case, as I have already stated, it has been clearly demonstrated that Gezani and the plaintiff were in peaceful and undisturbed occupation of the church premises until 22 September 2006. It has also been incontrovertibly established that Gezani and the plaintiff were unlawfully evicted and dispossessed of the premises. In this respect, the defendants' assertion that Bisop Chauke has continued in office unconstitutionally is totally immaterial. B Equally irrelevant is their contention that Gezani was unprocedurally appointed as pastor to the Masvingo church. It is trite

that the lawfulness or otherwise of the claimant's possession of the property in question does not arise for consideration at all. See *Chisveto's* case s*upra* at 250.

As regards ownership of the church premises, the receipts for the purchase of C the land are in the name of the plaintiff and not the fifth defendant. Moreover, according to paras. A856-858 of the Book of Discipline, all church property, including that acquired by any local church, belongs to the plaintiff and vests in the Board of Trustees of the General Conference. Thus, as was eventually accepted by the first and second defendants, even though the premises might have been purchased by the fifth defendant, they ultimately belong to the D national church as its headquarters and main place of business. In any event, the question of ownership is not a relevant consideration in the context of spoliation. It is settled law that in spoliation proceedings the fact that the spoliator owns or has beneficial rights in the property despoiled is wholly irrelevant. See *van t'Hoff's* case s*upra* at 296.

E Turning to the delay in instituting these proceedings, the one year limitation period supposedly applicable to the remedy of *mandament van spolie* was firmly rejected in *Jivan's* case s*upra* at 892-893. Steyn J went on, at 893, to postulate that the court has a discretion to decline the remedy where, on account of the delay in seeking it, no relief of any practical value can be granted at the time of the hearing. This approach was approved in *Chisveto's* F case s*upra* at 253. The additional aspect to be considered is whether the claimant's failure to apply for relief immediately constitutes such acquiescence in what has been done by the spoliator as to deprive the claimant of the right to seek restoration of the *status quo ante*. See *de Villiers v Holloway* (1902) 12 CTR 566 at 569. Having regard to these case authorities, with which I respectfully concur, it is clear that delay *per se* does not preclude the G *mandament*. Rather, the remedy may be refused where the delay in instituting proceedings shows acquiescence on the part of the claimant and/or the facts are such that no relief of practical value can be granted by the court at the time of the hearing of the matter.

Before addressing the facts in this case, I would note that the defendants H did not specifically raise the questions of excessive delay, acquiescence or

---

impracticality in their pleadings. Be that as it may, the evidence herein shows A that, after 22 September 2006, the plaintiff initially attempted to involve the police. Thereafter, it resorted to internal dispute resolution mechanisms, both within the country and at the World Conference level. Eventually, the plaintiff instituted legal proceedings in the magistrates court, as well as earlier an application in this court that was later withdrawn, before issuing summons B in the present case. On these facts, the delay in instituting this claim cannot be said to be inordinate or unreasonable. Moreover, the plaintiff's conduct after having been dispossessed of the church premises is patently inconsistent with any acquiescence on its part. As regards the practicality of the relief sought, there is nothing before me to show that the restoration of the church premises into the plaintiff's control is of no practical value. On the contrary, C the fifth defendant, which is effectively in control of the premises, is still a member of the plaintiff church and the latter, quite obviously, requires access to the premises as its headquarters in order to carry out its work for the purposes of the General Conference.

The concept of counter-spoliation was articulated in *Mans'* case s*upra* at 977-978, on the basis that the act of recovery must be *instanter*. In other words, D it must form part of the *res gestae* of the act of spoliation so as to be a mere continuation of the existing breach of the peace. Such instant recovery may be condoned. However, where the act of dispossession has been completed, any attempt at recovery is no longer forthwith or instant but amounts to a new act of spoliation which the law condemns. E

In my view, the defence of counter-spoliation does not avail the defendants *in casu* for the following reasons. First and foremost, it cannot be said that the defendants were despoiled of the church premises in any way. On the contrary, the plaintiff was in control of the premises to begin with. After his suspension, pursuant to Bishop Chauke's directive, the first defendant vacated the pastor's house on 31 August 2006 and surrendered all the keys F in his possession to the bishop and the stewards. On 8 September 2006, Rev Gezani moved into the premises and assumed his pastoral duties, until he was forcibly evicted on 22 September 2006. Secondly, even if it were to be accepted that Gezani dispossessed the defendants, the supposed act of recovery by the defendants took place two weeks later. It certainly cannot be G regarded as having occurred instantly as a continuation of

Gezani's breach of the peace. It was clearly a new act of spoliation without any court order or other legal basis. Accordingly, restoration of the church premises to the plaintiff's control does not involve any infringement of the defendants' rights. Nor does it entail the eviction of the fifth defendant as it will continue to occupy and utilise the premises under the auspices of the General Conference. H

Patel J

A **Interdict against interference with plaintiff's activities**

The unchallenged evidence of the plaintiff's witnesses demonstrates that since September 2006 the plaintiff and all of its functionaries have been denied entry and access to the church premises in order to carry out their respective duties. That this situation has continued is confirmed by Zanamwe's letter B in May 2009 barring the plaintiff from entering and utilising the premises.

The grant of a final interdict is premised on the establishment of three well-settled requirements: a clear right vested in the applicant; an injury actually committed or reasonably apprehended; and the absence of any other remedy. See *Setlogelo v Setlogelo* 1914 AD 221 at 227 and *Universal Merchant Bank Zimbabwe Ltd v The Zimbabwe Independent & Anor* 2000 (1) ZLR 234 (H) C at 239.

In the instant case, there is no doubt that the plaintiff is the ultimate owner of the church premises and that it uses them as its headquarters on the basis of a clear right to do so. It is obviously entitled to freely access the premises and use them for its daily activities. It is also not in doubt that the D defendants have barred the plaintiff's access to the premises and inflicted injury by interfering with the plaintiff's lawful activities at the premises. Lastly, I cannot perceive any other viable remedy that might be available to the plaintiff in the circumstances of this case. It is accordingly entitled to the interdict that it seeks against the defendants.

Disposition

E The plaintiff seeks an order for costs on a higher scale because the defendants have taken the law into their own hands and because of their persistence in defending this matter. While this argument is not without merit, the first and second defendants' stance was that they did not direct Rev Gezani's removal or participate in his eviction. Their evidence in this regard was not F meaningfully challenged or dislodged by the plaintiff's witnesses. Again, there was no evidence to show the third and fourth defendants' involvement in the dispossession of the plaintiff.

The only clear culprit in the process is Zanamwe who, by his own admissions, directed Masiyambiri and others to eject Gezani and thereafter took action to prevent the plaintiff from entering and utilising the church premises. G However, neither Zanamwe nor Masiyambiri have been cited as defendants in this action. If they had been so cited, they would clearly have deserved censure with a punitive award of costs.

Zanamwe claimed to represent the fifth defendant at the trial as its trustee and senior steward. However, he was unable to adduce any written authority H to do so. Therefore, his actions and those of Masiyambiri cannot be directly

Patel J

attributed to the fifth defendant. In the event, I do not believe that there is A any justification for penalising the entire congregation comprising the fifth defendant for the unlawful conduct of two of its members.

In the final analysis, I take the view that this is the kind of case where an order for costs, whether on an ordinary or higher scale, would be purely counter-productive and is therefore unwarranted. The plaintiff has clear B proprietary rights which have been violated. On the other hand, the defendants have genuine grievances pertaining to Bishop Chauke's tenure of office and style of leadership. It seems to me that all the parties involved should now endeavour to reconcile and settle their differences so as to further their mutual spiritual alliance. That, after all, is the only legitimate purpose of their adherence to the Free Methodist Church of Zimbabwe. C

In the result, it is ordered as follows:

1. The defendants and all those who claim occupation through them be and are hereby ordered to restore to the plaintiff possession and control of the church premises at Stand No. 12489 Runyararo, Masvingo, within ten days of this order, failing which the Deputy Sheriff be and is hereby D authorised to give effect to this order.
2. The defendants be and are hereby ordered not to disrupt or interfere with the plaintiff's lawful activities at the aforesaid church premises.
3. Each party shall bear its own costs. E

Magwaliba & Kwirira, plaintiff's legal practitioners

Mushonga & Associates, defendants' legal practitioners F

© 2015 Juta and Company (Pty) Ltd.

Document 11 of 75

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2012/Volume 1/ZVOMA v MOYO NO & ORS 2012 (1) ZLR 117 (H)

ZVOMA v MOYO NO & ORS 2012 (1) ZLR 117 (H)

Citation	2012 (1) ZLR 117 (H)
Case No	Judgment No. HH-23-12
Court	High Court, Harare
Judge	Bere J
Heard	21 December 2011; 30 December 2011; *CAV*
Judgment	20 January 2012
Counsel	*D Ochieng* for the applicant Mrs *B Mtetwa*, for the third and fourth respondents *C Mhike*, for the first, second, fifth, sixth and seventh respondents
Case Type	Urgent chamber application
Annotations	No case annotations to date

Flynote

Constitutional law – *Parliament – powers – standing orders – need for Parliament to obey such orders – motion passed in breach of standing order – such motion a nullity – no right of members of Parliament to deal with matters pending before courts or which are sub judice* D

Constitutional law – *Parliament – privilege – Speaker's certificate – validity – need for certificate to be specific and detailed*

Constitutional law – *Parliament – staff – Clerk of Parliament – appointment of – appointed by Committee on Standing Rules – dismissal of Clerk – dismissal must be initiated by Committee, followed by due process* E – *Parliament – no right of Parliament to dismiss Clerk without initial enquiry by Committee – effect of failure to follow proper procedures – locus standi –members of Parliament having no locus standi to initiate dismissal of Clerk*

Employment – *Labour Act [Chapter 28:01] – applicability – Act not applicable* F *to staff of Parliament appointed in terms of Constitution*

Headnote

Parliament, because of its unique position as the supreme law making body, must project itself as the epitome of fair play. It must demonstrate to the citizens of Zimbabwe the importance of complying with its own rules and regulations. G

On 12 December 2011, the applicant, who was the Clerk of Parliament, filed an application with the High Court, seeking a prohibitory interdict against the respondents in order to prevent them from dismissing him from office. He sought to prevent them from moving or accepting any motion from any member of the House of Assembly without the matter H of his dismissal being referred to the Committee on Standing Rules

---

2012 (1) ZLR p118

Bere J

and orders (CSRO). It was his case that, as an officer of parliament, he A had been appointed by that body, and only that body, in terms of the House of Assembly Standing Orders, had the power to dismiss him. The respondents, however, upon learning of the application, continued to move for his dismissal from office. As a result, the applicant sought amended relief designed to prevent the respondents from continuing to B debate and vote upon any motion to dismiss him. Notwithstanding this, on 15 December 2011, and before the High Court was able to hear the application, such a motion, in an amended form, was passed by House of Assembly. The respondents, therefore, argued that the application had been overtaken by events. They also produced a certificate of privilege signed by the Speaker of the House of Assembly which, they argued, had C the effect of ousting the jurisdiction of the court upon its mere production. In respect of both, the respondents argued, as points in *limine*, that the court should not proceed to hear argument on the merits.

For his part, the applicant pointed out that the respondents, in continuing to move for his dismissal after 12 December, had done so at a time when the matter was already awaiting the determination of the court. He also D drew attention to the fact that the certificate of privilege failed to disclose properly the matters of privilege upon which Parliament sought to be protected and that the certificate was devoid of detail. On the merits, the applicant argued that, in seeking to dismiss him, the House of Assembly was not empowered to ignore its own Standing Orders, in particular E order 62(d) thereof, but was obliged to follow them. It was also argued that s 48(2) of the Constitution, under which he was appointed, did not preclude s 57 of the Constitution, the House of Assembly Standing Orders, Officers of Parliament (Terms of Service) Regulations 1977 and the Labour Act [*Chapter 28:01*] from regulating his employment relationship with Parliament. F

Held, that the matter could not be resolved in terms of the *in limine* points raised by the respondents. The passing of the amended motion of the House of Assembly did not preclude the applicant from seeking relief, nor did the certificate of privilege, which was fatally devoid of detail and also sought to override Standing Orders. G

Held, further, that the effect of standing order 62(d) was to preclude the House of Assembly from dealing with matters pending before the courts or which were *sub judice*. It was, therefore, not empowered to pass the amended motion of 15 December 2011.

Held, further, that the applicant, being a constitutional appointee, was not covered by the Labour Act and his attempt to seek refuge in the Labour H

2012 (1) ZLR p119

Bere J

A Act was misplaced. Section 3(1) of the Act made that quite clear. However, the legislature had given the CSRO the mandate to appoint the applicant and consequently the power to supervise him and other staff of Parliament. The CSRO was the administrative arm of Parliament and only it had the power to initiate the dismissal of the applicant by B following due process. It followed that members of Parliament lacked *locus standi* to initiate, debate and vote on a motion to determine the fate of the applicant.

Held, further that following due process had not been followed. It was only when the CSRO had conducted a proper inquiry against the applicant and had found him guilty that Parliament, in terms of s 48 (2) of the C Constitution, could resolve to dismiss him. This had not happened.

Held, further that in these circumstances, the High Court had the right to insist upon Parliament conducting its affairs properly. The amended motion of 15 December 2011 did not cure the defect in the dismissal of applicant. Pending the determination of the High Court, the application D of 12 December 2011 did not cure the defect in the dismissal of the applicant. Pending the determination of the High Court application of 12 December 2011, the amended motion was of no force and effect.

Cases referred to

Bennett v Mnangagwa NO & Ors 2006 (1) ZLR 218 (S)

E *Messenger of the Magistrate's Court, Durban v Pillay* 1952 (3) SA 678 (A)

Mutasa v Makombe NO 1997 (1) ZLR 330 (S)

Smith v Mutasa NO & Anor 1989 (3) ZLR 183 (S)

Legislation considered

F Constitution of Zimbabwe, 1980, ss 48(1), 48(2), 48(4) & 57(2)

Labour Act [*Chapter 28: 01*], s 3

Case information

D Ochieng for the applicant

Mrs *B Mtetwa,* for the third and fourth respondents

G *C Mhike,* for the first, second, fifth, sixth and seventh respondents

Judgment

Bere J: On 12 December 2011 the applicant filed an application in this court under case No HC 12336/11 seeking a prohibitory interdict against the respondents. The remedy sought was to prevent the respondents from moving or accepting any motion from any member of the House of Assembly H to dismiss the applicant without the matter of his dismissal first being

---

Bere J

brought before the Committee on Standing Rules and Orders (CSRO) or its A sub-committee or other independent and impartial disciplinary authority.

On realising that despite having filed the aforesaid application, the respondents were determined to proceed with the motion to have him dismissed, the applicant filed the instant urgent application whose amended interim relief is couched in the following terms: B

> "1. Pending the determination of the court application under case No. HC 12336/11 the respondents are prohibited, restricted and interdicted from continuing to debate and voting on any motion to dismiss the applicant.
>
> 2. Pending the determination of the court application under case No. HC 12336/11, any debate, voting or decision on the motion to dismiss the applicant with or without amendments be and is hereby declared null and C void *ab initio* and therefore of no force and effect".

The notices of opposition filed by the respondents have raised two preliminary points which I must deal with first.

It was contended on behalf of the respondents that the motion whose passing the applicant had sought to prevent was passed as amended by Parliament on D Thursday 15 December 2011 and therefore the applicant's urgent application has been overtaken by events.

Secondly, it was argued, through the sixth respondent, that the certificate of privilege prepared by the first respondent ousted the jurisdiction of this court upon its mere production. E

I propose to deal first with the certificate of privilege.

With all due respect, I do not share the sentiments expressed by two counsel for the respondents that, once produced, the certificate of privilege must be viewed as some immutable document which has the effect of ousting the jurisdiction of this court.

The strong view that I take, as highlighted by the applicant's counsel, is that F a defective certificate will not be conclusive of the matter and further, that the court is empowered to consider the jurisdictional basis of such a certificate first before its effect can be determined. Such a certificate should never be looked as some biblical verse.

Dumbutshena CJ, after carrying out a fairly detailed survey of the legal G position in other jurisdictions, eloquently put it in *Smith v Mutasa & Anor* 1989 (3) ZLR 183 (S) at 194B-D in the following words:

> "When construing the provisions of [*Chapter 10*] (the Privileges, Immunities and Powers of Parliament Act) the courts of justice cannot ignore any breaches of fundamental rights in order to rule in favour of Parliamentary privilege. To do so would be inconsistent with the provisions of the Constitution". H

Bere J

A Gubbay CJ emphasised that the jurisdictional basis of such a certificate must be established first before it can be accepted to stay proceedings [1]. In the instant case, the applicant has expressed reasonable apprehension that Parliament appeared to be determined to continue dealing with the matter in a manner which is in complete violation of its own rules which precludes members to debate or refer to any matter on which a judicial decision is pending [2].

B There can be no argument that the Members of Parliament continued to debate the alleged shortcomings of the applicant after 12 December when his matter was already awaiting determination in this court under case HC 12336/11.

Order 62(d) of the Parliament of Zimbabwe House of Assembly Standing Orders is clear on this point. It is Parliament which crafted its own rules and C this same Parliament must not take pride in assaulting its own rules. This court will not aid Parliament in violating its own Standing Orders or stay aloof in circumstances which manifestly demonstrate Parliament is off rail merely because of the doctrine **o**f the separation of powers.

Secondly, and as argued by counsel for the applicant, the certificate of D privilege must be specific in its disclosure of the matters of privilege that it seeks to be protected. It must not be left to the court to speculate on such issues, as suggested by Mrs *Mtetwa* that the issues the certificate referred to are apparent in the opposing papers.

In my view, the certificate before me is devoid of detail. So the attempted E pronouncement by the Speaker to persuade me to stay the proceedings or to owner the privilege so desired has not been properly done.

Contrary to the ratio pronounced in the landmark case of *Smith v Mutasa NO & Anor supra*, the certificate produced is completely silent on detail.

Because of the cumulative shortcomings of the certificate as highlighted coupled with the attempt by Parliament to severely dislocate its own standing F orders, I hold the very strong view that the certificate is incapable of ousting the jurisdiction of this court in hearing this matter. I remain firmly seized with this matter despite the production of the certificate of privilege.

Let me quickly revert to the first preliminary point. I do not believe that the mere passing of the motion on 15 December 2011 deals a death knell to the G concerns raised by the applicant in his application.

The passing of the motion was significant, but it is not the conclusion of the whole process as evidenced by the amended motion eventually passed. The

Bere J

applicant has argued that the only body that supervises him in the execution A of his duties is the Committee on Standing Rules and Orders, chaired by the first respondent and it is my view that it is this committee which is mandated to initiate disciplinary proceedings against him should the need arise. The argument is persuasive and I have no difficulties in following it, as I will look at it in detail as I will deal with the matter on the merits. B

If the applicant's position in this regard is correct (which I am certain it is), the rules of natural justice would be seriously stamped upon if his dismissal were to be initiated by Members of

Parliament instead of the Committee which appoints him in the first place, because he who hires must be empowered to fire or initiate disciplinary proceedings.

In conclusion, it is worth noting that the CSRO is constitutionally provided for in terms of s 57 of the Constitution and, in my view, this committee may not be subordinated to any other committee desired by the respondents in terms of their amended motion.

For the above reasons I am more than satisfied that the urgency of this matter is beyond reproach. The applicant's matter deserves to be heard on an urgent basis.

On the merits

Having disposed of the preliminary points raised, I wish to focus on the substantive issues raised by the parties in this application.

The fundamental guiding principle in this case was eloquently summed up by Mr Shepherd Mushonga, the fourth respondent, when he put it in the following words:

> "The principle of separation of powers is the hallmark of a constitutional democracy which entails that the three arms of State, namely, Parliament, the Executive and the judiciary, are separate and independent of each other in so far as the exercise of their powers is concerned.
>
> The Constitution vests Parliament with the powers to regulate its own affairs. Parliament exercise judicial powers in respect of certain matters that fall within its domain, to the exclusion of the courts [3]".

I applaud the sentiments and indeed associate myself with same.

Be that as it may, one needs to appreciate the often overlapping functions that characterise the legislature, the executive and the judiciary. Whilst these three arms of Government must enjoy their independence, they do not exist outside each other. They play complementary roles.

2012 (1) ZLR p123

Bere J

The sovereignty of Parliament, or, to put it simply, the power enjoyed by Parliament, is not absolute, for, if it were so, the citizens would be extremely vulnerable. It would mean that Parliament would do virtually everything it desired, including violating its own rules and regulations to the detriment of its citizen with impunity. Such a scenario, in my view, would not be tenable. There must be some control mechanism through which Parliament is to be held accountable by disgruntled citizens. See J S Dugdale *The British Constitution* (London 1962), pp 32-33.

From my reading of the applicant's urgent chamber application and the notices of opposition filed by the respondents, I discern the following issues to be pertinent and decisive in this matter:

(a) Whether or not the House of Assembly violated Standing Order 62(d) of the House of Assembly Standing Orders by continuing to debate and voting on the motion to dismiss the applicant after the applicant had filed case No. HC 12336/11.

(b) Whether or not the Members of Parliament have *locus standi* to initiate the applicant's dismissal in the manner that they have done in this case.

(c) Whether or not the House of Assembly through the active participation of the respondents used illegal means to initiate the dismissal of the applicant.

(d) What is the correct procedure which should be used to initiate the dismissal of the applicant?

(e) Whether or not the amended motion proposed on 14 December 2011 and eventually adopted by the House of Assembly cures the defects which are of concern to the applicant.

Having identified the issues, I propose to deal with them *seriatim*.

(a) Alleged violation of standing orders 62(d)

It was contended by the applicant that, after he had filed his application in this court, seeking, among other things to interdict the respondents from continuing to debate on the issue of his dismissal, and to force compliance with proper disciplinary procedures, the House of Assembly was obliged to follow the dictates of Standing Order 62(d) of the House of Assembly Standing Orders.

In countering this argument, the respondents argued that the existence of a court application could not operate as a bar to the conduct of Parliamentary business and that only a court order had the

capacity to stop further debate H on the motion that was already before the House. The argument by the

Bere J

respondents in this regard is pronounced in para 8 of the joint notice of A opposition filed by the first, second, fifth, sixth and seventh respondents.

In supporting the same argument, the fourth respondent, on his own behalf and also duly authorised by the third respondent, reaffirmed the position that Parliamentary debate on the issue could not be stopped by the court application alluded to by the applicant. B

It is evident from the Hansard of the day that the members of the House offered conflicting views on this issue. It is necessary to refer to the specific section in issue. The section reads as follows:

> "62 No member shall, while speaking to a question …
>
> (d) use derogatory, disrespectful, offensive or unbecoming words against the C Head of State, Parliament or its members or the Speaker, nor reflect upon an statute unless for the purposes of moving for its repeal; *nor shall a member refer to any matter on which a judicial decision is pending*"(my emphasis).

It appears to me that if one were to concentrate on the ordinary grammatical meaning of the standing order in question one would find it extremely difficult not to understand what the House intended when it crafted these rules of D debate. It is trite that in interpreting statutes the very basic approach is first to ascribe to the words used their ordinary grammatical meaning.

It is clear to me that the standing order referred to simply meant that, when a matter is pending before the Courts or when a matter is *sub judice*, House members are obliged to respect the court process until a determination on that E matter is made. In this regard I feel more inclined to lean on the views of van den Heever JA when he remarked on the use of the word "shall" as follows:

> "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 the issuer of the command intended disobedience to be visited with nullity" [4]. F

It will be noted that, during debate on the issue, those who spoke in favour of proceeding with the tabled motion suggested, strangely so in my view, that the members of the House could only be stopped from debating the issue if at the time there was a court order barring them from so acting.

With respect, the standing order in question does not say what the respondents G and those who contributed in support of the motion desire it to mean. If Parliament intended the standing order to mean what the respondents say, surely Parliament would have had no difficulty in crafting the standing order to that effect.

Bere J

A It is not in dispute that the respondents, despite having been duly served with case No. HC 12336/11, continued to debate the motion in complete defiance or violation of the standing order in question.

This belligerent attitude displayed by the respondents can only lead to one inevitable conclusion: that disobedience by the House of its own standing B orders must be visited with "nullity" over what it did, because it was not competent for the House to stubbornly ignore the clear provisions of s 62(d) of the House of Assembly standing orders.

(b) Did the Members of Parliament (the respondents inclusive) have *locus standi* to initiate the applicant's dismissal in the manner C they did?

The applicant's case in this regard is that he is constitutionally appointed by the CSRO, chaired by the Speaker of the House of Assembly. He likened the CSRO to a board of directors in a company set up and the Members of Parliament to shareholders in a similar set up.

D It was the applicant's position that it is this organ of Parliament (CSRO) which is mandated to supervise him in the execution of his duties and that it should therefore be this body which should initiate disciplinary proceedings against him as opposed to Parliamentarians should the need arise.

The applicant also argued that in his belief s 48(2) of the Constitution does E not preclude s 57 of the Constitution, the House of Assembly Standing Orders, Officers of Parliament (Terms of Service) Regulations, 1977 and the Labour Act [*Chapter 28:01*] from regulating his employment relationship with Parliament.

The respondents argued that it was within the power of Parliamentarians to initiate the applicant's dismissal and that the Officers of Parliament F (Terms and Service) Regulations 1977 and the Labour Relations Act are not applicable to the applicant.

Both counsel for the respondents, Mr *Mhike* and Mrs *Mtetwa*, argued to my satisfaction that the applicant, being a constitutional appointee, is not covered by the Labour Act and that his attempt to seek refuge in the Labour G Act may have been misplaced. I agree.

In advancing this argument reliance was placed on s 3 of the Labour Act which is self explanatory and reads as follows:

> "**3 Application of Act**
>
> (1) This Act shall apply to all employers and employees except those whose H conditions of employment are otherwise provided for in the Constitution".

Bere J

I did not hear the applicant to have attempted to rebut this watertight argument. A This argument was therefore conclusively made in favour of the respondents.

In order to appreciate whether or not the respondents and other members of Parliament have *locus standi* to initiate disciplinary proceedings against the applicant there is need to look closely on the office of the applicant.

The office of the applicant is created by s 48(1) of the Constitution of B Zimbabwe and that section reads:

> "**48 Clerk of Parliament and other staff.**
>
> (1) There shall be a Clerk of Parliament *appointed by the Committee on Standing Rules and Orders*" (my emphasis).

Section 57(2) of the Constitution then goes further to define in an exhaustive C manner the composition of the CSRO.

I do take the argument raised by Mr *Mhike* that the CSRO is not a stand-alone body but it is an organ of Parliament.

Despite this, however, it must be appreciated that the legislature has given the CSRO the mandate to appoint the applicant and consequently the power D to supervise him and other staff members of Parliament. I see the CSRO as the administrative arm of Parliament.

If it is accepted that the CSRO is constitutionally mandated to appoint the applicant, then surely it must be to this same body that the constitution reposes the power to initiate the dismissal of the applicant by following due process.

Because the Clerk of Parliament is a professional person whose life goes E beyond the life of Parliament, his supervision cannot be left in the hands of every member in the House (who, incidentally do not appoint him). The view that I take is that the body which appoints the applicant is the same body that must supervise him. It is this same organ that must enjoy the prerogative to initiate disciplinary proceedings against him. I am fully F cognisant of the existence of s 48(2) of the Constitution and I intend to deal with its application and implications in greater detail later in this judgment.

If my reading of the role of the CSRO vis-à-vis the applicant is correct (which I am certain it is) then it goes without saying that the respondents must have lacked *locus standi* to initiate the motion, debate it, and vote on it G to determine the fate of the applicant. In so doing, the respondents violated the constitutional provisions dealing with the appointment and supervision of the applicant and consequently their actions were illegal.

As I will demonstrate in this judgment there are grave consequences that would remain visible if the respondents' conduct is not interfered with by this court. H

Bere J

(c) The A correct procedure in initiating the dismissal of the applicant

(d) What is the correct procedure which should be used to initiate the dismissal of the applicant?

I intend to deal with issues (c) and (d) together.

To fully understand the fear that gripped the applicant in this case one needs B to understand the motion that was tabled for debate in Parliament.

Following numerous allegations which touched on the alleged shortcomings of the applicant in the execution of his duties as the Clerk of Parliament the motion that eventually stood in the name of the third respondent was worded as follows:

> C "Now therefore, this House places on record its disapproval of the untoward behaviour and actions exhibited by the Clerk of Parliament, Mr Austin Zvoma, and further resolves to invoke provisions of 48(2) of the Constitution of Zimbabwe to *dismiss* Mr Austin Zvoma from the service of Parliament forthwith through a secret ballot process – Hon Tshuma" [5] (my emphasis).

D The wording of the motion shows the inherent dangers of allowing the respondents and other Parliamentarians to determine the fate of the applicant. The motion as it stood had no provision for proper disciplinary proceedings, yet the right to be heard, even for a murderer, is one of the core values of the rules of natural justice.

As already alluded to elsewhere in this judgment, s 48(1) of the Constitution E has vested the power to appoint a Clerk of Parliament (the applicant), not to every Member of Parliament, but to a special organ of Parliament called the CSRO, which organ is tasked to supervise not only the applicant but also other staff members of Parliament who are appointed in terms of s 48(3) of the Constitution.

F Section 48(4) of the Constitution then gives Parliament the power to formulate terms or conditions of service for the staff members. The Officers of Parliament (Terms of Service) Regulations 1977 were approved by Parliament in terms of this section. These rules cover in sufficient detail the appointment procedure and conditions of service, including the procedure to be adopted G in the termination of the employee's service should the need arise.

It is pertinent to note that in terms of Part 1 of the Officers of Parliament (Terms of Service) Regulations, 1977 it is stated that "the staff of Parliament shall *in addition to the Clerk of Parliament*, consist of such officers …" The

---

Bere J

regulations go on to identify these other officers or employees as specified A in the regulations.

I do not read this section to *exclude* but to *include* the person in the position of the applicant.

A simple perusal of the regulations concerned clearly show that the administration of the staff members of Parliament as well as their appointments B is vested in the CSRO.

The rules, in so far as they deal with the disciplinary proceedings of the staff members of Parliament, are clear and they do not require any complicated interpretation. The Speaker of the House of Assembly (the first respondent) is firmly empowered by the rules to initiate any enquiry against any of the C staff members of Parliament (who, incidentally, include the applicant). There does not seem, in my view, to be any room for the CSRO through the Speaker of the House of Assembly to relinquish or to delegate its administrative functions to the ordinary members of Parliament. This appears to me to have been done for obvious reasons. Ordinary members of Parliament do not appoint the staff of Parliament and the applicant and may not have the D capacity or ability to supervise the employees in their day to day activities.

There seems to be greater wisdom in dealing with disciplinary proceedings in terms of the regulations of Parliament. That procedure commends itself, in that, before anyone is condemned, the individual is given an opportunity to explain his conduct in line with the much cherished and time honoured E principle of the *audi alteram partem*.

It occurs to me that it is only when the CSRO has conducted a proper inquiry against the applicant and the applicant found to be guilty that the Speaker can then advise Parliament in terms of s 48(2) of the Constitution. It is only then that the House of Assembly can then resolve, by the affirmative votes of more than one-half of its total membership, to have the applicant F removed. Anything short of this would be illegal and any finding in support of the approach taken by Parliament would amount to this court sanctioning Parliament to act in breach of its own regulations. This court did not make the Parliamentary regulations in question. It was Parliament in its wisdom which made them and the members of Parliament must be seen to comply G with such regulations.

Having said this, I have not the slightest hesitation in concluding that Parliament, in allowing the motion, debating on same and voting on it, clearly overstepped its authority. This is so, because the voting that is referred to in s 48(2) of the Constitution must be the end result of due process in the removal or dismissal of the applicant. H

Bere J

(e) Has A the amended motion cured the defect alluded to by the applicant?

During argument it was suggested to me by counsel for the respondents that the seemingly rough edges of the motion that triggered debate in Parliament was ultimately refined by the amendment that was proposed by the fourth B respondent and subsequently adopted by the House, thereby removing the defect complained of by the applicant.

I am not persuaded by this argument. It completely misses one fundamental issue in these proceedings. The issue is that the respondents or Parliament as a body did not have the power to do what it did.

C Even if I were to assume for a moment that the respondents and Parliament in general had such powers, one needs to look at the resolution that was eventually passed, with particular regard to the terms of reference of the proposed five member committee to appreciate the fallacy of the position taken by the respondents.

D The House concluded by proposing the appointment of a special five member committee whose terms of reference is as follows:

> "(a) The Special five member committee is to make recommendations to the full House on its findings whether:
>
> (i) To terminate immediately the Clerk of Parliament's contract of employment. E
>
> (ii) To suspend without pay for a period of time.
>
> (iii) To demote and or reprimand the Clerk of Parliament …."

The terms of reference on their own make it impossible for the committee of five to approach the inquiry with an open or impartial mind. Their mandate is simply to find the applicant guilty at all costs and consider the nature of punishment to be meted out against him. Such an approach clearly represents F kangaroo proceedings which must not be allowed to happen within the precincts of the supreme law making body of this country – Parliament.

If allowed to happen this would be a clear violation of the applicant's constitutionally recognised right to be afforded a fair hearing before an impartial body. The applicant's apprehension is clearly justified and Parliament G must not be allowed to stampede on his rights with impunity.

During submissions I was referred to two very important decisions in this country for guidance, *viz Bennett v Mnangagwa NO & Ors* 2006 (1) ZLR 218 (S) and *Mutasa v Makombe NO supra.* These two cases were referred to me as authority for the reaffirmation of the doctrine of the separation H of powers and generally as authorities demonstrating the reluctance of the

Bere J

courts to interfere in the internal processes of Parliament in regulating its A own practices and procedures.

With respect, I believe reference to these two cases missed one fundamental issue. In both cases, Parliament was dealing with the punishment of its members for contempt of court. There is no doubt

in my mind that Parliament, by its very nature and largely as a result of the doctrine of the separation of powers, B enjoys quite some latitude in dealing with its own members, but even in such circumstances the cited cases clearly show that where Parliament's conduct exceeds the bounds of reasonable justification the courts will interfere with its decision: *Smith v Mutasa supra*. But the main line of distinction between these cases and the applicant's case is that the applicant is not a member of Parliament but a professional in the employment of Parliament. There is no C way the applicant can be treated like a politician or a member of Parliament.

As already highlighted, Parliament's involvement in the treatment of a person in the position of the applicant is greatly curtailed and is clearly limited by the provisions of s 48(2) of the Constitution, not as a starting point, but as the end result, after a proper enquiry has been carried out and concluded D in terms of the applicant's contract of employment, and that action having been initiated by that organ which appoints and surprises him – the CSRO. So really, reference to these cases was clearly out of context.

In conclusion, I wish to point out that, Parliament, because of its unique position as the supreme law making body, must project itself as the epitome of fair play. It must demonstrate to the citizens of this country the importance E of complying with its own rules and regulations. It visibly came short in this regard and because of this, its actions cry out for interference by this court. In *Smith v Mutasa NO & Anor supra* the full bench of the Supreme Court unanimously agreed to reverse the decision of the Parliament in depriving the appellant of his salary and allowances. F

The interference by the courts with the activities of Parliament (the respondents inclusive) must be seen as a desperate clarion call by the courts to insist on Parliament conducting its affairs above board.

I am satisfied that the applicant's apprehension as captured in his papers is more than justified. He risks irreparable harm to his employment if corrective G action as prayed for is not taken.

I accordingly grant the following order:

Pending the determination of the court application under case No. HC 12336/11, the motion passed by Parliament as amended be and is hereby declared to be null and void *ab initio* and therefore of no force and effect. H

2012 (1) ZLR p131

Bere J

A *Dube Manikai & Hwacha*, applicant's legal practitioners

Atherstone & Cook, first, second, fifth, sixth and seventh respondents' legal practitioners

B *Mtetwa & Nyambirai*, third and fourth respondents' legal practitioners

1 *Mutasa v Makombe NO* 1997 (1) ZLR 330 (S) at 335
2 Order 62(d), Parliament of Zimbabwe House of Assembly Standing Orders, 1 ed (2005)
3 Paras 2.1-2.2 of Mr Mushonga's notice of opposition to the urgent chamber application.
4 *Messenger of the Magistrate's Court, Durban v Pillay* 1952 (3) SA 678 (A) at 683
5 Parliament of Zimbabwe: Votes and proceedings of the House of Assembly No. 21 p 243; Wednesday 14-12-11

© 2015 Juta and Company (Pty) Ltd.

Document 12 of 75

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2012/Volume 1/VICTORIA FALLS MUNICIPALITY v NYATHI & ORS 2012 (1) ZLR 132 (H)

VICTORIA FALLS MUNICIPALITY v NYATHI & ORS 2012 (1) ZLR 132 (H)

2012 (1) ZLR p132

Citation	2012 (1) ZLR 132 (H)
Case No	Judgment No. HB-2-12
Court	High Court, Bulawayo
Judge	Ndou J
Heard	27 September 2010; *CAV*
Judgment	19 January 2012
Counsel	*J James*, for the plaintiff *C Dube-Banda*, for the defendants
Case Type	Civil trial
Annotations	No case annotations to date

Flynote

Contract – formation – *offer and acceptance – need for offer to be positive and unambiguous – need for court to ascertain from external facts whether minds of parties had come together with requisite animus contrahendi*

Headnote

The plaintiff sought the eviction of the defendants from the various houses D they occupied in the town of Victoria Falls. The plaintiff claimed that these were pool houses for use by the plaintiff's employees and that the defendants were given these pool houses by virtue of their employment with the plaintiff. It was further contended that upon termination of E such employment, each individual defendant would cease to occupy the property in issue. The defendants' counter claim was for an order directing the plaintiff to take all necessary steps to transfer the various stands to each defendant on the basis that the defendants purchased the stands on a rent-to-buy scheme.

Held, that agreement by consent is the foundation of contract. In order to F decide whether a contract exists one looks first for the true agreement of two or more parties and, because such agreement can only be revealed by external manifestations, one's approach must of necessity be generally objective. The court can only judge from external facts whether the minds of the parties have come together. The most helpful G way of determining whether there has been agreement, true or based on quasi-mutual assent, is to look for an offer and an acceptance of that offer. A binding contract is as a rule constituted by acceptance of an offer. But offer and acceptance must never be sought for their own sake but as aids in deciding whether an agreement has been reached. A true offer means an express or implied intention to be bound by the offeree's H

Ndou J

A acceptance – the *aminus contrahendi*. The offer must be unequivocal i.e. positive and unambiguous.

Held, further, that, looking at the evidence led by the plaintiff there was no meeting of minds that these houses were being sold to the defendants. There was no such offer to the defendants. The rent cards produced did not constitute an offer made with the requisite *animus contrahendi*. There B were no unequivocal offers of sale made to the defendants. The fact that it was not easy to ascertain the alleged purchase price points to the relationship between the parties as being one of lease and not purchase and sale. On the evidence, there was no agreement by consent or true agreement, or a meeting of minds, or a coincidence of wills, or *consensus* C *ad idem* between

the parties and the only credible explanation is that these houses were pool houses for use at the discretion of the plaintiff. The plaintiff was therefore entitled to the order it sought.

Cases referred to

Allen v Sixteen Stirling Investments (Pty) Ltd 1974 (4) SA 164 (D)

D *Barnhoorn NO v Duvenage and Others* 1964 (2) SA 486 (A)

Boerne v Harris 1949 (1) SA 793 (A)

Cinema City (Pty) Ltd v Morgenstern Family Ests (Pty) Ltd & Ors 1980 (1) SA 796 (A)

Globe Electrical Transvaal (Pty) Ltd v Brunhuber & Ors 1970 (3) SA 99 (E) E

Hillas & Co Ltd v Arcos Ltd (1932) 147 LT 503 HL

Jordaan v Trollip 1960 (1) PH A25 (T)

Levenstein v Levenstein 1955 SR 91; 1955 (3) SA 615 (SR)

Saambou-Nasionale Bouvereeniging v Friedman 1979 (3) SA 978 (A)

Salisbury Municipality Employees Assn & Anor v Salisbury City Council F *& Anor* 1957 (2) SA 554 (SR)

Spes Bona Bank Ltd v Portals Water Treatment South Africa (Pty) Ltd 1983 (1) SA 978 (A)

Titaco Projects (Pty) Ltd v AA Alloy Foundry (Pty) Ltd 1996 (3) SA 320 (W)

G *Wasmuth v Jacobs* 1987 (3) SA 629 (SWA)

Case information

J James, for the plaintiff

C Dube-Banda, for the defendants

Judgment

Ndou J: These are twelve cases, which were consolidated into two matters, H which were heard at the same time. For easy reference the one matter

---

Ndou J

involved what may be called the ZimSun houses (five defendants under A HC 2224/08), the five defendants being Alice Ndlovu, Sivumo Ndlovu, Kambarachi Zex Raura, Freda Khumalo and Simolita Maseko. The other matter involved what may be called the National Housing Fund ("NHF") houses (seven defendants under HC 2225/08). The seven defendants are Loida Nyathi, Everson Ndebele, Collen Ndebele, Phindile Ncube, Sihlobo B Sibanda, Shadreck Ndlovu and Stephen Ndlovu. The trial lasted 12 days, which is understandable, considering that there were two witnesses for the plaintiff and 12 witnesses for the defendants i.e. all the defendants. Two of the defendants had died by the time the trial commenced, and they were substituted by the executrix of their estates. There was a bundle of documents with slightly over 400 pages as well as some more documents which were C later introduced during the course of the trial. However, a closer analysis will show that the issues are fairly simple, and are similar in the seven NHF houses and the five ZimSun houses. Basically, it boils down to this:

(a) Is the plaintiff the owner of the twelve houses in question, or are the defendants the owners? D

(b) If the plaintiff is the owner, then the plaintiff is entitled to an order for:
  (i) Evicting the defendants
  (ii) Damages
  (iii) Costs of suit

(c) If the defendants are the owners, then they are entitled to transfer of E these houses into their names with an order for costs against the plaintiff. In essence the defendants have to prove that there were valid contracts of purchase in respect of each of the houses in dispute. The houses concerned are the following: F

Loida Nyathi	-	House 4251
Everson Ndebele	-	House 4255
Collen Ndebele	-	House 4247
Phindile Ncube	-	House 4242
Sihlobo Sibanda	-	House 4246
Shadreck Ndlovu	-	House 4241 G
Stephen Mpofu	-	House 4244
Alice Ndlovu	-	House 4403
Sivumo Ndlovu	-	House 4401
Smolita Maseko	-	House 4408
Kambashu Zex Raura	-	House 4407
Fred Khumalo	-	House 4400 H

Ndou J

A All these properties are at Chinotimba, Victoria Falls. Cut to the bone, in all instances the plaintiff claims that these are pool houses for use by the plaintiff's employees. The plaintiff contends that the defendants were given these pool houses by virtue of their employment with plaintiff. It further being contended that upon termination of such employment, each individual defendant will cease to occupy the property in issue. This position does not B apply to one of the defendants, Stephen Mpofu, who was never employed by the plaintiff. His case is different, but the bottom line is that he was granted occupation through a lease. Of the twelve defendants, only two, namely Sihlobo Sibanda and Smolita Maseko, are still in the employ of the plaintiff. As alluded to above, the defendants' counter claim is for an order C directing the plaintiff to take all necessary steps to transfer the various stands to each defendant on the basis that the defendants purchased the stands on a rent-to-buy scheme. This is denied by the plaintiff. It is beyond dispute that these properties in issue are registered in the name of the plaintiff. The plaintiff is the registered owner of these twelve stands. This point is admitted in paragraph 2.3 of each defendants' plea under HC 2225/08 and paragraph D 2.5 in each defendants' plea under HC 2224/08. There are documents from the Ministry of Local Government ("Ministry") dated 20 July 2000 (pages 45 and 55 of the bundle of documents) which evince the transfer from the Ministry to the plaintiff. This creates a problem for the defendants who contend the stands still belong to the Ministry.

E They, however, did not take any legal action against the Ministry to prevent the transfer of the stands from the Ministry to the plaintiff. Be that as it may, I propose to consider the evidence adduced by the parties in turn.

[The learned judge then considered the evidence in detail and continued:]

Having made the above findings of facts I proceed to consider the effect of these findings and the law applicable. I have to determine whether there F were contracts of purchase and sale between the protagonists in these two matters. I have to determine whether the essentials of a purchase and

sale contract are present. *In casu*, there is no dispute that there is more than one party to the alleged contracts: *Barnhoorn NO v Duvenage & Ors* 1964 (2) SA 486 (A) 494A-D. The crucial issue is whether there was true agreement G between the parties. It is trite that agreement by consent is the foundation of contract: *Salisbury Municipality Employees Association & Anor v Salisbury City Council & Anor* 1957 (2) SA 557 (SR); *Cinema City (Pty) Ltd v Morgenstern Family Estates (Pty) Ltd & Ors* 1980 (1) SA 796 (A) 804D and R H Christie *The Law of Contract in South Africa* 3 ed at 21-23. In order to decide whether a contract exists one looks first for the true agreement H of two or more parties and because such agreement can only be revealed

---

Ndou J

by external manifestations one's approach must of necessity be generally A objective. The court can only judge from external facts whether the minds of the parties have come together: *Jordaan v Trollip* 1960 (1) PH A25 (T) and *Allen v Sixteen Stirling Investments (Pty) Ltd* 1974 (4) SA 164 (D) at 172. Looking at the evidence led by the plaintiff, there was no meeting of minds that these houses were being sold to the defendants. It is trite that the B most helpful way of determining whether there has been agreement, true or based on quasi-mutual assent, is to look for an offer and an acceptance of that offer. A binding contract is as a rule constituted by acceptance of an offer: *Reid Bros (SA) Ltd v Fisher Bearing Co Ltd* 1943 AD 232 at 241. But offer and acceptance must never be sought for their own sake but as aids in deciding whether an agreement has been reached. A true offer means an C express or implied intention to be bound by the offeree's acceptance – the *aminus contrahendi*: *Saambou-Nasionale Bouvereeniging v Friedman* 1979 (3) SA 978 (A) at 991G and *Spes Bona Bank Ltd v Portals Water Treatment South Africa (Pty) Ltd* 1983 (1) SA 978 (A). *In casu*, there was no such offer to the defendants. The rent cards produced do not constitute an offer made with the requisite *animus contrahendi*. There were no unequivocal offers of D sale made to the defendants. The offer must be unequivocal i.e. positive and unambiguous: *Boerne v Harris* 1949 (1) SA 793 (A) at 799 and *Wasmuth v Jacobs* 1987 (3) SA 629 (SWA) at 633E-G. Accordingly from the evidence, there was no agreement by consent or true agreement, or a meeting of minds, or a coincidence of wills, or consensus *ad idem* between the parties E and the only credible explanation is that these houses were pool houses for use at the discretion of the plaintiff. On this point alone the plaintiff's claims must succeed and the defendants' counter-claims fail. Further, there is no agreement on the price. As alluded to above it is not easy to ascertain the alleged purchase price. This points to the relationship of lease and not purchase and sale between the parties. The defendants, save for one, were all F employees of the plaintiff at the time of allocation of the houses in dispute. They obviously know the difference between being pool accommodation and rent-to-buy houses. All the defendants later, but before this dispute arose, entered into proper rent-to-buy agreements with the plaintiff so they are familiar with such agreements. The latter agreements clearly state the terms G of agreement and the parties. They cannot be heard to be saying they mistook the rent cards for agreements of sale. The defendants are just influenced by greed and are trying to obtain two properties each from the plaintiff by converting their leases of the pool houses into ownership agreements. There are simply no agreements of sale in respect of the houses in issue and the court cannot contract for the parties: *Hillas & Co Ltd v Arcos Ltd* (1932) H

Ndou J

A 147 LT 503 (HL) at 514; *Globe Electrical Transvaal (Pty) Ltd v Brunhuber & Ors* 1970 (3) SA 99E at 105-6; *Levenstein v Levenstein* 1955 (3) SA 615 (SR) and *Titaco Projects (Pty) Ltd v AA Alloy Foundry (Pty) Ltd* 1996 (3) SA 320 (W) at 338C-E.

The plaintiff's claims must succeed against all the defendants save for Sihlobo B Sibanda and Smolitha Maseko. These two defendants are still employed by the plaintiff as alluded to above and the plaintiff is still collecting rentals from their respective salaries. If the plaintiff wants to evict them it cannot be on the basis of this cause of action. As far as the damages are concerned, the plaintiff does not charge market related rentals of US$150 per month as claimed in this case. The plaintiff is charging US$20 per month for the C houses in dispute. There is no basis for granting the plaintiff damages based on market related rentals.

Accordingly, it is hereby ordered:

(1) That the plaintiff's claim for the eviction of the defendant Smolitha Maseko and Sihlobo Sibanda from houses 4408 and 4246 respectively D be dismissed.

(2) That the counter-claims by Smolitha Maseko and Sihlobo Sibanda against the plaintiff be dismissed with each party bearing own costs.

(3) That the plaintiff's claim for the eviction of:

3.1	Loida Nyathi	-	House 4251 Chinotimba
3.2 E	Everson Ndebele	-	House 4255 Chinotimba
3.3	Collen Ndebele	-	House 4247 Chinotimba
3.4	Phindile Ncube	-	House 4242 Chinotimba
3.5	Shadreck Ndlovu	-	House 4241 Chinotimba
3.6 F	Stephen Mpofu	-	House 4244 Chinotimba
3.7	Alice Ndlovu	-	House 4403 Chinotimba
3.8	Sivumo Ndlovu	-	House 4401 Chinotimba
3.9	Kambashu Zex Raura	-	House 4407 Chinotimba, and
3.10	Fred Khumalo	-	House 4400 Chinotimba

be and is hereby granted. G

(4) That each of the above-mentioned defendants named in paragraph 3 above, be ordered to pay US$20 per month from the month of February 2009 to the date of eviction.

(5) That the counter-claims by each of the defendants named in paragraph H (3), above are dismissed.

2012 (1) ZLR p138

Ndou J

(6) That the defendants named in paragraph 3 above are to bear costs of A suit on the ordinary scale.

(7) That the plaintiff be declared owner of all the properties subject matter of this case.

James, Moyo-Majwabu & Nyoni, plaintiff's legal practitioners B

Dube-Banda, Nzarayapenga & Partners, defendants' legal practitioners C

© 2015 Juta and Company (Pty) Ltd.

Document 13 of 75

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2012/Volume 1/KAISER ENGINEERING (PVT) LTD v MAKEH ENTERPRISES (PVT) LTD 2012 (1) ZLR 139 (H)

KAISER ENGINEERING (PVT) LTD v MAKEH ENTERPRISES (PVT) LTD 2012 (1) ZLR 139 (H)

Citation	2012 (1) ZLR 139 (H)
Case No	Judgment No. HB-6-12
Court	High Court, Bulawayo
Judge	Ndou J
Heard	21 February 2011; *CAV*
Judgment	19 January 2012
Counsel	*P Dube*, for the applicant *C P Moyo*, for the respondent
Case Type	Application for rescission
Annotations	No case annotations to date

Flynote

Practice and procedure – *judgment – rescission – grounds for – error – by court – court being induced by non-disclosures and misrepresentation to* D *make an order – such order made in error and susceptible to rescission*

Headnote

The court has both a statutory and a common law power to reverse a default judgment that has been granted in error or under circumstances that indicate some irregularity. An error on the part of the court, where the judgment would not have granted had the court been fully of certain E facts, would be grounds for rescission. Where a default judgment was induced by certain non-disclosures and misrepresentations made by the respondent in its papers, the judgment was granted in error and should be rescinded.

Cases referred to

F *Holmes Motor Co v SWA Mineral & Exploration Co* 1949 (1) SA 155 (C)

Jones v Strong S-67-03

Mudzingwa v Mudzingwa 1989 (2) ZLR 182 (S); 1991 (4) SA 17 (ZS)

Nyingwa v Moolman NO 1993 (3) SA 508 (Tk)

Topol & Ors v L S Group Mgmt Svcs (Pty) Ltd 1988 (1) SA 639 (W)

G *Young v Stalin Mau Mau* S-3-05

Case information

P Dube, for the applicant

C P Moyo, for the respondent

Judgment

Ndou J: There is a long history of litigation between the parties as evinced H by the cross-references cited above. The history can be summarized as

Ndou J

follows. The parties' relationship stems from a lease agreement originally A signed between the applicant and a company called Endurite (Pvt) Ltd. The respondent bought the property, the occupancy of which is at the centre of the dispute, from Endurite (Pvt) Ltd. At the time, the applicant was a sitting tenant. The applicant remains a tenant of the respondent by operation of law. In or about May 2009 the respondent issued summons in the main matter. B Almost immediately afterwards, in June 2009, the respondent brought an urgent chamber application. By the time process was served on the applicant a provisional order had been granted. I do not think that there is need to discuss the contents of the provisional order in detail, save to state that it shut the applicant down on the basis of perfecting the landlord's hypothec. The applicant's business has been closed since June 2009 as a result of this latest C batch of litigation. When the summons was served, the director of the applicant was out of the country. On his return, he emailed detailed instructions to his erstwhile legal practitioner Mr *Majoko*, providing answers and defences to both the summons and the chamber application. For some reason I cannot understand, Mr *Majoko* agreed to represent the applicant, notwithstanding that he had previously acted for the respondent. In this email, the applicant D evinced a strong desire to defend the case and the applicant proffered defences to the claims. The applicant left everything to its legal practitioner Mr *Majoko,* under the belief that the matters were being defended. Instead of defending/opposing the matters, Mr *Majoko* chose to negotiate with the respondent. Mr *Majoko* was trying to achieve an amicable solution to the dispute. No papers were filed timeously on behalf of the applicant during E these negotiations. This resulted in a default judgment granted in favour of the respondent against the applicant under case number HC 815/09. This application is for rescission of the said judgment. The applicant moves this application for rescission on two alternative grounds. The first and principal ground is that the default judgment was granted by error. It is submitted by F the applicant that this judgment should be set aside in terms of r 449 of the High Court Rules, 1971, as it was granted by error.

The alternative ground upon which rescission is sought is the ordinary ground, being that the papers filed by the applicant show good and sufficient cause for rescission of the judgment. I propose to consider these grounds in turn. G

Judgment granted in error

It is trite law that the court has both a statutory and a common law power to reverse a judgment that has been granted in error or under circumstances that indicate some irregularity. In *Mudzingwa v Mudzingwa* 1989 (2) ZLR 182 (S) at 189-190; 1991 (4) SA 17 (ZS) Gubbay JA (as he then was) made the following statement: H

Ndou J

> A "Furthermore, it is firmly established that a judgment can only be rescinded under the common law on one of the grounds upon which *restiitutio in integrum* would be granted, such as fraud or some other just cause, including *justus error* … Certainly a litigant who is himself negligent and the author of his own misfortune will fail in his request for rescission – see Voet 2.4.14; *Groenewald v Gracia (Edms) Bpk* 1985 (3) SA 968 (T) at 972C-D and G-H."

B See also *Jones v Strong* S-67-03 and *Young v Stalin Mau Mau & Anor* S-3-05.

It was submitted that there was *justus error* in this case. Such error, it was submitted, was on the part of the court, and was induced by certain non-disclosures and misrepresentations made by the respondent in its papers founding the urgent chamber application. In its papers under HC 815/09, the C respondent failed to disclose to the court the existence of an order previously granted in a similar dispute over rent between the parties. That order was granted in case number HC 3256/04 and reads, in the material part, as follows:

> "The parties agree that CB Richard Ellis shall determine a reasonable market rental in respect of the said premises from the 1st December 2004, and for the entire duration of the respondent's occupation of the premises."

D This order was granted by consent of the parties. It sets down a conflict resolution procedure for any further disputes on rentals between the parties. A neutral arbiter was appointed by consent, to assess reasonable rentals for the disputed premises from time to time, for the entire duration that the applicant (who was the respondent under case number HC 3256/04) would E be in occupation of the premises. It is common cause that the present dispute was in the main, a dispute over rentals.

It is also beyond dispute that the dispute arose during the applicant's occupancy of the premises. It is clear from the papers that the respondent did not have the rentals determined by the above-mentioned estate agent. The respondent unilaterally set the rentals and then demanded these rentals from the applicant, who disputed them. F The dispute, as alluded to above, fell to be determined squarely under the consent order. The respondent was supposed to have disclosed the existence of this consent order when it made the application under HC 815/09. It is trite law that the court may set aside a judgment granted in error, where the judgment would not have granted had the court been fully of certain facts: *Nyingwa v Moolman NO* 1993 (2) SA 508 (Tk); *Topol & Ors v LS Group* G *Management Services (Pty) Ltd* 1988 (1) SA 639 (W) and *Holmes Motor Co v SWA Mineral and Exploration Co* 1949 (1) SA 155 (C).

In my view, the non-disclosure of the above-mentioned consent order did lead to the judgment being granted in error. The court would not have granted the judgment had it been aware of the existence and provisions of H the consent order.

2012 (1) ZLR p142

Ndou J

Accordingly, on this point alone, the default judgment must be rescinded. A

It is therefore ordered as follows:

(1) That the judgment entered by this court against the applicant in case number HC 815/09 be and is hereby rescinded.

(2) That the respondent pays costs of this application on the ordinary scale. B

Lazarus & Sarif, applicant's legal practitioners

Moyo & Nyoni, respondent's legal practitioners C

© 2015 Juta and Company (Pty) Ltd.

Document 14 of 75

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2012/Volume 1/MOYO v MKOBA & ORS 2012 (1) ZLR 143 (H)

MOYO v MKOBA & ORS 2012 (1) ZLR 143 (H)

2012 (1) ZLR p143

Citation	2012 (1) ZLR 143 (H)
Case No	HB-7-12
Court	High Court, Bulawayo
Judge	Ndou J
Heard	26 August 2011; *CAV*
Judgment	19 January 2012
Counsel	*H Zhou*, with him Ms *C Bhebhe* for the applicant *J Mumbengegwi* for the second, third, fourth and fifth respondents
Case Type	Opposed application
Annotations	No case annotations to date

Flynote

Customary law – *chief – appointment of – by President – customary principles of succession – President only obliged to give due consideration to such principles – not obliged to follow them*

Headnote

D Although chiefs are envisaged as hereditary holders of office, it is only official recognition by the President that carries with it the title of chief. In practice the President frequently appoints the person holding traditional title to the chieftainship, but he is not obliged to do so. Section 3(2) of the Traditional Leaders Act [*Chapter 29:17*] obviously implies that the E President "should give due consideration to the customary principles of succession, if any, applicable to the community over which the chief is to preside", as investigated by Ministry of Local Government officials, in particular the district administrator. However, he is not obliged to follow those principles in making his choice. Once the investigation has been made, the President is free to act as he thinks best in the interests F of good governance of the community.

Cases referred to

Muwuungani v Min of Native Affairs 1957 R & N 298 (FC): 1957 (2) SA 544 (FS)

Ruzane v Paradzai & Anor 1991 (1) ZLR 273 (S)

Legislation considered G

Traditional Leaders Act [*Chapter 29:17*], s 3(2)

Case information

H Zhou, with him Ms *C Bhebhe* for the applicant

H *J Mumbengegwi* for the second, third, fourth and fifth respondents

Ndou J

Judgment

Ndou J: There are two matters in this case. The first matter is for the A confirmation or discharge of a provisional order granted by this court on 10 September 2009. The second, which is the main matter, is for the rescission of the decision to appoint the first respondent as substantive Chief Bunina. In the latter matter, the applicant also seeks that the matter be remitted to the office of the second respondent for the reconvening of a selection meeting B of all interested parties for the fresh selection of a candidate for appointment as Chief Bunina. The background facts of the matter are the following. The applicant is the first born son of Jackson Moyo, the last Chief Bunina of Lower Gweru, who died sometime in June 2003. In turn, the late Jackson Moyo had taken over the chieftainship as substantive Chief Bunina from his late father, Mantiya. After the death of Jackson Moyo the applicant was appointed C acting Chief Bunina in May 2004 and his term as acting Chief was set to expire, and did expire, in May 2006. Meanwhile, meetings were conducted between Ministry of Local Government officials and the Bunina family to select the substantive Chief Bunina where the first respondent emerged as a claimant to the throne. It is common cause that the late Chief Bunina had more than one family, i.e. he had different wives, the eldest of which was the D mother of Mantiya, applicant's grandfather who also ruled as Chief Bunina. The first respondent's father, Mkoba, was a son of one of Chief Bunina's wives. The first respondent's claim to the chieftainship does not seem to be based on a recognizable Ndebele system of succession, custom or tradition of the clan but merely on some kind of election or poll conducted by Local Government officials. This is captured in the memorandum dated 28 August E 2006 from the Midlands Provincial Administrator to the Minister of Local Government, Public Works and Urban Development. In this memorandum the Provincial Administrator states:

> "1. Subject to the Traditional Leaders Act [*Chapter 29:17*] section 3, the President shall appoint Chiefs to preside over Communal and Resettlement F areas.

2. Subject to subsection (2), the President shall give due consideration to the prevailing customary principles of succession, if any, applicable to the community over which the chief is to preside, and the administrative needs of the communities in the area concerned in the interest sof good governance. G

3. The last incumbent in the Bunina Chieftainship was Golden Moyo whose acting term has since expired. In line with the requirement of Circular No. 38 of 2004, the District Administrator held a selection meeting on the 2first of June 2006. The meeting was chaired by DA Kwekwe and included Ms Muzenda, assisted by DA Gweru, Mr Maguma with the Provincial Administrator and Mr Mukwaira (Traditional Support Services Director). *Though there was no succession among the family, what sufficed was that* H

2012 (1) ZLR p145

Ndou J

A *Stephen Mkoba was chosen by the majority of the houses. The decision to appoint Stephen Mkoba from the families, though non-procedural and non-congruent with either the bilateral or collateral system, was welcome dby this office in the best interests of the Chieftainship as continued squabbles derail the operations of Chiefdom.*

4. *This office support* [*sic*] the nomination of Stephen Mkoba I.D. 29-063837 B B 29 as substantive Chief Bunina *premised on the above-mentioned light. …*" (Emphasis added)

The applicant protested this nomination of the first respondent to the President's office resulting in the selection process being reopened. The Minister of Local Government gathered stakeholders in 2007 and advised them to consult among themselves, promising to return to finalise the process. Before the C above-mentioned recommendation was sent to the Minister, there was a selection meeting held on 21 June 2006. At this meeting the Mantiya family, Mkoba family, Lugwalo family and Mpabanga family were represented. The applicant, the first respondent, and the second respondent attended the meeting. A total of 22 persons represented the above-mentioned families. At D this meeting the Mantiya family traced their chieftainship as having come with Bunina from Matojeni, with a group of followers who came and settled in the Lower Gweru. According to them, the chieftainship did not cascade across to the brothers but to the sons i.e. bilateral system of succession. In this regard, Mavu's descendents, being the eldest wife, were eligible to the throne. The Mantiya family highlighted the fact that although the Bunina's E were of Rozvi origin, their ancestors inherited the Ndebele customs and culture following their defeat by the Ndebele in the pre-colonial era. Accordingly, in terms of the Ndebele system of succession their chieftainship was passed from father to son. The Mkoba version was contrary to that of the Mantiya family. The Mkoba version enjoyed the support of the Lugwalo and Mpabanga families. Their version was that there was a battle between the whites and F the Bunina community which resulted in the latter being victorious and ultimately being appointed Chief by the government of the day. As is to be expected, the meeting was acrimonious and hotly debated. After all these processes and debates a recommendation was made by the Minister of Local Government, Public Works and Urban Development (fourth respondent) to G the President of the Republic of Zimbabwe (fifth respondent). In the exercise of his powers, the President appointed the first respondent the substantive Chief Bunina on 7 May 2007. This appointment is in accordance with the Rozvi principles of succession. The President, in his wisdom and discretion, did not follow the Ndebele system of succession. It is this appointment really that resulted in these two matters. This appointment was done in terms of s 3 H of the Traditional Leaders Act [*Chapter 29:17*] ("the Act") which provides:

2012 (1) ZLR p146

Ndou J

"**3. Appointment of Chiefs** A

(1) Subject to subsection (2), the President shall appoint Chiefs to preside over communities inhabiting communal and resettlement areas.

(2) In appointing a chief in terms of subsection (1), the President –

(a) shall give due consideration to –

(i) the prevailing customary principles of succession, if any, applicable B to the community over which the chief is to preside; and

(ii) the administrative needs of the communities in the area concerned in the interest of good governance; and

(b) wherever practicable, shall appoint a person nominated by the appropriate persons in the community concerned in accordance with the principles referred to in sub-paragraph (i) of paragraph (a): C

> Provided that, if the appropriate persons concerned fail to nominate a candidate for appointment as chief within two years after the office of chief became vacant, the Minister, in consultation with the appropriate persons, shall nominate a person for appointment as chief …"

I have highlighted above that the most contentious issue is whether the Ndebele or Rozvi system is applicable in determining the succession battle D for the Bunina Chieftainship. It is trite that although chiefs are envisaged as hereditary holders of office, it is only official recognition by the President that carries with it the title of Chief. In practice, the President frequently appoints the person holding traditional title to the chieftainship, but he is not obliged to do so. Section 3(2) of the Act obviously implies that the President E "should give due consideration to the customary principles of succession, if any, applicable to the community over which the Chief is to preside", as investigated by Ministry of Local Government officials and, in particular, the relevant District Administrator. But, once the investigation has been made, the President is free to act as his thinks best in the interests of good governance of the community – *Muwuungani v Minister of Native Affairs* F 1957 R & N 298 (FS) at 300E; 1957 (2) SA 544 (FC) and *Ruzane v Paradzai & Anor* 1991 (1) ZLR 273 (S) at 280G-281F. In the latter case Manyarara JA at 280H to 281A had this to say:

> "The clear meaning of the provision is that the President is required to 'give due consideration to the customary principles of succession', and not to follow them in making his choice. In other words, s 3 of the Act provides the President with an G unfettered discretion in the appointment of a chief. The President has exercised this discretion and appointed the first respondent as substantive Chief Bunina. The President exercised this discretion after supporters of rival candidates were consulted through the second, third and fourth respondents. This exercise of executive powers by the President cannot be reviewed.

Accordingly, the applicant's case fails. I therefore order as follows: H

2012 (1) ZLR p147

Ndou J

(1) That A the provisional order granted by this court on 10 September 2009 under HC 1396/09 be and is hereby discharged with costs.

(2) That the application filed under HC 1410/09 be and is hereby dismissed with costs.

B *Coghlan & Welsh,* applicant's legal practitioners

Joel Pincus Konson & Wolhuter, first respondent's legal practitioners

Civil Division, Attorney-General's Office, second, third, fourth and fifth respondents' C legal practitioners

---

© 2015 Juta and Company (Pty) Ltd.

Document 15 of 75

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2012/Volume 1/S v SIKOTI 2012 (1) ZLR 148 (H)

S v SIKOTI 2012 (1) ZLR 148 (H)

2012 (1) ZLR p148

Citation	2012 (1) ZLR 148 (H)
Case No	Judgment No. HH-283-11
Court	High Court, Harare
Judge	Bhunu J and Zimba-Dube J
Heard	27 October 2011; *CAV*
Judgment	25 January 2012

Counsel *V Chivhinya*, for the appellant
E Nyazamba, for the respondent

Case Type Criminal appeal

Annotations No case annotations to date

Flynote

Criminal procedure *(sentence) – offences under Criminal Law Code – possession of a dangerous drug (s 157(1)) – possession not necessarily less serious than dealing – substantial amount of drug in accused's possession – permissible to infer that drug not only for personal use –* D *sentence requiring treatment for addiction – need for evidence of addiction*

Headnote

The appellant, a repeat offender, appealed against a sentence of 18 months' imprisonment, of which six months were suspended on appropriate conditions for contravening s 157 (1)(a) of the Criminal Law (Codification E and Reform) Act [*Chapter 9:23*]. The facts disclosed that he had been found in possession of 2 kg of dagga which had been hidden in a maize field. In attacking the sentence, it was urged upon the appellant's behalf that it induced a sense of shock.

Held, that while the legislature did distinguish possession and dealing by creating two different offences, this did not necessarily make the offence F of possession more trivial that dealing and deserving, in every case, a fine or community service.

Held, further, dismissing the appeal against sentence, that it was permissible for the court to infer that the dagga was not for the appellant's personal use because of the large quantity involved. His previous conviction further G supported the inference that he possessed the dagga for resale or supply.

Held, further, that it would not be incompetent for a court to impose a sentence requiring treatment for addiction in terms of s 157(2) of the Code in the absence of evidence of proof of addiction, and there was no such evidence in this case. H

2012 (1) ZLR p149

Dube J

Cases referred to A

S v Chingwaru HB-106-93

S v Chingwena HH-251-89

S v Chizunza HB-2-87

S v Odu HH-165-89

S v Phiri HB-76-90

B *S v Ramushu & Ors* S-25-93

S v Sixpence HH-77-03

S v Zuze S-53-92

Legislation considered

C Criminal Law (Codification and Reform) Act [*Chapter 9:23*], ss 157(1)(a) & (2)

Case information

V Chivhinya, for the appellant

E Nyazamba, for the respondent

Judgment

Dube J: The appellant appeared before a Harare Magistrate facing a charge of contravening s 157 (1) (a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*], (hereinafter referred to as the Code). The appellant was found in possession of dagga weighing 2 kg hidden in a maize field. He pleaded guilty to the charge and was sentenced to 18 months' imprisonment, of which six months' imprisonment was suspended for five years on condition that he does not during that period commit any offence involving unlawful possession or use of dangerous drugs for which he is sentenced to imprisonment without the option of a fine. He appeals against sentence only.

The appellant attacks the sentence on the basis that the sentence is harsh and induces a sense of shock and that the trial magistrate failed to place sufficient weight on the fact that he pleaded guilty to the offence. The appellant's counsel submitted that the appellant intended to use the dagga for medicinal purposes and that the trial court erred by drawing the inference that the dagga was meant for sale, as s 157 of the Code does not make provision for a court to presume or infer that the dagga possessed was meant for either sale or supply.He also submitted that as the sentence imposed was below 24 months' imprisonment, the court ought to have imposed community service. In addition, the appellant urged this court, in assessing the appropriate sentence, to consider imposing a sentence requiring the appellant to undergo treatment or rehabilitation for addiction to dagga in terms of s 157(2) of the Code.

The respondent's counsel supported the sentence imposed. Mr *Nyazamba* submitted that the trial court did not err when it sentenced the appellant to

---

Dube J

a custodial sentence. He drew the court's attention to *S v Sixpence* HH-77-03 where Hungwe J refused to confirm a sentence of a fine of $50 000 or in default of payment six months' imprisonment for possession of dagga involving 2.6 kg. The learned judge said the following;

> "It must always be borne in mind that dagga is a mind bending and habit forming drug. The courts must be seen to be discouraging the use of this drug with all its dangerous consequences to the youth and the community at large."

Counsel also referred the court to *S v Chingwaru* HB-106-93 and *S v Phiri* HB-76-90 where offenders were sentenced to custodial sentences for possession of 1.4 kg and 3.39 kg respectively.

In assessing the appropriate sentence, the court considered the following mitigating features advanced on behalf of the appellant:

(a) that he is a first offender who is aged 32 years;

(b) unemployed and married with one child;

(c) who pleaded guilty to the offence; and

(d) has savings of US$200 and has no assets.

The trial court also considered that the appellant has a previous conviction involving dealing in dagga weighing 501 grams. That the fine imposed in that case did not reform him and that he is unrepentant. The appellant was convicted in 2003 of contravening s 4 of the Dangerous Drugs Regulations and was fined Z$40 000. The trial court rejected his explanation in mitigation that he uses the dagga to put in his tea for relief of his asthmatic condition. The magistrate was concerned with the quantities involved and found that his moral blameworthiness was very high as the offence was premeditated and that this was evidenced by the fact that the dagga was found hidden in a maize field. The magistrate also considered that the offence is very serious and has serious effects on one's health. The trial court considered imposing community service and decided against it and found that that would amount to trivializing the offence.

Looking at the approach the trial court adopted in arriving at the sentence imposed, the court cannot be faulted for arriving at the sentence it imposed. This court finds no basis for interfering with the sentence imposed.

An appellate court may only interfere with the sentencing discretion of a trial court where there is a misdirection, irregularity or where the resulting sentence is shockingly excessive. As clearly enunciated in *S v Ramushu & Ors* S-25-93*:*

"But in every appeal against sentence, save where it is vitiated by irregularity or misdirection ,the guiding principle to be applied is that sentence is pre-eminently a matter for the discretion of the trial court, and that an appeal court should be H

Dube J

A careful not to erode such discretion. The propriety of a sentence, attacked on the general ground of being excessive should only be altered if it is viewed as being disturbingly inappropriate"

This sentence is in line with other sentences imposed in similar cases. In *S v Chizunza* HB-2-87 a sentence of two years' imprisonment with six months suspended was upheld on appeal for possession of 1.7 kg of dagga. Another B case in point is *S v Chingwena* HH-251-89 where a sentence of two years' imprisonment with nine months suspended for possession of 1.275 kg of dagga was upheld on appeal.

In *S v Chingwaru* HB-106-93*,* a sentence of 24 months' imprisonment with six months suspended for possession of 1.4 kg was confirmed on appeal. C In *S v Zuze* S-153-92 the accused possessed one kilogram of dagga and was sentenced to 24 months' imprisonment with six months suspended on conditions. The appeal court held that the sentence was neither excessive nor out of line with sentences for possession of this quantity of dagga for a first offender.

This is not a case of simple possession, where an offender is found in D possession of a small amount of dagga or a twist or two for his personal consumption, in which case a fine would be justified. As found in *S v Sixpence supra* imposing a fine in a case such as this would amount to trivializing the offence. Whilst the legislature did distinguish offences of possession and dealing by creating two different offences, this does not necessarily make E the offence of possession more trivial than dealing, deserving in every case a fine or community service. Each case has to be determined on its own circumstances. The appellant was found in possession of 2 kg of dagga, which is a substantial amount. He is a repeat offender.

Although the appellant was not charged with the offence of dealing or supplying dagga, the offence still remains serious in view of the quantities F involved. The offence was premeditated and the court cannot lose sight of the fact that the appellant was likely to supply or sell it to other users, thereby influencing others to commit offences. Motive is relevant to sentencing. It is permissible for the court, at the sentencing stage, to infer that the dagga was not for personal use on the basis of possession of large quantities involved. In G *S v Sixpence supra* Hungwe J commented that the fact that further justifies a custodial sentence in possession cases where there is no evidence that it was intended for supply to other persons, is the quantity involved. The onus is on the appellant on appeal against sentence, to displace the inference that the large quantity of dagga was not for supply or sale. The appellant's previous conviction in dealing in dagga further supports the inference that the dagga H possessed in this case was meant for resale or supply. The appellant has

Dube J

failed to displace that onus. *See S v Odu* HH-165-89 where at p 4 of the A judgment, Korsah J (as he then was), said the following of inferences that can be drawn where large quantities are involved:

"… the quantity of dagga he was found in possession of being considerable, the presumption arises that it was possessed not for his personal use, but for sale. That being so, his possession of the dagga is to be viewed as posing a more serious threat to society. considering the prevalence of trafficking in this type of B drug, the courts have persistently imposed sentences of a deterrent nature, even on first offenders who are found in possession of such quantities of dagga."

The appellant's argument that the court cannot draw the inference that the dagga was for resale or supply, does not find favour with this court.

It is incompetent for a court to impose a sentence of counseling or rehabilitation C in terms of s 157(2) of the Code in the absence of evidence of medical proof of addiction or other cogent reasons. There is no evidence showing that appellant has an addiction to dagga. A previous conviction in dealing in dagga is no justification for a rehabilitation order.

In the result, the appeal against sentence is hereby dismissed. D

BHUNU J concurred.

Muchineripi & Associates, appellant's legal practitioners

Attorney General's Office, respondent's legal practitioners E

© 2015 Juta and Company (Pty) Ltd.

Document 16 of 75

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2012/Volume 1/MACHAKA v MINISTER OF LOCAL GOVERNMENT & ORS 2012 (1) ZLR 153 (H)

MACHAKA v MINISTER OF LOCAL GOVERNMENT & ORS 2012 (1) ZLR 153 (H)

Citation	2012 (1) ZLR 153 (H)
Case No	Judgment No. HH-37-12
Court	High Court, Harare
Judge	Mathonsi J
Heard	25 January 2012
Judgment	25 January 2012
Counsel	Detail not supplied
Case Type	Urgent application
Annotations	No case annotations to date

Flynote

C **Customary law** – *chief – appointment of – selection of candidate – clan selecting a candidate – government officials having no right to interfere with nomination process and nominate another person*

Headnote

D In compliance with s 3 of the Traditional Leaders Act [*Chapter 29:17*] a nomination process was embarked on to select a candidate for appointment as Chief Ngezi. That process came up with the name of the applicant as the candidate for appointment by the President. Notwithstanding the selection of the applicant as a candidate for appointment, the Minister of and the Secretary for Local Government established a commission to E investigate the selection of the applicant. This halted the process under circumstances suggesting interference with the process of selection. The commission proposed putting forward the name of the third respondent to the President for appointment. The applicant sought an order interdicting the respondents from doing so.

Held, that the process of nominating a candidate is the province of the clan F and s 3 of the Act does not envisage a situation where government officials interfere with that process and dictate what should be done, whether in the form of commissions or otherwise. It was clear that the commission had rejected the selection process and the outcome of the meetings held by the clan. That commission was therefore unlikely to G do anything favourable to the applicant. The order would be granted.

Legislation considered

Traditional Leaders Act [*Chapter 29:17*], s 3

Cases referred to

H *Mbedzi v Mbedzi & Ors* HB-145-11

2012 (1) ZLR p154

Mathonsi J

Judgment

Mathonsi J: This is an urgent application in which the applicant seeks to A interdict the first and second respondents from forwarding the name of the third respondent for appointment as substantive Chief Ngezi.

The basis of the application is that in compliance with s 3 of the Traditional Leaders Act [*Chapter 29*:17] a nomination process was embarked on to select a candidate for appointment as Chief Ngezi. That process came up with the B name of the applicant as the candidate for appointment by the President. The minutes that have been placed before me, clearly demonstrate that.

Notwithstanding the selection of the applicant as a candidate for appointment, the first and second respondents have commissioned a commission to investigate the selection of the applicant. This has halted the process under circumstances suggesting interference with the process of selection. C

The process of nominating a candidate is the province of the clan and s 3 of the Act does not envisage a situation where government officials interfere with that process and dictate what should be done, whether in the form of commissions, or otherwise. See *Mbedzi v Mbedzi & Ors* HB-145-11.

It is in view of the activities of the commission set up by the first and second D respondents, which the applicant says have reversed the will of the appropriate members of the community, that a summons has been issued out of this court as Case No HC 797/12. In that action the applicant seeks a declarator that he is the rightful candidate to be appointed Chief Ngezi.

He has therefore approached the court seeking to interdict the first and second E respondents from processing the third respondent's papers until such time as the respective rights of the parties have been determined by the court.

Ms *Hove* for the first and second respondents has argued that the actions of the applicant are premature, regard being had to the fact that the commission is still to submit its findings. I do not agree. What is clear from the papers is that the commission has rejected the selection process and the outcome F of the meetings held by the clan. That commission therefore is unlikely to do anything favourable to the applicant. There is therefore a reasonable apprehension that the interests of the applicant may be prejudiced by the secondment of the third respondent for appointment by the President ahead of the applicant. For that reason I am satisfied that the applicant has made a good case for the relief sought. G

In the result I grant the provisional order in terms of the amended draft order.

Jarvis Palframan, applicant's legal practitioners

Attorney General's *Office*, respondents' legal practitioners H

© 2015 Juta and Company (Pty) Ltd.

Document 17 of 75

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2012/Volume 1/GABARINOCHEKA v OFFICER COMMANDING TRAFFIC, CENTRAL BUSINESS DISTRICT, BULAWAYO & ORS 2012 (1) ZLR 155 (H)

GABARINOCHEKA v OFFICER COMMANDING TRAFFIC, CENTRAL BUSINESS DISTRICT, BULAWAYO & ORS 2012 (1) ZLR 155 (H)

Citation	2012 (1) ZLR 155 (H)
Case No	Judgment No. HB-15-12
Court	High Court, Bulawayo
Judge	Ndou J
Heard	13 October 2011; 17 October 2011; *CAV*
Judgment	26 January 2012
Counsel	*L Ncube*, for the applicant *L Masika*, for the respondent
Case Type	Criminal application
Annotations	No case annotations to date

Flynote

Police – discipline – trial of member before a single officer – such member not having right to elect to be tried by a magistrate

Headnote

D A member of the police force who is not an officer may be tried by a single officer for minor infractions of the Police Act [*Chapter 11:10*] and regulations made thereunder. Such an officer may impose a punishment of imprisonment for up to 14 days and a fine of up to level two. Such infractions are minor disciplinary measures in the police force and are E not regarded as criminal offences. A member who is summoned for trial before a single officer does not have the right under s 32 of the Act to elect to be tried by a magistrate. The election provided for in that section only applies to trials before boards of officers and not trials before a single officer.

Legislation considered F

Police Act [*Chapter 11:10*], ss 29, 32 & 34

Case information

L Ncube, for the applicant

L Masika, for the respondent

Judgment

G **Ndou J:** The applicant seeks an order in the following terms:

"**The final order sought**

That the provisional order granted by this honourable court confirmed in the following manner:

1. That the hearing referred to in para 1 of the interim relief be and is hereby H referred for hearing at the magistrates court.

Ndou J

2. The respondents be and is hereby ordered to pay costs of suit if opposed A to this application.

Interim relief granted

Pending the finalization of this matter, the applicant be granted the following relief:

1. The respondents be and are hereby ordered to suspend the hearing of 13 October 2011, or any such trial or hearing involving the applicant, on the B charge of 'performing any duty in an improper manner' until the finalization of this matter.
2. That should the hearing proceed in contravention of para 1 above such hearing be and is hereby held to be of no force or effect."

The salient facts of the case are the following. The applicant is a sergeant in the Zimbabwe Republic Police ("ZRP") now stationed at Gwanda police C station. All along, and for the past 14 years, he has been stationed at the National Highway Patrol i.e. ZRP, Traffic Section. The applicant has been in the police force for around 26 years. On 17 September 2011 at around 1300 hours he was patrolling in the Bulawayo central business district using a BMW patrol car together with his team members, Cst Thebe, Sgt Nhoti and Cst Marava. The applicant was the team leader. They set up a road block D along Fort Street, opposite Bakers Inn. The applicant waved down a white omnibus with a red strip and it stopped. The vehicle was attended to by Cst Thebe. The vehicle had an excess of four passengers. Cst Thebe told the driver of the offence and invited him to pay a US$20 fine. The driver, Owen Kurenga, paid the spot fine. The fine was receipted and the driver signed the E receipt. It is not what transpired between the driver and Cst Thebe that is in issue. It is what is alleged to have transpired between the driver and the applicant that resulted in him being charged under the Police Act [*Chapter 11:10*]. The gravamen of the charge against him is that he discovered that the driver had photocopies of Route Authority and Operator's Licence, serial numbers 023238 and 029439 respectively. It is alleged that the applicant got F emotional, indicating that the papers were invalid and tore them up in full view of members of the public. This conduct is alleged to have reached the ears of his superiors, resulting in him being charged under the Police Act. He was charged with contravening s 34 of the schedule to the Police Act i.e. "Perform a duty in an improper manner". G

The events preceding the charge are the following. This incident, as alluded to, above, occurred on 17 September 2011. The same evening, the applicant was questioned by his superior, one Supt Mhlanga. He denied any wrongdoing. He was questioned once more on 18 September 2011. He denied wrongdoing again. On 19 September 2011 he was telephoned by one of his commanders in Harare. He was instructed to go and surrender the above-mentioned BMW H

Ndou J

A patrol vehicle in Harare the same day. He was told to bring his entire team with him. He complied and when they got to Harare they were once more interrogated about the issue. They all made written reports of their side of the story. Thereafter, the applicant was with immediate effect transferred from National Traffic to Gwanda police station. The rest of his team were B also moved from National Traffic to Nkulumane, Rusape and Mashava police stations respectively. The applicant reported for duty at Gwanda police station. On 3 October 2011 he was telephoned by Assistant Inspector Khabo and advised to attend a disciplinary hearing on 4 October 2011 at 9 am at ZRP, Southampton Building, in Bulawayo. The latter told him that he was the prosecutor in the matter. At that time he was not told of the charge he C was facing. He sought legal representation. When they got to the hearing his legal practitioner was furnished with a charge sheet and a copy of the synopsis. The charge sheet reads, *inter alia*:

> "The accused, being a member of the force, did wrongfully and unlawfully perform a duty in an improper manner, that is to say, he tore up a certified copy of the Route Authority Serial Number 023238 and a certified Operators Licence D Serial Number 029439 for vehicle number ABQ 9523, to wit, a Toyota Hiace, belonging to Sibanda Motors."

At the commencement of the trial, his legal practitioner objected to the hearing continuing, on the grounds that the applicant had not been properly served with a notice to attend the hearing and he needed more time to instruct E his legal practitioner. The hearing was postponed to 13 October 2011. On 5 October 2011 the applicant's legal practitioner addressed a letter to the presiding officer, one Supt A C Dube, requesting that the matter be referred for trial before a magistrate. The basis for the request for referral is stated thus:

> "Our basis for this objection is grounded on s 35 of the Police Act *Chapter 11:10* which lays down clearly that the proceedings before or at any trial by a board F of officers or an officer in terms of the Act, shall as near as may be, be the same as those prescribed for criminal cases in the Court of Zimbabwe.

To this effect, we believe that our clients will not be afforded a fair trial as the case before the court involves Levy Sibanda, the Deputy Commissioner-General of Zimbabwe Republic Police, who for all intents and purposes is the complainant in this case.

G Furthermore, the principles of natural justice are also very clear in cases of this nature, as the presiding officer in this matter is a junior to the complainant, who holds a superior office and position and our client has reasonable and well founded belief or fear that the latter may influence the decision of the trial officer and the opposite equally obtains as the trial officer is a junior of the complainant who may be afraid to deliver judgment not in favour of his superior, for fear H of victimization.

2012 (1) ZLR p158

Ndou J

Attached is the initial copy of the charge sheet against our client that was them A amended, to substantiate the above-mentioned points."

The initial charge sheet read as follows:

"… did wrongfully and unlawfully destroyed by tearing a certified copy of the route authority serial number 023238 and a certified copy of an operator's licence belonging to Levy Sibanda the Deputy Commissioner-General of the Zimbabwe B Republic Police."

The respondents decided to proceed with the trial under the Police Act, resulting in this application to stop them. The respondents' case is basically that the applicant does not have any right to elect to be tried by a magistrate when appearing before a single office. Their understanding is that the applicant could have had the right to elect to be tried by a magistrate if he was an C officer and the Commissioner-General convened a board of officers to deal with the matter. This is the preliminary legal issue that I have to determine. The election of trial by magistrate is provided for under s 32 of the Police Act [*Chapter 11:10*]. This section reads:

"32. Member may elect trial by magistrates court

If notice is given, in the manner and time prescribed, by a member whom it is D proposed to try before a board of officers in terms of paragraph (c) of subsection (1) of section twenty-nine that he wishes that the charge against him be tried by a magistrates court and not by a board of officers, the charge shall be tried by a magistrates court."

It is common cause that the applicant is not facing the charge before a board E of officers in terms of s 29(1)(c) of the Act. The applicant is being charge before a single officer in terms of s 29(1)(d) of the Act.

It has to be emphasized that the election provided for in s 32 only applies to trials before a board of officers and not trials before a single officer. The procedure under s 29 (1)(c) is for serious offences, whereas the procedure under s 29(1)(d) is for minor infractions of the Police Act and regulations F made thereunder. Such minor infractions are punishable by imprisonment of up to 14 days and a fine of up to level two. These are minor disciplinary measures in the police force and are not regarded as criminal offence. Section 34(9) provides:

"9. A member who is found guilty of a contravention of this Act by an officer G shall not be regarded as having been convicted of an offence for the purposes of any other law."

These proceedings are subjected to automatic review by the Commissioner-General. All these factors clearly evince that the legislature deliberately excluded a member charged before a single officer from the provisions of s 2. In brief, such a member cannot elect to be tried by a magistrates court. H

2012 (1) ZLR p159

Ndou J

A On this point alone, the applicant cannot choose to be tried by a magistrates court. Accordingly, the application is dismissed with costs.

James, Moyo-Majwabu & Nyoni, applicant's legal practitioners

B *Civil Division, Attorney General's Office,* respondents' legal practitioners

---

© 2015 Juta and Company (Pty) Ltd.

Document 18 of 75

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2012/Volume 1/MATHE v MATHE 2012 (1) ZLR 160 (H)

MATHE v MATHE 2012 (1) ZLR 160 (H)

Citation	2012 (1) ZLR 160 (H)
Case No	Judgment No. HB-17-12
Court	High Court, Bulawayo
Judge	Ndou J
Heard	25 August 2011; *CAV*
Judgment	26 January 2012
Counsel	*N Mazibuko,* for the plaintiff No appearance for the defendant
Case Type	Unopposed application
Annotations	No case annotations to date

Flynote

Practice and procedure – *set down – notice of – matrimonial matter – need for notice of set down to be given personally in all situations – notice in accordance with Form 30 – no need to serve such notice on defendant where summons in accordance with Form 30A* D

Headnote

In terms of r 272 of the High Court Rules, 1971, in an action for divorce or nullity of marriage, where the defendant has failed to enter appearance, the plaintiff who wishes to obtain judgment must, if the declaration has not been served with the summons, file and deliver his or her declaration and, either simultaneously or subsequently, a notice in accordance with E Form No. 30. This notice calls upon the defendant, if he or she wishes to defend, to plead, answer or except or make a claim in reconvention within 12 days of the date of delivery of the notice and informs him or her that in default, judgment will be sought against him or her. If the declaration was served with the summons, the plaintiff must file and deliver the notice to the defendant after the expiry of the *dies induciae*. F After that the plaintiff may set the case down for trial but must serve personal notice of set down upon the defendant. The court may not proceed to trial unless it is satisfied that the personal notice of the defendant has been drawn to the fact that the matter has been set down for trial or that, for good and sufficient reason, the giving of personal G notice is impracticable.

However, under r 269A, the summons commencing an action mentioned may, at the option of the plaintiff, be issued in Form No. 30A, to which a copy of the plaintiff's declaration is annexed. In that event, r 272 does not apply and there is no need to serve a Form 30 notice. Nonetheless, personal service of the notice of set down must be given. This salutary H

Ndou J

A rule of practice is motivated by the irreparable harm that may result in a final decree of divorce. Divorce results in a final change of status of the parties.

Cases referred to

Afrika v Afrika 1944 CPD 78

B *Barkhuizen v Kruger* 1959 (3) SA 506 (O)

Butler v Butler 1951 SR 122

le Roux v le Roux 1957 R & N 831 (SR)

Strydom v Strydom 2003 (1) ZLR 379 (H)

Legislation considered C

High Court Rules 1971 (RGN 1047 of 1971), rr 269A & 272(1)

Case information

N Mazibuko, for the plaintiff

No appearance for the defendant

Judgment

D **Ndou J:** The issue here is whether the plaintiff complied with Order 35 r 272 (1) of the High Court Rules, 1971. The salient facts are the following. The plaintiff issued out, at this court, summons incorporating a declaration on 10 June 2011. The summons, together with plaintiff's declaration, were served on the defendant personally by the Deputy Sheriff of Bulawayo on 10 E June 2011. The defendant did not contest the summons. After the expiry of the *dies induciae*, the plaintiff set the matter down for trial on 28 July 2011. The notice of service of set down was served on the defendant personally on 14 July 2011. The defendant was not in attendance on 28 July 2011. It is common cause that the plaintiff did not serve the defendant with a notice described in r 272(1) *supra*. Rule 272(1) provides:

"(1) In F an action for restitution of conjugal rights, divorce, judicial separation or nullity of marriage where the defendant has failed to enter appearance –

(a) *If the declaration has not been served with the summons,* the plaintiff wishing to obtain judgment shall file and deliver his declaration and, either simultaneously or subsequently, a notice in accordance with Form No. 30 calling upon the defendant if he wishes to defend, to purge his failure to G enter appearance to plead, answer or except or make claim in reconvention within twelve days of the date of delivery of the notice and informing him that in default thereof judgment will be prayed against him;

(b) *If the declaration has been served with the summons, the plaintiff wishing to obtain judgment shall file and deliver the aforesaid notice to the defendant* after the expiry of the *dies induciae*, as calculated in the proviso to rule 119.

(2) Thereafter H the plaintiff may –

Ndou J

(a) in the case of an action for conjugal rights, set the case down for trial without A notice to the defendant;

(b) in the case of a claim for a final order of divorce, for judicial separation or for nullity of marriage, set the case down for trial but shall serve personal notice of set down upon the defendant, and in such case the court shall not proceed to trial unless it is satisfied that the personal notice of the defendant has been drawn to the fact that the matter has been set down for trial or that B for good and sufficient reason the giving of personal notice is impracticable" (emphasis added).

Reading r 272(1)(b) *supra* in isolation, the plaintiff is not entitled to the order prayed for because she did not file and deliver to the defendant the notice defined in r 272(1)(a), *supra.* But when r 272(1) is read with r 269A C a different picture emerges.

Rule 269A reads:

> "The summons commencing an action mentioned in this Order may, at the option of the plaintiff, be issued in Form No. 30A, to which a copy of the plaintiff's declaration shall be annexed, in which case the *provisions of rule 272 shall not apply to such an action"* (emphasis added). D

The summons in this case was issued in Form 30A and a copy of plaintiff's declaration was annexed thereto. Both the summons and declaration were served on defendant. In the circumstances, the provisions of r 272 do not apply. There is no need for the plaintiff to file and deliver the notice prescribed in r 272 (1). This construction does not, however, dispense with the requirement E for the personal service of the notice of set down as discussed in *Strydom v Strydom* 2003 (1) ZLR 379 (H). The requirement that there be personal service is not only premised on the provisions of r 272. It is also based on the salutary rule of practice. As stated by Tredgold CJ in *Butler v Butler* 1951 SR 122:

> "It has always been the practice in this court that where the divorce is sought F on the grounds of desertion the restitution order must come to the *personal knowledge of the defendant*: in other words, although he has knowledge of the proceedings and has authorized attorneys to act on his behalf the court has always insisted that in its final stages he should be given personal notice of the proceedings in order that he might reconsider his position. *It seems illogical that in other cases where a divorce reaches its final point it should be allowed* G *to proceed without any notice to the defendant …* So this seems to me to be a salutary rule of practice" (emphasis added).

See also *Africa v Africa* 1944 CPD 78, *le Roux v le Roux* 1957 R & N 831 (SR) and *Barkhuizen v Kruger* 1959 (3) SA 506 (O). This salutary rule is inspired by the irreparable harm that may result in a final decree of divorce. Divorce results in a finality in the change of status of the parties. H

Ndou J

A Accordingly, because the plaintiff filed and served the summons in Form 30A together with a declaration, there is no need for her to serve the notice prescribed in r 272. It is for these reasons that I granted the divorce as prayed for.

B *Calderwood, Bryce Hendrie & Partners*, plaintiff's legal practitioners

© 2015 Juta and Company (Pty) Ltd.

Document 19 of 75

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2012/Volume 1/ZELLCO CELLULAR (PVT) LTD v NET-ONE CELLULAR (PVT) LTD & ORS 2012 (1) ZLR 164 (H)

ZELLCO CELLULAR (PVT) LTD v NET-ONE CELLULAR (PVT) LTD & ORS 2012 (1) ZLR 164 (H)

Citation	2012 (1) ZLR 164 (H)
Case No	Judgment No. HH-32-12
Court	High Court, Harare
Judge	Gowora J
Heard	31 May 2011; *CAV*
Judgment	1 February 2012
Counsel	*F Chirimuuta*, for the applicant. *D Ochieng*, for the respondents.
Case Type	Civil application

Annotations No case annotations to date

Flynote

Company – *director – liability – for acts of company – company in contempt of court order – director not cited in original proceedings – need to show that director was served with or aware of court order before committal* D *for contempt permissible*

Court – *contempt – corporation – liability of officer of corporation – can be convicted of contempt if negligently or knowingly refuses to comply with a court order*

Court – *contempt – failure to obey court order – application for order holding* E *respondent in contempt – what applicant must show – need to show that respondent was served with or aware of court's order – company director – not cited in original proceedings – application against – need to show that director was served with or aware of order*

Court – *contempt – principle object of contempt proceedings – application for* F *an order of contempt of court – what needs to be proved – disobedience of the court order must be wilful and mala fide – onus upon respondent once failure to comply with court order is established*

Costs – *tariff of fees – de facto bar – fees of its members are a disbursement and not subject to taxation by the taxing master – fees should represent* G *a fair and reasonable overall charge for work performed*

Headnote

The *de facto* bar which operates within the jurisdiction of the Zimbabwe court system, does not work to a tariff of fees. The fees of members thereof (who style themselves advocates) are a disbursement and not subject to taxation by the taxing officer. Such fees should represent an overall H

2012 (1) ZLR p165

Gowora J

A charge for the work performed which the taxing officer considers fair and reasonable in the circumstances.

The principal object of contempt proceedings is to compel compliance by a party to an order given by a court of competent jurisdiction. Before an applicant can be afforded an order for committal of the basis of contempt of an order of court, an applicant must establish (a) that an order was B granted against the respondent; (b) that the respondent was either served with the order or informed of the grant thereof against him and can have no reasonable ground for disbelieving that information; and (c) that the respondent has either disobeyed the order or neglected to comply therewith. A party cannot be found to be in contempt of an order which C has not been addressed to it or which has not been served upon it. An order *ad factum praestandum,* that is, an order to do or refrain from doing a thing, is by its nature an order *in personam* and consequently is only binding upon the person against whom it has been issued.

In cases of contempt of court involving a corporation, a corporation can only comply with a court order through its officers. Thus, it can be convicted D of contempt if its officers have refused or neglected to comply with a court order. A person who also contributes to the commission of the offence can, without being a principal, be punishable as an accomplice. Consequently a director, who has knowledge of the order and causes the company to refuse to obey the order, is guilty of contempt.

E A court will not entertain an application for committal for contempt unless willful or reckless disregard for the court order has been proved. Before a person can be found guilty of contempt, his disobedience of the order must not be only willful but also a *mala fide.* In contempt proceedings, once a failure to comply with a court order has been established, wilfulness will normally be inferred and the onus is on the person who F failed to comply with the order to rebut the inference of wilfulness on a balance of probabilities.

Cases referred to

Choto v CBZ & Anor 2006 (2) ZLR 277 (H)

Consol Fish Distributors (Pty) Ltd v Zive & Ors 1968 (2) SA 517 (C)

G *Haddow v Haddow* 1974 (1) RLR 5 (G); 1974 (2) SA 181 (R)

Höltz v Douglas & Associates (OFS) CC en Andere 1991 (2) SA 797 (O)

Logan v Taxing Officer & Ors NNO 2001 (2) ZLR 175 (H)

Putco Ltd v TV &Radio Guarantee Co (Pty) Ltd 1985 (4) SA 809 (A)

Twentieth Century Fox Film Corp v Playboy Films 1978 (3) SA 202 (W)

H *Uncedo Taxi Svc Assn v Mtwa & Ors* 1999 (2) SA 495 (E)

Gowora J

Case information

F Chirimuuta, for the applicant. A

D Ochieng, for the respondents.

Judgment

Gowora J: On 13 April 2011 under Case No HC 3507/11 Patel J granted a provisional order in the following terms;

"INTERIM RELIEF GRANTED B

Pending the determination of this matter, the applicant is granted the following interim relief;

1. The decision of the Respondent to cancel the Service Provider Agreement be and is hereby declared unlawful and is set aside.
2. The Respondent be and is hereby interdicted from effecting any of the consequences of such cancellation in terms of Clauses 15 and 16 of the C Service Provider Agreement.
3. The Respondent be and is hereby ordered to retract its text message sent to the Applicant's post-paid customers by way of a similar message to the effect that the Applicant's Service Provider Agreement is still valid and subsists and that customers should continue to pay their bills to Zellco Cellullar and that the Respondent regrets the previous notification of cancellation D which was issued in error.

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:

The Respondent is interdicted from invoking and implementing the termination provisions of Clause 15 and 16 of the Service Provider Agreement pending the E resolution of the dispute declared by the Applicant in accordance with Clause 19 of the Service Provider Agreement.

SERVICE OF PROVISIONAL ORDER

That leave be and is hereby granted to the Applicant's legal practitioners to effect service of this Provisional Order upon the Respondent."

The parties to the dispute under Case No HC 3507/11 are the applicant and F the first respondent respectively. The second, third and fourth respondent were not cited as parties thereto. On 10 May 2011 the applicant then launched these proceedings as an ordinary court application seeking the following relief:

IT IS ORDERED THAT:

1 The second, third, and fourth respondents be and are hereby held to be properly enjoined to these proceedings. G

2 The respondents be and are hereby held to be in wilful contempt of the court order by Patel J on 13 April 2011 in HC 3507/11.

3 The first respondent be and is hereby ordered purge its contempt and to mitigate the consequences of cancellation of the Service Provider Agreement that it effected against the applicant in defiance of the court order within 48 hours of this order as follows: H

Gowora J

(a) Remit A to the applicant all payments received directly from the applicant's customers from date of unlawful cancellation of the Service Provider Agreement to date.

(b) Cancel all contracts or arrangements for provision of direct services concluded with the applicant's customers from date of cancellation of the said Agreement to date.

(c) Provide B the applicant with all call data relating to its customers as from 1 April to date in the form and detail as ordinarily provided in terms of the Service Provider Agreement.

(d) Action all requests for network services submitted by the applicant from 1 April to date.

4 The first respondent be and is hereby ordered to broadcast within 24 hours C of this order the following text message to the applicant's customers:

> "NetOne sincerely regrets the text messages sent to all Zellco's subscribers on 5 April 2011 and 19 April 2011 which text messages were grossly inaccurate, misleading, sent in error and should be completely disregarded. Customers are advised that the Service Provider Agreement is still valid and subsists and should continue to pay their bills to Zellco D Cellular. There will be no loss of service."

5 The second, third and fourth respondents be and are hereby ordered to ensure full compliance by the first respondent with the terms of this order failure of which they shall be committed to prison until such time as full compliance takes place.

6 The respondents shall not be heard in any court, whether in this matter or E in matters already before the courts in HC 8318/10, HC 1587/11 and HC 3507/11 or any new related matter, unless and until they have purged their contempt.

7 The first respondent be and is hereby ordered to pay a fine for contempt of court in the sum of USD20 000 within 7 days of service of this final court order upon it.

8 The F second, third and fourth respondents be and are hereby ordered, in their persons, to pay a fine of USD1 500 each within 7 days of service of this final court order upon them.

9 The respondents be and are hereby ordered to pay the costs of this application on a higher scale, that of legal practitioner and client basis, jointly and severally, one paying the others to be absolved.

G The application is opposed by all four respondents. The third respondent has filed an opposing affidavit on his own behalf and on behalf of the first respondent. The respondents have also raised points in *limine*.

In so far as the first respondent is concerned, it is contended that the applicant has failed to abide by the order of Mtshiya J under Case No HC 3639/11 H which was dismissed with an order of costs payable by the applicant. The

---

matter had been brought to court as an urgent matter. The learned judge had A dismissed it on the basis that it was not urgent and had ordered the applicant to pay the costs. The first respondent had through its legal practitioners sent an estimate of its costs and an indication of what it had paid to counsel. The applicant had not paid. It was therefore argued on behalf of the respondents that due to the refusal to pay these costs, the applicant was in contempt of a court order and until such time that it had purged its contempt, it should B not be afforded a hearing on the merits of the dispute.

The applicant counters by arguing that it had sought the taxation of the estimated bill as it considered that the costs were on the high side. It was suggested on behalf of the applicant that counsel did not have the latitude to charge any amount as his fees and that counsel's fees should be subjected to C taxation in ordinary course. It was in this vein argued that the reasonableness of counsel's fees must be tested through taxation.

It is trite that counsel's fees are a disbursement and not subject to taxation by the taxing officer. It is also accepted that counsel's fees are not regulated by a tariff such as attorney's fees are. In *Logan v Taxing Officer & Ors NNO* 2001 (2) ZLR 175 Gillespie J noted that the *de facto* bar within this D jurisdiction does not work to a tariff of fees. He bemoaned the absence of such tariff, which he suggested should set minimum and maximum thresholds for various work. This point was reiterated by Guvava J in *Choto v CBZ & Anor* 2006 (2) ZLR 277 at 281E thus:

> "It is also accepted that fees charged by legal practitioners who have been so E instructed are generally regulated from the bar from which they operate. These fees are not determined by any tariff. That this distinction has been maintained by the legislator may be gleaned from the provisions of the First Schedule to the High Court (Fees and Allowances) Rules 2000 (SI 82 of 2000) as amended by S.I. 195 of 2003, which provides as follows:
>
> > '8. When another legal practitioner is instructed he or she shall not be required F to adhere to this tariff but shall charge such overall fee as the taxing officer considers fair and reasonable in the

circumstances:

Provided that this paragraph shall not apply where a legal practitioner is instructed by a country practitioner'.

In my view, therefore, there is a recognition by the legislator that there is a class of legal practitioners who are not bound by the tariff set out in the Rules." G

The respondents have argued that the urgent chamber application filed by the applicant under HC 4169/11, wherein the first respondent was awarded costs, was so defective in a manner and to an extent that not just the respondent but the court before whom it was set down commented on the defects. This did not appear to deter the applicant as it proceeded to file yet another urgent application substantially on the same basis as the defective one. It H

2012 (1) ZLR p169

Gowora J

A however did not pay the costs it had been ordered to pay. I am persuaded to agree with the contention by the respondents that the applicant has taken a decision to mire the respondents in litigation despite the dispute over the parties' commercial transaction needing resolution. A submission to the effect that the applicant had filed no less than six sets of proceedings went B unchallenged. When a litigant files defective proceedings and refuses to pay costs awarded against it, it is clearly causing the other party unwarranted expense. The applicant was advised that the costs from the abortive urgent applicant amounted to US$2 205, constituting US $2 005 being fees due to counsel and US$200, the estimation of the costs due to the respondent's legal practitioners.

C It seems that the applicant was not unhappy about the estimation of US$200 but required that counsel's fee be taxed. The basis of the unhappiness was the assumption that counsel's fee was not a disbursement. The law on that is clear and in the absence of a tariff against which counsel's fee can be measured, it is clear that the taxing officer has no means by which to test its D reasonableness or otherwise. That said, it was, I believe, the obligation of the first respondent, in order to enforce payment of its costs by the applicant, to have the bill taxed. I believe that the requirement that the first respondent have its bill taxed is not unreasonable as every party to a *lis* has the right to have the costs claimed by the successful party tested as to their reasonableness by a taxing officer. The first respondent chose not adopt this route but to force E the applicant pay on the basis that it considered the costs reasonable and that the applicant should accept its position. That was an error on the part of the first respondent. It would have been different if the applicant had chosen not to pay a taxed bill of costs. That is not the position here. I therefore find that the first respondent has not made out a case for these proceedings to be F stayed. The first point *in limine* therefore fails.

The next issue raised *in limine* is that the second, third and fourth respondents have been wrongly cited herein and their citation, in fact, amounts to a misjoinder. They are, in fact, cited in their official capacities, i.e as representatives of the first respondent. It is contended by the respondents that their citation herein, in fact, amounts to a duplication of the citation of G the first respondent. The applicant has prayed for the joinder of the second, third and fourth respondents to these proceedings. Since they are already cited, it is difficult to understand why an order for their joinder to these particular proceedings is being sought. Para 2 of the draft order seeks that the respondents be found in contempt for lack of or refusal to comply with H the order granted by Patel J against the first respondent under HC 3507/11.

2012 (1) ZLR p170

Gowora J

It is trite that an applicant for an order for committal must establish the A following:

1 that an order was granted against the respondent;

2 that the respondent was either served with the order or informed of the grant thereof against him and can have no reasonable ground for disbelieving that information; and B

3 that the respondent has either disobeyed the order or neglected to comply therewith. See *Uncedo Taxi Service Association v Mtwa & Ors* 1999 (2) SA 495 (E); *Consolidated Fish Distributors (Pty) Ltd v Zive & Ors* 1968 (2) SA 517 (C).

Contempt of court in the context of these proceedings would entail a deliberate C disobedience of a lawful order issued by a court of competent jurisdiction. That an order was granted against the first

respondent is not in dispute. The order was served upon the first respondent's legal practitioners who are also instructed by the second, third and fourth respondents herein.

Service of the order upon the legal practitioners clearly constitutes proof D of service upon the first respondent. The applicant contends that the first respondent is in contempt of the provisional order granted against by Patel J on 13 April 2011. It contends further that in view of the continued act of contempt by the first respondent, it, the applicant, addressed a letter to the first respondent through the fourth respondent which letter it copied to the second and third respondents requesting them to comply with the order. E Despite the letter having demanded action from the respondents, the applicant contends that the order has not been complied with.

It is trite that a party cannot be found to be in contempt of an order which has not been addressed to it or which has not been served upon such party. The provisional order granted against the first respondent is an order *ad factum* F *praestandum,* an order to do or refrain from doing a thing. It is trite that by its nature, an order *ad factum praestandum*, as the provisional order in this case is, is an order *in personam* and consequently is only binding upon those against whom it has been issued. The principal object of contempt proceedings is to compel compliance by a party to an order given by a court of competent jurisdiction. Before an applicant can be afforded an order for G committal on the basis of contempt of an order of court, an applicant must show that the court's order was either served upon the respondent personally or has been brought to his personal attention.

It is correct, as contended by the respondents, that the order was not granted against the other respondents herein but against the first respondent. H

Gowora J

A The first respondent is a corporate entity and the affairs of corporate entities are managed and run their officers and directors and any disobedience of court orders must therefore be attributed to the directors of the company. The directors of a company are its mouth, brains, voices and bodies through which the company acts. Any proceedings by the company are directed, managed B and implemented by them. To this end the applicant contends that the second respondent, as chairman of the board, has ultimate authority to cause and direct the first respondent to act in a certain way. The third respondent is the managing director of the first respondent and it is contended by the applicant that he ensures that the decisions of the first respondent and the board are implemented. The fourth respondent is a legal practitioner, who is the company C secretary in the first respondent and, it is contended by the applicant, he acts as the legal adviser to the second and third respondents herein.

I am not aware of any principle that would seek to hold liable an officer of a company for acts done by the company unless the person is a member of the board of directors. Clearly no liability attaches to the fourth respondent D herein. As for the second and third respondents, it is clear that as directors, they constitute the physical arm of the first respondent. A corporation can only comply with a court order through its officers. Thus it can be convicted of contempt if its officers have refused or neglected to comply with the court order. A person who also contributes to the commission of the offence, can, without being a principal, be punishable as an accomplice [1] Consequently, a E director who has knowledge of the order and causes the company to refuse to obey the order is guilty of contempt. In *Twentieth Century Fox Film Corporation v Playboy Films* 1978 (3) SA 202 (W) King AJ opined as follows:

> "A director of a company, who with knowledge of an order of court against the company, causes the company to disobey the order is himself guilty of contempt of court. By his act or omission such director aids and abets the company to F be in breach of the order of court against the company. If it were not so a court would have difficulty in ensuring that an order *ad factum praestandum* against a company is enforced by a punitive order. *Vide* Halsbury 4 ed vol 9 at 75. Consequently Jagger who had knowledge of the order of court is guilty of contempt of an order of this court. An order *ad factumpraestandum* against a company should also be served on its directors if a punitive order is sought G against the directors in order to establish knowledge of the order of court." [2]

The purpose of contempt proceedings is to ensure that court orders are obeyed. Courts must jealously guard the orders they grant against the community and persons appearing before these courts cannot and should be allowed

---

Gowora J

to disobey or ignore such orders with impunity. Since the applicant seeks A an order for the incarceration of the second and third respondents herein, it should have ensured that the court be served upon each of them personally. It did not do this. It addressed a letter to the fourth respondent. The applicant has not in these proceedings proffered any authority to support its contention that the second, third and fourth respondents, who had not been cited in the main proceedings and who were not served with the order, should be found B to have been in contempt of the provisional order.

Proceedings for committal for contempt are a form of enforcement of an order *ad factum praestandum*. An applicant for an order for committal must show that the respondent had personal knowledge of the order from which the proceedings for contempt emanate. A court will not entertain an application C for committal for contempt unless wilful or reckless disregard for the order has been proved. It has been held that before a person can be found guilty of contempt, his disobedience of the order must be not only wilful but also *mala fide . It has also been held that in proceedings for contempt of court, once a failure to comply with an order of court has been established wilfulness will normally be inferred and the onus is on the person who failed to comply with* D *the order to rebut the inference of wilfulness on a balance of probabilities . At p 836D-E Smallberger AJA stated:*

> "… Once a failure to comply with an order of court has been established, wilfulness will normally be inferred, and the onus will rest upon the person who refused to comply with such order to rebut the inference of wilfulness on a balance of probabilities (cf *du Plessis v du Plessis* 1972 (4) SA 216 (O) at 220A-D). This E can be done by such person establishing that he did not intentionally disobey the court's order."

In this case the applicant relies on a letter addressed to the Company's Secretary and copied to the second and third respondents. Even if it were to be inferred that the second and third respondents were informed through F the copy of the letter in question, there is no proof that these copies were actually delivered to the respondents. The applicant has in my view failed to establish personal knowledge of the order on their part and a wilful decision to disregard it or disobey it.

The position is different as far as the first respondent is concerned. The court order in question was issued against it and served on its legal practitioners. G It deliberately decided to alter the terms of the order given by Patel J and inserted its own version. In his order Patel J had ordered the retraction of the text sent out to customers by the first respondent and for the respondent

---

Gowora J

A to issue a text to the effect that the applicant's service provider contract was still in force and customers should continue paying their bills to the applicant. The first respondent did retract the text but instead of requesting customers to pay to the applicant, it directed that customers pay their bills to the first respondent. The cause of the dispute between the parties was the B alleged failure by the applicant to remit payments from customers to the first respondent. The purported termination had the effect of changing the mode of payment directly to the first respondent. The order by Patel J reversed the cancellation which is why the first respondent was ordered to retract its text message. The retraction it published had no effect on the termination as customers were ordered to pay their bills to it instead of the applicant as C previously obtained. In the circumstances, it defied the order of court. I have no hesitation in finding that it was guilty of contempt.

Subsequent to hearing this matter after having researched on the subject, I requested the parties to address supplementary heads of argument for the benefit of the court. The respondents were kind enough to oblige and I am D indebted to Miss *Moyo* for having taken the time to prepare and file the heads of argument. At the time of preparing this judgment the applicant had not acceded to this request. In the heads of argument filed by Miss *Moyo* on behalf of the respondents, I am informed that the proceedings herein have been overtaken by events in that the contract has been cancelled. In her view, ordering the first respondent to purge its contempt by issuing an amended E statement is of no force and effect in view of the position prevailing between the parties. The only alternative is consequently that the first respondent be ordered to pay a fine as prayed in the draft order. There were no representations from the respondents on the fine to be paid. I therefore order the payment of the sum prayed for in the draft.

F It is ordered as follows:

1 The first respondent be and is found to be in wilful contempt of the court order of this court under Case No HC 3507/11 dated 13 April 2011.

2 The first respondent be and is hereby ordered to pay a fine in the sum of US$20 000 within ten days of the date of service of this order.

3 The G first respondent shall pay the applicant's costs.

4 The application against second, third and fourth respondent is hereby dismissed with costs.

Chirimuuta & Associates, legal practitioners for the applicant

H *Coghlan, Welsh & Guest*, legal practitioners for the respondents

1 *Holtz v Douglas & Associates & Ors* 1991 (2) SA 797 (O)
2 At p 203-C-E
3 See *Haddow v Haddow* 1974 (1) RLR 5 (G);1974 (2) SA 181 (R) at 182H
4 See *Putco Ltd v TV & Radio Guarantee Co (Pty) Ltd* 1985 (4) SA 809 at 836E

© 2015 Juta and Company (Pty) Ltd.

Document 20 of 75

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2012/Volume 1/S v MANUWA 2012 (1) ZLR 174 (H)

S v MANUWA 2012 (1) ZLR 174 (H)

Citation	2012 (1) ZLR 174 (H)
Case No	Judgment No. HH-47-12
Court	High Court, Harare
Judge	Hungwe J and Mavangira J
Heard	31 January 2012; *CAV*
Judgment	2 February 2012
Counsel	*A Nyamupfukudza*, for the appellant *A Masamba*, for the respondent
Case Type	Criminal appeal
Annotations	No case annotations to date

Flynote

Evidence – *alibi – need for State to disprove alibi if raised – need for accused to furnish State with material details in time for truth of alibi to be investigated*

Headnote

In his defence on a charge of rape, the appellant raised an alibi. In the D defence outline, it was merely stated that, at the time in question, he had been out drinking with his friends. However, no specific mention was made of the place or places where the drinking took place, nor of the names of his drinking companions, nor of the specific times. He gave a detailed account only when he gave evidence. There was no indication E that he had given this full story from the very beginning, i.e. from the time of his arrest.

Held, that where the accused raises the defence of alibi, it is not for him to prove it but for the State to disprove it. This principle does not, however, give the accused the option to keep his cards close to his chest until the very end. The State would have no opportunity to be able to discharge F the onus on it if it is not, at the outset or at a stage that allows the police or the State to investigate its veracity, furnished with the material details of such defence of alibi as the accused relies on.

Cases referred to G

S v Masawi & Anor 1996 (2) ZLR 472 (S)

S v Musakwa 1995 (1) ZLR 1 (S)

S v Mutandi 1996 (1) ZLR 367 (H)

Case information

A Nyamupfukudza, for the appellant

A Masamba, for the respondent H

Mavangira J

Judgment

A **Mavangira J:** The appellant was charged with rape as defined in s 65 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. He pleaded not guilty but was convicted after a trial. He was sentenced to 20 years' imprisonment of which six years was suspended for five years on condition of future good conduct.

B The allegation against the appellant was that he had on 8 May 2009 unlawfully had intercourse with the complainant, a female juvenile, without her consent, knowing that she had not consented to it or realising that there was a real risk or possibility that she might not have consented to it.

The State led evidence from the complainant, her mother, her grandparents C and the medical doctor who examined her. The sum effect of the State evidence is to the following effect: the complainant and her family were co-tenants with the appellant and his family at a house in Glen Norah A, Harare. The complainant was aged 11 at the time of the commission of the offence, having been born on 20 February 1997. It is noted that when she testified before the trial court a year later, she was 12 years old and was in D Grade 7 of her primary school education.

On 8 May 2009 the complainant's mother went to attend a funeral at their rural home. She failed to return home on the same day as had been her intention. At about 6.00 p.m. on that day the complainant was preparing supper for her seven year old twin brothers and herself. The appellant arrived and asked E if her mother was around, the question having apparently been prompted by the fact that the complainant was doing the cooking. The complainant answered that her mother was away after which his next question to her was whether she was the mother that day. The complainant said that she was.

The complainant left for church returning home around 8.00 p.m. in the F company of her two brothers who she then fed and put to bed. She washed up the dishes and swept the house. She locked the kitchen door and went into the bedroom and started praying. The appellant entered the bedroom. She stood up. The appellant said that he wanted to sleep with her. She did not answer. The appellant who was by the doorway started taking off his clothes. The complainant pushed the appellant who held her and gagged her G mouth when she tried to scream. The appellant removed the complainant's pair of jeans. When the complainant tried to scream no one heard her. The appellant pushed her onto the bed where he raped her and thereafter fell asleep while lying on top

of the complainant. When she tried to shake him off he would hold her down. The complainant said that she felt pain and that H she bled. The appellant only left the room about 4.00 a.m.

2012 (1) ZLR p176

Mavangira J

The complainant's mother returned home on a Sunday. There was no A electricity. On the Monday the complainant went to school. On her return from school her mother asked her what had transpired in her absence. The mother's questions were prompted by her observation on how the complainant was walking. The complainant did not divulge the rape to her mother. The complainant's mother examined her on the Tuesday morning after her bath. B She observed a swelling. The complainant was referred to her grandmother who also examined her and asked her if she had had sexual intercourse. The complainant said that she had not. The grandmother indicated that she would take the complainant to the doctor the following day. The complainant thereafter opened up to her grandfather, in the presence of the grandmother, C and divulged that the appellant had raped her.

The complainant said that she had not divulged or reported the rape earlier or to her mother or grandmother because the appellant had threatened to kill her with a knife. She was later examined by a doctor who commented on his medical report regarding the complainant's emotional state that she was "very traumatised" and also that her labia majora were "very swollen". He D also observed that her hymen was swollen shut and torn and bleeding. On her behaviour the doctor's comment was "severely traumatised. Raped all night starting just after say (*sic*) bedtime prayers."

The appellant's defence was an alibi, namely, that he was not at home at the material time having only arrived home in the early hours of 9 May 2009. He E said that he had otherwise spent the whole night drinking with his friends. He denied raping the complainant. He called as defence witnesses his father and one Brian Madzivanyika who he said he was out drinking with.

The appellant raised four grounds of appeal against his conviction. The first is that the lower court erred in finding that the complainant was a credible F witness as she did not mention the number of times that she was raped yet the State outline indicated that she was raped throughout the night. Secondly, that the lower court erred by not taking into account the fact that a period of more than seven days had elapsed before the complainant was medically examined; yet her injuries were said to be fresh thereby giving rise to a G possibility that the offence may have been committed by a person other that the appellant and on a day other than the alleged date. Thirdly, that the lower court erred by not taking due consideration of the fact that the medical report was inconsistent with the doctor's *viva voce* evidence. The fourth is that the lower court erred by not giving reasons as to why the appellant's defence should be dismissed. H

2012 (1) ZLR p177

Mavangira J

A As against sentence the ground raised by the appellant is that the lower court erred in not observing that no evidence was adduced as to the number of counts allegedly committed and thus did not properly reflect on the appropriate sentence.

In his oral submissions before this court Mr *Nyamupfukudza* submitted that B the fact that the complainant was sexually abused is not and was never in dispute in view of the medical evidence. He further submitted that it was not for the appellant to prove his defence of an alibi. Rather, it was for the State to disprove it. In this regard it is noted that all that was said on behalf of the appellant, who was legally represented at his trial, in his defence outline is:

> "On the day in question he went out with friends and was drinking until the early C hours of the following day."

Notably, no specific mention is made therein of the place or places where the drinking took place; nor of the names of his drinking companions; nor of the specific times when the appellant says that he was away from the shared residence. Notably also, besides repeatedly stating that the appellant had not committed the offence, all that was put to the complainant specifically on D this aspect of his defence by way of cross-examination was:

> "He did not commit the offence, but in fact he was out. The accused will say he was out with his friends at the time";

to which the complainant answered:

"The accused was present."

E The case authorities are clear that where the accused raises the defence of alibi, it is not for him to prove it but for the State to disprove it. See *S v Mutandi* 1996 (1) ZLR 367 (H); *S v Musakwa* 1995 (1) ZLR 1 (S); *S v Masawi & Anor* 1996 (2) ZLR 472 (S). In *S v Musakwa* McNally JA stated:

> "What no-one seems to have realised is that the defence raised was that of an alibi. F The appellant was saying that he had only just arrived when he was accused. So he was not there when the confidence trick was set in motion.
>
> The appellant said so right from the beginning. So why did the police not check whether he was being truthful when he said he worked for 'Heat and Systems', who make pressure pipes? Why did they not check his story that he left there at 4.30 p.m.? Why did they not check how long it takes to walk from there to the spot where the offence was committed? Why did they not ask the complainant G what time it was when the two young men approached her?
>
> The court should have been alive to the importance of these matters. It was not simply a matter of the reliability of the young woman's powers of recognition."

In casu, the appellant did not, as already noted above, give specific details of his alleged alibi to allow for investigation thereof. He only purported to H do so after he went on the witness stand when he said *inter alia:*

2012 (1) ZLR p178

Mavangira J

> "I did not rape her. In a nutshell on that evening, I left work around 1800 hours. A I boarded a bus and dropped at Specimen (Spaceman) Shopping Centre. I found my friends around 1900 hours at Dollar Power pub. We started drinking until the early hours of the following day. It was around 0100 hours when we went home. We were three of us, i.e. myself, Brian Madzivanyika and Charles. Brian lives near the shops. So we parted ways and I proceeded with Charles. When I got home everyone was asleep. I then knocked at my father's window. Charles B proceeded to his place. My father woke up to open the door for me. I got into the house. My father locked the door and I went into my room and slept."

There is no evidence that the appellant gave this full story from the very beginning, i.e. from the time of his arrest. The police could not have been expected to check the truthfulness of a story that was not furnished to them. At trial the appellant opted to give these details at an advanced stage in the C proceedings. The trial court cannot therefore also be faulted for dismissing the defence of alibi in the circumstances and on the evidence adduced before it. This is so despite the calling of evidence intended and purporting to support or confirm the appellant's version. Significantly, whilst in his evidence under oath the appellant said that Brian lived near the shops and it was Charles in whose company he was when he got home, the appellant D did not call Charles but rather called Brian.

Significant note is also taken of the complainant's mother's evidence to the effect that the appellant was arrested in the evening because he had changed his time of coming home. He used to come home around 6.00 p.m. before going out for a drink but after the commission of the offence he would go E to the bar for a drink first before coming home.

McNally JA further stated in *S v Musakwa supra,* at p 3C:

> "I have spoken, often enough of the 'boxing ring' approach to criminal trials. It is not good enough simply to throw the complainant and the accused into the ring and decide the matter on credibility …" F

and further down:

> "The alibi defence is referred to in s 158 of the Criminal Procedure and Evidence Act and in Hoffmann and Zeffertt *South African Law of Evidence* 4 ed at p619. The onus is on the State to disprove the alibi: *R v Biya* 1952 (4) SA 514 (A); *S v Khumalo & Ors* 1991 (4) SA 310 (A) at 327 H
>
> The State made no effort to disprove the alibi in this case. Mistakes in identification G can happen. The police should know this. They should have checked."

I do not understand the law to accord an accused the option, when he relies on or claims that the defence of alibi is or should be available to him, to keep his cards close to his chest until the very end. For how else would the State be afforded the opportunity to be able to discharge the onus on it, if it is not furnished with the material details of such defence of alibi as the accused H

2012 (1) ZLR p179

Mavangira J

A relies on at the outset, or at a stage that allows the police or the State to investigate its veracity? *In casu,* as already stated, the trial court was dealing with a legally represented accused. The appellant's legal practitioner before this court is the same counsel who represented him at the trial. In explaining the belated narration or furnishing of these details of the appellant's alibi, B he said that that was so because he had not been furnished with the relevant instructions before that stage. This also tends to be supported by the fact that the details of the appellant's alibi were not put to the complainant during her cross examination by the appellant's counsel.

In *S v Mutandi* 1996 (1) ZLR 367 (H) Gillespie J said at 369-370, after C reviewing some authorities regarding the treatment of the defence of alibi:

> "As the extracts above show, the true enquiry is whether or not the accused is the person who accosted and cheated the complainant. That is to say the real issue is whether or not the complainant's evidence of identification of the accused was reliable. The extract from his judgment shows that the magistrate was obviously prepared to believe the complainant and indeed good reasons are given tending to show the genuineness of her belief and the truthfulness of her evidence. It is D not enough, however, to be able to find that the complainant honestly believes that she has correctly identified the accused. She might be honestly mistaken. This is the true danger which the magistrate, although he uttered the words of caution to himself, failed to appreciate or to consider."

The learned judge proceeded further at 370-371:

> E "As was said by Holmes JA in *S v Mthetwa* 1972 (3) Sa 766 (A) at 768 A-C (and approved by Dumbutshena CJ in *S v Dhliwayo & Another* 1985 (2) ZLR 101 (S) at 107 A-D:
>
> > 'Because of the fallibility of human observation, evidence of identification is approached by the courts with some caution. It is not enough for the identifying witness to be honest: the reliability of his observation must also F be tested. This depends on various factors, such as lighting, visibility, and eyesight; the proximity of the witness; his opportunity for observation, both as to time and situation; the extent of his prior knowledge of the accused; the mobility of the scene; corroboration; suggestibility; the accused's face, voice, build, gait, and dress; the result of identification parades if any; and of course, the evidence by or on behalf of the accused. The list is not G exhaustive. These factors, or such of them as are applicable in a particular case, are not individually decisive, but must be weighed one against the other, in the light of the totality of the evidence, and the probabilities; ..."

Gillespie J further continued at 371C:

> "The present Chief Justice of this country, Gubbay CJ, drew attention to the same need for caution when, in *S v Ndlovu & Others* 1985 (2) ZLR 261 (S) at H 263G-264E, he said:

Mavangira J

> 'Confidence and sincerity are not enough. The possibility of a mistake A occurring in the identification, especially where the witness has not known the person previously, demands that the greatest circumspection be employed.'"

In casu, the appellant was well known to the complainant as they had been resident at the same house for about three months prior to the commission of the offence. On the night in question the complainant saw the appellant firstly at 6.00 p.m. and later at around 8.00 p.m. On both occasions he spoke to her. B Although it was evening and therefore dark outside, the room in which she was when she saw the appellant was lit. The appellant was not at a distance far from where she was; he was at close range. The appellant spent the night in the complainant's room, leaving only at 4.00 a.m. The appellant had learnt earlier that the complainant's mother was away. In addition, the complainant, C who hitherto always used to sleep in the same bedroom with her sister, on this day was in the same bedroom with her two seven-year-old brothers in their parents' bedroom. The appellant accepted that the complainant knew him and would thus not fail to identify him. He suggested that the allegations against him were fabricated by the complainant's mother as there was bad blood between him and her. D

In the first place, this allegation was not put to the complainant's mother when she was in the witness box. In addition the complainant's mother fairly stated that she did not know who had raped the complainant and that it was only the complainant who could say who it was. Secondly, this was also said for the first time only in the appellant's evidence after the close of the State case. E

On a consideration of such of the factors as are applicable in this case to test the reliability of the complainant's identification of the appellant, it appears that for the reasons discussed above, the evidence by and on behalf of the appellant is so highly improbable as to be unworthy of belief.

Regarding the attack that it is not clear as to who the complainant eventually opened up to between her grandparents, the trial magistrate's comment that in F the circumstances of this case, that aspect is irrelevant and misplaced, finds support on a perusal of the evidence on record. It is clear therefrom that it was only when the grandmother examined the complainant the grandfather was not also present. After the examination both grandparents were present during their talk with the complainant and particularly when she opened up G about the rape. There is no inconsistency to talk about on this part of the State's evidence, contrary to what the appellant's legal practitioner sought to urge the court to find.

The appellant's contention that there is also inconsistency in the State case by reason of the fact that no specimens were taken from him to try and connect him with any infection that the complainant may have contracted is not H

A based on any evidence on record. There is no evidence that the complainant contracted any infection and therefore this contention, as eventually and properly conceded by the appellant's legal practitioner, makes no sense on the facts of this case.

In casu, it is of significance that the offence came to light a couple of days B after its commission. The complainant, 11 years old at the time of the offence, said that the appellant threatened her with a knife, hence her failure and/or reluctance to report the offence to her mother and initially to her grandparents as well. It is also significant to note that it came to light as a result of the complainant's mother's observation of the manner of the complainant's walk or gait after her return from the funeral. The medical examination confirmed C the sexual abuse; the complainant had been raped.

The details of the medical report are disturbing. The doctor observed that the complainant was "very traumatised" or "severely traumatised" and that her labia majora were "very swollen". Furthermore, that her hymen was "swollen shut – torn and bleeding". She was also found to have sustained various D injuries as chronicled by the doctor at p 48 of the record of proceedings, including tears on the hymen: one at 12 o'clock, a small tear at 10 o'clock, a medium-sized tear at 4 o'clock, a deeper tear than the 1 o'clock tear at 5 o'clock; then at 6 o'clock a tear between the vagina and the anus, the tear continuing through the hymen into the vagina; another tear at 7 o'clock and a small one at 1 o'clock. The doctor's evidence or expert opinion was E that all these injuries and tears were caused by the force of penetration or attempted penetration.

Although the doctor's report states that the complainant was raped all night, it is true, as submitted by the appellant's legal practitioner, that on the record, no evidence was adduced from the complainant as to how many times F she was raped that night. That, however, is of no material consequence as the appellant was charged with only one count of rape. There is no effect therefore, on the conviction of the appellant. It may be that this may be a consideration relevant for purposes of the appeal against sentence but certainly not in relation to the charge and or conviction. The appellant's conviction is therefore supported by the evidence on record and there is no basis for G quashing it. The concession by State counsel with regard to conviction does not find favour with this court as it is not supported by the evidence.

With regard to sentence, it is trite that sentencing discretion is generally the trial court's. The authorities are clear that an appeal court may only interfere in circumstances where the lower court has misdirected itself or where the H sentence appealed against is unduly harsh or so severe as to induce a sense

---

of shock. In his comments to the notice and grounds of appeal, the trial A magistrate said that he agreed that the appellant's sentence be reduced. He opined that another court may reduce the sentence by two or three years' imprisonment. That in itself is not a ground entitling an appeal court to interfere. It is however noted that *in casu,* the HIV tests conducted on the complainant fortunately produced a negative result.

It is true that justice must always be tempered with mercy. Mr *Masamha* B for the State submitted that a sentence in the region of 12 to 13 years would meet the justice of the case and suffice. There

is no doubt however on the facts of this case that a custodial sentence is called for. At the time of the trial the appellant was said to be 30 years old. He would thus have been 29 at the time of the commission of the offence. The complainant was only 11 C years old. As the magistrate stated in his reasons for sentence, the appellant was brutal to a defenceless minor towards whom he should have assumed a protective role. He cannot escape a lengthy term of imprisonment. Any other sentence would send the wrong message abroad.

In the result, for the above reasons the appeal against conviction fails and is D hereby dismissed. The appeal against sentence succeeds. The appeal against sentence is allowed to the extent that the sentence of the lower court be and is hereby set aside and is substituted with the following:

> "16 years' imprisonment of which three years' imprisonment is suspended for five years on condition the accused is not during that period convicted of an offence involving sexual abuse on the person of another and for E which he is sentenced to imprisonment without the option of a fine."

HUNGWE J concurred. F

© 2015 Juta and Company (Pty) Ltd.

Document 21 of 75

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2012/Volume 1/MASHONALAND TURF CLUB v MUTANGADURA 2012 (1) ZLR 183 (S)

MASHONALAND TURF CLUB v MUTANGADURA 2012 (1) ZLR 183 (S)

Citation	2012 (1) ZLR 183 (S)
Case No	Judgment No. S-5-12
Court	Supreme Court, Harare
Judge	Ziyambi JA, Garwe JA & Gowora AJA
Heard	6 February 2012
Judgment	6 February 2012
Counsel	*N Madya*, for the appellant *P Makuwaza*, for the respondent
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

C **Employment** – *contract – termination – dismissal – grounds for – misconduct going to root of contract of employment – employer's discretion as to whether or not to dismiss – appeal to arbitrator or Labour Court – right of arbitrator or Labour Court to alter penalty of dismissal – no right to alter penalty in absence of misdirection or unreasonableness*

Headnote

D The respondent, a managerial employee employed by the appellant for 20 years, participated as spokesman in, and facilitated, an unlawful industrial action by the employees of the appellant. Following a disciplinary hearing, the respondent was found guilty of two acts of misconduct E namely, conduct inconsistent with the express or implied terms of his contract and disobedience to a lawful order, as a result of which finding he was dismissed from employment. The arbitrator to whom the matter was referred for compulsory arbitration found that the appellant could not be faulted in finding that the respondent's conduct warranted his dismissal from employment and that the two offences of which the F respondent was found guilty and in respect of which he was dismissed by the appellant went to the very basis of his contract of employment with the respondent. He found the appellant's decision to dismiss the respondent to be "unassailable". In spite of that finding, he found that the dismissal was unfair in the circumstances, principally because only the respondent, out of all the employees who participated in the G industrial action, had been singled out for disciplinary action. He found to be mitigatory the fact that the unlawful industrial action consisted of a peaceful sit-in which lasted only 2½ hours; that the workers had genuine grievances; and that the record of service of the respondent had been accorded little weight. He therefore set aside the penalty of the H dismissal and imposed in its place a final warning. The Labour Court

Ziyambi JA

agreed with the arbitrator and upheld his award. It found that, in terms A of s 12B(4) of the Labour Act [*Chapter 28:01*], the arbitrator was correct in setting aside the penalty of dismissal imposed by the appellant. On further appeal to the Supreme Court:

Held, that the law is clear that, in a situation such as this, the employer is entitled to dismiss the employee. The fact that the respondent was singled B out for disciplinary action becomes irrelevant once it is accepted that his misconduct went to the root of his employment contract. In the exercise of their powers in terms of s 12B(4) of the Labour Act, the Labour Court and arbitrators must be reminded that the section does not confer upon them an unbounded power to alter a penalty of dismissal imposed by an employer just because they disagree with it. In the absence of a C misdirection or unreasonableness on the part of the employer in arriving at the decision to dismiss an employee, an appeal court will generally not interfere with the exercise of the employer's discretion to dismiss an employee found guilty of a misconduct which goes to the root of the contract of employment. Both the Labour Court and the arbitrator erred in substituting their discretion for that of the employer in setting D aside the dismissal.

Case referred to

Jiah & Ors v PSC & Anor 1999 (1) ZLR 17 (S)

Legislation considered E

Labour Act [*Chapter 28:01*], s 12B(4)

Case information

N Madya, for the appellant

P Makuwaza, for the respondent F

Judgment

Ziyambi JA: This is an appeal against the judgment of the Labour Court in which it upheld an award by an arbitrator dismissing the appellant's appeal. The arbitrator substituted a penalty of a final warning in place of an order of dismissal made by the appellant.

It is common cause that the respondent, a managerial employee employed G by the appellant for 20 years, participated as spokesperson in, and facilitated, an unlawful industrial action by the employees of the appellant. Following a hearing, the respondent was found guilty of two acts of misconduct namely, conduct inconsistent with the express or implied terms of his contract and disobedience to a lawful order, as a result of which he was dismissed from employment. H

Ziyambi JA

A The arbitrator to whom the matter was referred for compulsory arbitration found that in the process of the unlawful industrial action, the respondent "openly taunted members of management and challenged their authority. He openly called for the dismissal of six managers and brought about chaos and mayhem at the appellant's business premises on 3 and 4 December 2008. He held a very senior position as branch manager and he openly led B and associated himself with his subordinates in an act of disobedience to his superiors". He found that the appellant could not be faulted in finding that the respondent's conduct warranted his dismissal from employment and that the two "offences" of which the respondent was found guilty and in respect of which he was dismissed by the appellant went to the "very basis C of his contract of employment with the respondent. He found the appellant's decision to dismiss the respondent to be "unassailable".

Notwithstanding the above findings, the arbitrator went on to find that the dismissal was unfair in the circumstances, principally because only the respondent, of all the employees who participated in the industrial action, had been singled out for disciplinary action. He found to be mitigatory the fact D that the unlawful industrial action consisted of a peaceful sit-in which lasted only 2½ hours; that the workers had genuine grievances; and that the record of service of the respondent had been accorded little weight. He therefore set aside the penalty of the dismissal and imposed in its place a final warning.

The court *a quo* agreed with the arbitrator and upheld his award. It found E that in terms of s 12B(4) of the Labour Act, the arbitrator was correct in setting aside the penalty of dismissal imposed by the appellant. In addition, the court *a quo* found as mitigating the submission that the respondent had acted both in a personal and representative capacity and that he was leading workers who "needed little persuasion".

The gravamen of the appeal is that the Labour Court erred in upholding the F manner in which the arbitrator exercised his discretion in terms of s 12B(4) of the Labour Act and that the decision of the court *a quo* ignored the employer's right to dismiss an employee found guilty of an act of misconduct which goes to the root of the employment contract. Alternatively, it was contended that the order made by the arbitrator was defective, in that it made no award of G damages as an alternative to reinstatement as required by s 89(2)(c)(iii) of the Labour Act and that the court *a quo* misdirected itself in upholding the order.

Having considered submissions of both counsel, we are of the view that *Jiah's* case, to which we were referred by the respondent, is not applicable to the circumstances of this case. The record clearly shows, and the arbitrator

---

Ziyambi JA

found, that the respondent committed serious acts of misconduct which went A to the root of his contract of employment. The law is clear that in a situation such as this the employer is entitled to dismiss the employee. The fact that the respondent was singled out for disciplinary action becomes irrelevant once it is accepted that his misconduct went to the root of his employment contract.

In the exercise of their powers in terms of s 12B(4) of the Labour Act, the B Labour Court and arbitrators must be reminded that that the section does not confer upon them an unbounded power to alter a penalty of dismissal imposed by an employer just because they disagree with it. In the absence of a misdirection or unreasonableness on the part of the employer in arriving at the decision to dismiss an employee, an appeal court will generally not interfere with the exercise of the employer's discretion to dismiss an employee found C guilty of a misconduct which goes to the root of the contract of employment.

We are, therefore, of the unanimous view that both the Labour Court and the arbitrator erred in substituting their discretion for that of the employer in setting aside the dismissal.

In view of the decision we have reached, it is not necessary to consider D the alternative relief sought by the appellant.

It is accordingly ordered as follows:

(1) The appeal be and is hereby allowed with costs.

(2) The order of the court *a quo* is set aside and substituted as follows:

(i) The appeal is allowed with no order as to costs. E

(ii) The award of the arbitrator is set aside and the dismissal of the respondent is hereby confirmed.

GARWE JA and GOWORA AJA concurred. F

Wintertons, appellant's legal practitioners

Sinyoro & Partners, respondent's legal practitioners

1 *Jiah & Ors* v *Public Service Commission & Anor* 1999 (1) ZLR 17

© 2015 Juta and Company (Pty) Ltd.

Document 22 of 75

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2012/Volume 1/CHIKOMO v YEHUDAH 2012 (1) ZLR 187 (H)

CHIKOMO v YEHUDAH 2012 (1) ZLR 187 (H)

Citation	2012 (1) ZLR 187 (H)
Case No	Judgment No. HH-29-12
Court	High Court, Harare
Judge	Mavangira J
Heard	28 June 2011; *CAV*
Judgment	8 February 2012
Counsel	Miss *R Nemaramba*, for the applicant *E T Moyo*, for the respondent
Case Type	Opposed application for summary judgment
Annotations	No case annotations to date

Flynote

Interest – rate – *rate greater than prescribed rate – interest may be charged at such rate if parties have so agreed*

Headnote

D The respondent borrowed a sum of money from the applicant. The loan agreement provided that if he did not repay within the agreed period of a week, interest would be charged at 25 percent. It was also agreed that the respondent would pay "collection charges as well as costs of suit for the legal practitioner and any other costs incurred by [the applicant]". E When the applicant sought summary judgment, the respondent, although admitting that he was indebted to the applicant for the capital debt, averred that the applicant was claiming usurious interest as the applicant was not a lending institution or a registered money lender in terms of the Moneylending and Rates of Interest Act [*Chapter 14*:*14*]. Furthermore, F the claim for collection commission was not within

the ambit of the Law Society tariffs and has no legal basis. Under s 8 of the Act, "No lender shall stipulate for, demand or receive from the borrower interest at a rate greater than the prescribed rate of interest."

Held, that under s 4 of the Prescribed Rate of Interest Act [*Chapter 8:10*], if a debt bears interest and the rate at which interest is to be calculated G is not governed by any other law or by an agreement or trade custom or in any other manner, such interest shall be calculated at the prescribed rate as at the date on which such interest begins to run. As there was an agreement governing the rate of interest, the respondent could not H escape from the provisions of the agreement.

Mavangira J

Held, further, that there was no agreement to pay costs on the legal practitioner A and client scale. The statement merely provided for "costs of suit for the legal practitioner". There was no ground for costs on the higher scale.

Cases referred to

Kingstons Ltd v L D Ineson (Pvt) Ltd 2006 (1) ZLR 451 (S) B

Scotfin Ltd v Ngomahuru (Pvt) Ltd 1997 (2) ZLR 567 (H)

SEDCO v Guvheya 1994 (2) ZLR 311 (H)

Tselentis House (Pvt) Ltd v Southern African P & P House (Pvt) Ltd 1995 (1) ZLR 56 (H)

Legislation considered C

Moneylending and Rates of Interest Act [*Chapter 14:14*], s 8

Prescribed Rates of Interest Act [*Chapter 8:10*], s 4

Case information

Miss *R Nemaramba*, for the applicant

E T Moyo, for the respondent D

Judgment

Mavangira J: The following facts are common cause. On 22 January 2010 the parties entered into an agreement in terms of which the applicant lent the sum of US $9 500 to the respondent. It was an express term of the agreement that payment would be made within seven days from the date of lending. The respondent failed to repay the lent amount within the agreed E period. He then requested for an extension of time and it was agreed that he would pay back the full amount on or by 30 June 2010. The respondent signed an acknowledgement of debt in which he acknowledged owing the respondent the sum of US $9 500 and also promised to pay the amount owing by or on 30 June 2010. F

The following is also stated on the acknowledgment of debt:

> "I agree that if I fail for any reason to pay this amount by the agreed date an interest of 25% will be charged.
>
> Legal action will be taken if the money plus interest is not paid within 24 hours from the above agreed date of payment.
>
> I hereby undertake and agree to pay the 25% interest, collection charges as well G as costs of suit for the legal practitioner and any other costs incurred by Chiedza Chikomo if legal action should be taken against me for the recovery of this debt or any other sums due in terms of this acknowledgment of debt."

The respondent did not make the payment by or on 30 June 2010. The applicants' legal practitioners wrote and served the respondent with a letter of demand. The respondent did not respond. On 16 July 2010 the applicant, H

Mavangira J

A through his legal practitioners, caused summons to be issued against the respondent claiming payment of the $9500, interest thereon of 25 per cent of the capital debt, ten per cent collection commission and legal costs at the legal practitioner and client scale. The respondent was served with the summons and he entered appearance to defend through his legal practitioners. The applicant has now made this application for summary judgment on the basis B that the respondent has no defence to the claim for the capital debt of $9 500.

The respondent opposes the application on the grounds that, although he is indebted to the applicant for the capital debt of $9 500, the applicant is claiming usurious interest and that, as the applicant is not a lending institution or a registered money lender in terms of the Moneylending and C Rates of Interest Act [*Chapter 14*:*14*]. Furthermore, the claim for collection commission is not within the ambit of the Law Society tariffs and has no legal basis. The respondent also contends that, as the agreement between the parties is consequently illegal, it would be equitable for costs to be on an ordinary scale.

D In *Kingstons Limited v L D Ineson (Pvt) Ltd* 2006 (1) ZLR 451 (S) Ziyambi JA stated:

> "not every defence raised by the defendant will succeed in defeating the plaintiff's claim for summary judgment. Thus what the defendant must do is to raise a *bona fide* defence – a plausible case with sufficient clarity and completeness to enable the court to determine whether the affidavit discloses a *bona fide* defence. E He must allege facts which, if established, would entitle him to succeed.

In casu, the respondent does not deny liability in respect of the principal debt in the sum of US$9 500. His opposition to the application is principally on the issues of interest, collection charges and costs. These issues are all dealt with in the acknowledgment of debt.

F Section 8 of the Money Lending and Rates of Interest Act stipulates as follows:

> "**8. Maximum rates of interest**
>
> (1) No lender shall stipulate for, demand or receive from the borrower interest at a rate greater than the prescribed rate of interest."

The respondent seeks refuge in this provision in his quest to defeat the G application. However, s 4 of the Prescribed Rates of Interest Act [*Chapter 8*:*10*] provides as follows:

> "If a debt bears interest and the rate at which interest is to be calculated is not *governed* by any other law *or by an agreement* or trade custom or in any other manner, such interest shall be calculated at the prescribed rate as at the date on which such interest begins to run, unless a court of law, on the ground of special H circumstances relating to that debt, orders otherwise" (emphasis added).

Mavangira J

In casu, the rate at which interest is to be calculated is governed by an A agreement as reflected in the acknowledgment of debt. The respondent cannot therefore, in my view, find any escape from the applicant's claim for 25 per cent interest as this is based on or governed by the agreement between the parties. Furthermore, by virtue of the provisions of s 4 of the Prescribed Rates of Interest Act, the acknowledgment of debt cannot, as Miss B *Nemaramba* correctly submitted, be said to be tainted with illegality. The applicant's claim for 25 per cent interest is thus justified and the respondent has no valid or *bona fide* defence against it.

The other claims contested by the respondent *in casu* are the claims for collection commission and costs on a legal practitioner and client scale. Miss *Nemaramba* referred the court to case authorities including *Tselentis House* C *(Pvt) Ltd v Southern African P&P House (Pvt) Ltd* 1995 (1) ZLR 56 (H) and *SEDCO v Guvheya* 1994 (2) ZLR 311 (H) in support of the proposition that where a party agrees to pay collection commission and legal costs, as in this case, the court should grant an order for the same. In *Scotfin Ltd v Ngomahuru (Pvt) Ltd* 1997 (2) ZLR 567 (H) Smith and Gillespie JJ stated at 582 B:

> "As is well known, costs are awarded at this higher rate only in exceptional D circumstances. They may, however, be awarded when there is agreement to such an effect. The purpose of such agreement, quite obviously, is the same as the intention behind an agreement that the debtor will be liable to reimburse his creditor collection commission. It is to ensure that the creditor does not suffer the inevitable loss which will be incurred as a result of the taxation of a party E and party bill, even though he recovers his costs."

They proceed at 584F-G:

> "The appropriate form of order for such relief moved in the High Court is accordingly the following, where there is an agreement between the creditor and debtor that collection commission and costs on the higher

scale may be recovered: F

> 'Judgment for the plaintiff in the sum of $x together with interest at the prescribed rate, presently y% per annum from ..... until the amount is paid in full and collection commission thereon calculated in accordance with by-law 70 of the Law Society of Zimbabwe By-laws, 1982, and costs on the legal practitioner and client scale to the extent such costs are permitted in proviso (iii) to by-law 70(2).'" G

In the acknowledgment of debt *in casu* the respondent agreed, *inter alia,* that should legal action be taken against him for the recovery of the debt, he would pay "collection charges as well as costs of suit for the legal practitioner and any other costs incurred" by the applicant. There is no agreement to pay costs on the legal practitioner and client scale. The statement merely states "costs of suit for the legal practitioner". I am not persuaded it is necessary to H

Mavangira J

A exercise discretion and award costs on the legal practitioner and client scale as urged by Miss *Nemaramba*. Costs will be awarded on the ordinary scale. The respondent also agreed to pay collection charges. I will be guided by the determination in the *Scotfin* case *supra* at 584 F-G in granting the relief sought by the applicant in this respect.

The respondent has failed to raise a valid defence to the applicant's claim. He B has not alleged any facts which, if established, would entitle him to succeed. His lack of *bona fides* is also shown by his non payment of even the capital debt only, for which he does not dispute liability. In the circumstances, it appears to me that there is no impediment to the granting of the order sought by the applicant with the modifications indicated above. It is therefore C ordered as follows:

> That the respondent shall pay to the applicant the sum of US$9 500, together with 25 per cent interest thereon, collection commission thereon calculated in accordance with by-law 70 of the Law Society of Zimbabwe By-Laws, 1982 and costs of suit.

D *Chihambakwe Mutizwa & Partners*, applicants' legal practitioners

E *Scanlen & Holderness*, respondent's legal practitioners

© 2015 Juta and Company (Pty) Ltd.

Document 23 of 75

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2012/Volume 1/MPUKUTA v MOTOR INSURANCE POOL & ORS 2012 (1) ZLR 192 (H)

MPUKUTA v MOTOR INSURANCE POOL & ORS 2012 (1) ZLR 192 (H)

Citation	2012 (1) ZLR 192 (H)
Case No	Judgment No. HB-25-12
Court	High Court, Bulawayo
Judge	Ndou J
Heard	3 February 2012; *CAV*
Judgment	9 February 2012
Counsel	Miss *C Mudenda*, for the applicant *D Ochieng*, for the respondents

Case Type Civil application

Annotations No case annotations to date

Flynote

Practice and procedure – *declaratory order – principles – applicant must have a direct and substantial interest in subject matter of suit – such interest must relate to an existing, future or contingent right – order may not be granted to resolve academic or abstract point – discretion* D *of court – duty of High Court to decide whether the declarator sought is a proper one*

Headnote

The condition precedent to the grant of a declaratory order is that the applicant 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 E prejudicially affected by the judgment of the court. The interest must relate to an existing, future or contingent right. The court will not decide abstract, academic or hypothetical questions unrelated to such interest. That is the first stage in the determination by the court. At the second stage of the enquiry, it is incumbent upon the court to decide whether or F not the case in question is a proper one for the exercise of its discretion under s 14 of the High Court Act [*Chapter 7:06*]. In this regard some tangible and justifiable advantage in relation to the applicant's position, with reference to an existing, future or contingent legal right or obligation, must appear to flow from the grant of the declaratory order. A matter G that does not present a live controversy having practical consequences is not justiciable.

Cases referred to

Adbro Invstm Co Ltd v Min of the Interior & Ors 1961 (3) SA 283 (T)

Geldenhuys & Neethling v Beuthin 1918 AD 426 H

Ndou J

A *Milani & Anor v SA Medical & Dental Council & Anor* 1990 (1) SA 899 (T)

Mnondo Residents' Association v Moyo & Ors HH-66-07

Munn Publishing (Pvt) Ltd v ZBC 1994 (1) ZLR 337 (S)

Radio Pretoria v Chairman, Independent Communications Authority of SA & Anor 2005 (1) SA 47 (SCA) B

Legislation considered

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

Case information

Miss C Mudenda, for the applicant

C *D Ochieng,* for the respondents

Judgment

Ndou J: The applicant seeks an order in the following terms:

"It is ordered:

(a) That the first respondent is not an insurer in terms of the Insurance Act but an association of insurers with no capacity to issue statutory policies in D terms of the Road Traffic [*Chapter 13:11*] or any other law.

(b) That the insurance being issued by the second respondent for and on behalf of first respondent is a nullity and therefore void *ab initio*.

(c) That alternatively to para (a) and (b) above if the insurance being issued by the second respondent on behalf of the first respondent be valid, the first E and second respondents be and are hereby ordered to issue cover notes and discs in terms of s 27(2) of the Road Traffic Act [*Chapter 13:11*].

(d) That the first, second and third respondents to pay costs of suit jointly and severally, the one paying the other to be absolved."

Put in another way, the applicant seeks a declaration, in terms of s 14 of the High Court Act [*Chapter 7:06*] ("s 14"), primarily on the fact that the F first respondent is not an insurer. The salient facts are the following. The applicant is a Zimbabwean citizen who is permanently resident in Botswana. His family is ordinarily resident in Zimbabwe. As a result he regularly drives to Zimbabwe to visit his family. Upon entry into Zimbabwe, he applies for a temporary import permit for his foreign registered motor vehicle. G He is also required by the law to obtain insurance in respect of his motor vehicle. That insurance, at the port of entry, is only obtainable from the second respondent, who grants it on behalf of and in the name of the first respondent. The second respondent endorses a stamp in the name of the first respondent on the temporary import permit as proof that the applicant has obtained statutory insurance. The applicant alleges that upon renewal H of a temporary import permit, the second respondent merely extends the

Ndou J

date on the permit without extending the statutory insurance. The applicant A alleges that, as a director in Botswana, he is entitled to a re-imbursement of the expenses which he incurs when he travels. However, his company is refusing to refund him the money which he pays for insurance upon entry into Zimbabwe on the grounds that his purported entry into Zimbabwe is not insured "by a registered and licenced insurer". B

The applicant further cites a single incident when a Zimbabwe Republic Police officer asked for a disc as defined by the Road Traffic Act at a police road block. The applicant states that "it is this incident which stimulated" him to seek a legal opinion on the matters at hand. This culminated in the current application. At the time of the filing of the application, the applicant was not an insurance policy holder and he is non-resident. The applicant seeks, C in essence, a declaratory relief regarding the validity of insurance policies issued in the name of the first respondent, and, alternatively, mandatory relief as regards the issuance of vehicle discs and cover notes by the first respondent. The first respondent is a Motor Insurance Pool formed by the Temporary Risk Pool agreement between insurers and the Government of D Zimbabwe, represented by the responsible Minister of Road and Road Traffic. The rights and duties of the Pool are clearly defined by the said agreement. This agreement has been in existence since January 1965. The relationship between the first and second respondents is governed by an Agency Agreement agreed and signed by the two parties in February 2010. The respondents raised points *in limine* which I propose to deal with them in turn. E

Is the application incompetent for raising a purely moot cause?

It is trite law that it is not the business of the courts to dispense legal advice or express opinions on abstract points. As stated by Innes CJ in *Geldenhuys & Neethling v Beuthin* 1918 AD 426 at 441:

> "[The courts] exist for the settlement of concrete controversies and actual F infringements of rights, not to pronounce upon abstract questions, or to advise upon differing contentions, however important."

It is therefore a pre-requisite to the grant of declaratory relief that the applicant must have some "existing, future or contingent right" that would be affected by the order of the court – *Munn Publishing (Pvt) Ltd v ZBC* 1994 (1) ZLR 337 (S) G at 343E to 344E. In other words, "the condition precedent to the grant of a declaratory order is that the applicant 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 of the court" – *Milani & Anor v South African Medical & Dental Council & Anor* 1990 (1) SA 899 (T) at 902G-H. The interest must relate to an existing, future or contingent H

Ndou J

A right. The court will not decide abstract, academic or hypothetical questions unrelated to such interest. This is the first stage in the determination by the court. At the second stage of the enquiry,

it is incumbent upon the court to decide whether or not the case in question is a proper one for the exercise of its discretion under s 14. In this regard, "some tangible and justifiable advantage B in relation to the applicant's position with reference to an existing, future or contingent legal right or obligation must appear to flow from the grant of the declaratory order": *Adbro Investment Co. Ltd v Minister of the Interior & Ors* 1961 (3) SA 283 (T) at 285B-C. A matter that does not present a live controversy having practical consequences is not justiciable: *Radio Pretoria v Chairman, Independent Communications Authority of SA & Anor* 2005 (1) SA 47 (SCA) C and *Mnondo Residents' Association v Moyo & Ors* HH-66-07. In this case ,the applicant is not an insured of first respondent, because he admits having allowed his policy to lapse three months before making this application. He is not being prosecuted for any real or imagined offence and in any event he has not joined the authorities who might prosecute him. D His papers disclose only a minor misunderstanding at a police road block, which was in any event resolved in his favour. He only professes to have a "right" against his Botswana employer, who is not party to these proceedings anyway. He has not proved that he is entitled to reimbursement of money expended on his vehicle insurance whilst visiting Zimbabwe. There is no policy document produced evincing such entitlement or rights. In the final E analysis, applicant's case against the respondents relates to no more than a burning curiosity as to purely theoretical propositions. The applicant himself states that he simply found himself "wondering" about certain issues "that came to mind" and that he sought legal advice in relation to them. It shows that the applicant has really come to court just to test the correctness of the F advice he received. There is no live dispute having any practical consequences as between the applicant and the respondents. This application presents the court with a moot cause. The applicant has not alleged that he made a claim or that there is any other reason to test the validity of the bygone policy. He simply has no relationship with any of the respondents now. Assuming in his favour that he may buy further policies, the applicant's own papers G show that any actual dispute that might arise in the future in relation to the issues he "wonders" about, would actually be between the applicant and some parties other than the respondents (i.e. the police or his employer in Botswana) anyway. There is, therefore, no proper dispute between him and the respondents and any judgment the court gives would be no more H than its opinion as to the correctness or otherwise of the applicant's views

Ndou J

on the issues about which he professes to be "worried". It would not be a A determination of any concrete controversy or any infringement of rights.

On this point alone, I dismiss the application with costs on the ordinary scale.

Mudenda Attorneys, applicant's legal practitioners

Atherstone & Cook, c/o Calderwood, Bryce Hendrie & Partners, respondents' B legal practitioners C

© 2015 Juta and Company (Pty) Ltd.

Document 24 of 75

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2012/Volume 1/ZIMBABWE ONLINE (PVT) LTD v TELECONTRACT (PVT) LTD 2012 (1) ZLR 197 (H)

ZIMBABWE ONLINE (PVT) LTD v TELECONTRACT (PVT) LTD 2012 (1) ZLR 197 (H)

Citation 2012 (1) ZLR 197 (H)

Case No Judgment No. HH-206-12

Court High Court, Harare

Judge Mutema J

Heard 9 February 2012

Judgment 9 February 2012

Counsel *E W W Morris*, for the applicant
Ms *R Theron*, for the respondent

Case Type Opposed application

Annotations No case annotations to date

Flynote

Costs – *legal practitioner and client scale – when may be granted – unsuccessful party's conduct completely unreasonable*

Practice and procedure – *particulars – application for – what particulars* D *litigant is entitled to – purpose of particulars*

Headnote

Whilst the courts will not lightly accede to a prayer for an award of costs on a legal practitioner and client scale, such an award will be granted where the unsuccessful party's conduct has been completely unreasonable and reprehensible. Where a party's attitude has been that of a man who E has deliberately and stubbornly refused to bring a dispassionate mind to bear on the dispute, which could have been resolved quite amicably and inexpensively if he had showed the slightest co-operation, it would in such circumstances be quite unfair for the successful party to be put out of pocket in the matter of costs. The unsuccessful party's conduct could rightly be described as vexatious or reckless or frivolous, any one F of which could be a ground for the award of costs on the higher scale.

The function of particulars, required to enable a party to plead to his opponent's pleading, is to provide a more precise, albeit fuller, statement of the issues which will arise on the trial. The supply of such particulars will, of necessity, limit the generality of the allegations in the pleadings and G will prevent the party so supplied from being taken by surprise at the trial. Where another party's claim or defence is not sufficiently clear, a party may request further particulars of the claim which will enable him to plead. Particulars are intended to define the issues and prevent a party from being taken by surprise at the trial. Only those particulars which are strictly necessary will be supplied and not where disclosure H of evidence is sought, or where the request is fishing expedition or

---

Mutema J

to gain time or to assemble material for cross-examination or where A particulars relate to a statement of law. There is a tendency on the part of practitioners to abuse the further particulars procedure by making unnecessary and unduly lengthy requests for information before pleading, thereby clouding the real issues between the parties. The particulars to which a litigant is entitled are particulars of matters in respect of which B the onus is on the opponent.

Cases referred to

Borrowdale Country Club v Murandu 1987 (2) ZLR 77 (H)

Nel v Waterberg Landbouwers Ko-operatieve Vereeniging 1946 AD 597

Purdon v Muller 1961 (2) SA 211 (A) C

Trinity Eng (Pvt) Ltd v CBZ 1999 (2) ZLR 417 (H)

Trinity Eng (Pvt) Ltd v CBZ 2000 (2) ZLR 385 (H)

White v Moffett Building & Contracting (Pty) Ltd 1952 (3) SA 307 (O)

Case information

E W W Morris, for the applicant D

Ms *R Theron,* for the respondent

Judgment

Mutema J: The two applications were consolidated for the simple reason that they involve the same parties wherein the respondent, as the plaintiff, instituted actions against the applicant as the defendant, claiming certain amounts of money "being the outstanding balance owed to the plaintiff by E the defendant for *inter alia* internet access provider services".

In case No. HC 8118/10 for instance, the respondent's declaration is composed of 13 paragraphs, excluding the prayer, spanning over six pages. In both cases the applicant filed a request for further particulars. Of the 50 further particulars requested in HC 8118/10 only one relating to the prayer regarding F the basis on which interest is claimed from 26 April 2010, was supplied.

In both cases, in refusing to supply the requested further particulars, the respondent reasoned thus:

> "The particulars requested herein are within the defendant's knowledge. The defendant has a copy of the agreement as well as the invoices. In any event, the G further particulars requested herein are matters of evidence and or law which the defendant does not require for purposes of pleading".

The foregoing reply prompted the applicant in each case to lodge the present court application to compel provision of the further particulars requested on 10 December 2010. In both applications the respondent opposed the relief sought on the basis quoted above. H

Mutema J

A Herbstein and van Winsen *The Civil Practice of the Superior Courts in South Africa* 3 ed at p 310 state that the function of particulars required to enable a party to plead to his opponent's pleading is to provide a more precise, albeit fuller, statement of the issues which will arise in the trial. The supply of such particulars will, of necessity, limit the generality of the allegations in the pleadings and will prevent the party so supplied from being taken by B surprise at the trial.

In its heads of argument, the respondent aptly captured the relevant law governing the subject of further particulars. For instance, Mary Welsh *Civil Practice Handbook* (1996) at pp 8-10 says that where another party's claim or defence is not sufficiently clear, a party may request further particulars C of the claim which will enable him to plead. Particulars are intended to define the issues and prevent a party from being taken by surprise at the trial. Only those particulars which are strictly necessary will be supplied and not where disclosure of evidence is sought, or where the request is a fishing expedition or to gain time or to assemble material for cross-examination or where particulars relate to a statement of law.

D She also cites *Trinity Engineering (Pvt) Ltd v CBZ* 1999 (2) ZLR 417 (H) at 421B where Smith J quoted with approval *White v Moffett Building and Contracting (Pty) Ltd* 1952 (3) SA 307 (O), which held that a defendant was entitled to request and be supplied with particulars when the plaintiff's declaration was lacking in certainty and particularity.

E In *Purdon v Muller* 1961 (2) SA 21 (A) Ogilvie Thompson JA, dealing with the detailed further particulars which had been requested therein, cautioned against the tendency on the part of practitioners to abuse the further particulars procedure by making unnecessary and unduly lengthy requests for information before pleading, thereby clouding the real issues between the parties.

F Also, in *Trinity Engineering (Pvt) Ltd v CBZ* 2000 (2) ZLR 385 (H) at 389 E-390 Gillespie J said,

> "In terms of these rules of court, particulars of a claim or defence may be supplied on the principle that:
>
> > 'A litigant is entitled to know the cause or defence he has to meet; not only to know whether he should admit or deny the particular allegation. He is G entitled to be placed in the position of being able to decide whether to persist in his claim or defence': *per* Macdonald ACJ in *Timesecurity (Pvt) Ltd v Castle Hotel (Pvt) Ltd* 1972 (1) RLR 155 (A) at 160E.
>
> The particulars to which a litigant is entitled however, are … particulars of matters in respect of which the onus is on the opponent…".

However, the respondent *in casu* has not been able to establish that the H lengthy requests made by the applicant fall within the purview of disclosure

---

Mutema J

of evidence or fishing expedition or statement of law. The lengthy requests A made are justified on the following grounds:

1. The suit at hand is not an ordinary run-of-the-mill suit. It is of a technical nature which calls for a more precise or fuller declaration.
2. The tenor of the respondent's declarations in both cases lacks sufficient particularity to fully appraise the applicant regarding, *inter alia*, when the B agreements were concluded; if prior to introduction of the multicurrency regime, whether the respondent could charge in foreign currency, several agreements having been concluded both orally and in writing over the years; which of those agreements were allegedly breached by the applicant, the applicant having made payment of what it deems is owing in respect of what services and which customers the alleged balance is predicated C upon; the basis of the calculations; what structural connectivity entails and the import and relevance of the alleged clandestinely erected base station.
3. The particulars being requested are of matters in respect of which the onus is on the respondent – he who avers must prove. The declarations D lack the necessary particularity to the extent of being susceptible to exception. They do not place the applicant in a position to know whether it should admit or deny the respective allegations or to be able to decide whether to persist in its defence.

Both applications must therefore succeed.

Regarding costs, each party prayed for them on a legal practitioner and E client scale.

In *Borrowdale Country Club v Murandu* 1987 (2) ZLR 77 (H) Mtambanengwe J held that, whilst the courts will not lightly accede to a prayer for an award of costs on a legal practitioner and client scale, such an award will be granted where the unsuccessful party's conduct has been completely unreasonable and F reprehensible. In the present case, the respondent's attitude had been that of a man who has deliberately and stubbornly refused to bring a dispassionate mind to bear on the dispute, which could have been resolved quite amicably and inexpensively if he had showed the slightest co-operation. In such circumstances it was quite unfair for the successful party to be put out of G pocket in the matter of costs.

L Rubin *Law of Costs in South Africa* (Juta & Co, 1949) at 190 listed principles guiding courts in deciding whether or not to award costs on an attorney and client scale as follows:

> "1. Dishonest conduct either in the transaction giving rise to the proceedings or in the proceedings. H

Mutema J

> 2. Malicious A conduct
> 3. Vexatious proceedings
> 4. Reckless proceedings
> 5. Frivolous proceedings"

And in *Nel v Waterberg Landbouwers Ko-operatieve Vereeniging* 1946 AD 597 B at 607, Tindall JA (as he then was) said:

> "The true explanation of awards of attorney and client costs not expressly authorised by statute seems to be that, by reason of special considerations arising either from the circumstances which give rise to the action or from the conduct of the losing party, the court in a particular case considers it just, by means of such an order, to ensure more effectually than it can do by means of a judgment for party C and party costs that the successful party will not be out of pocket in respect of the expense caused to him by the litigation."

In the instant case, the respondent, having poorly drafted its declarations as spelt out above, and the applicant having had the good sense of not going for an exception but requesting further particulars (a less expensive procedure) and the respondent, for no good cause shown, having refused to furnish the D particulars, such conduct befits the description of vexatious or reckless or

frivolous. I consider it just that the applicant should not be put out of pocket in respect of the expense occasioned to it by these applications.

In the event, I make the following order:

(a) Both applications in HC 6895/11 and HC 6896/11 be and are hereby E granted in terms of their respective draft orders;

(b) The respondent is ordered to pay the applicant's costs on the scale of legal practitioner and client.

Atherstone & Cook, applicant's legal practitioners

F *Scanlen and Holderness*, respondent's legal practitioners

© 2015 Juta and Company (Pty) Ltd.

Document 25 of 75

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2012/Volume 1/EVANS & ANOR v SURTEE & ORS 2012 (1) ZLR 202 (S)

EVANS & ANOR v SURTEE & ORS 2012 (1) ZLR 202 (S)

Citation	2012 (1) ZLR 202 (S)
Case No	Judgment No. S-4-12
Court	Supreme Court, Harare
Judge	Ziyambi JA, Garwe JA & Cheda AJA
Heard	11 July 2011; *CAV*
Judgment	13 February 2012
Counsel	*D Ochieng*, for the appellant *L Uriri*, for the respondent
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Court – *contempt – failure to obey court order – when application for holding defaulter in contempt may be granted – order must be one ad factum praestandum – need for court to determine true nature of order granted – failure to obey orders ad pecuniam solvendam not punishable as contempt – need for court also to consider whether order ad factum* D *praestandum can be complied with and whether other remedies available*

Practice and procedure – *order – types of order which may be granted – order ad factum praestandum and order ad pecuniam solvendam – distinction between*

Headnote

The appellants and the second, third and fourth respondents, were defendants E in a civil action brought against them by the first respondent. The first respondent had lent or made available to the fourth respondent (a company of which the appellants and the second and third respondents

were directors) a quantity of fuel which would be used in the course of trading. In terms of the contract, an equal quantity of fuel was to be F returned; and arrears of rent in respect of the premises being used for the trading would be paid in fuel.

The court *a quo* ordered the defendants to deliver to the plaintiff (the first respondent on appeal) a specified amount of fuel within 48 hours, failing which the Deputy Sheriff was authorised to recover the fuel and deliver it G to the plaintiff. The fuel was not delivered and when the Deputy Sheriff went to the defendants' premises, he was told that there was no fuel.

The plaintiff then brought contempt proceedings against the defendants, as a result of which the company was fined and the remaining defendants sentenced to a term of imprisonment, suspended on condition that they deliver the specified amount of fuel by a specified date. H

Ziyambi JA

A The appellants appealed, arguing that the court *a quo* erred in finding that the order made by the judge was one *ad factum praestandum*.

Held, that orders of court are, generally speaking, divided into two categories: orders to pay a sum of money, namely, orders *ad pecuniam solvendam*; and orders to do, or abstain from doing, a particular act, or to deliver a thing, namely, orders *ad factum praestandum*. The remedy of committal B for contempt is available only in the latter category of cases. These definitions notwithstanding, the distinction between the two types of orders is in practice not as clear cut as it may seem. Thus, certain orders for the payment of money, namely ,maintenance orders (which one would have regarded as orders *ad pecuniam solvendam*) have been classified C by the courts as orders *ad factum praestandum* on the basis that they are not really money orders at all. Essentially, they are orders that the defendant do something, namely, maintain the wife or the children. The key determinant is not the act directed, but the nature of the obligation to be enforced.

Held, further, that where the true nature of the order was one for the payment D of a debt, albeit in kind, the fact that, as *in casu*, the court ordered the delivery of fuel would not convert the order from an order for payment of a debt into an order *ad factum praestandum.* In view of the dire consequences attendant upon the failure to obey an order *ad factum praestandum*, namely, committal to prison, before granting an order E which is *ad factum praestandum,* a court ought to satisfy itself as to the ability of the defendant to comply with the order, otherwise it takes the risk of issuing a hollow and unenforceable order. Another consideration is that orders *ad factum praestandum* are usually granted only where there is no other remedy available to the applicant, the rationale being that the successful party has other options to enforce an order *ad pecuniam* F *solvendam*. Such other remedies were available to the first respondent.

Held, further, that in any event, although disobedience to an order *ad factum praestandum* may be visited with committal to prison, such disobedience must be wilful and *mala fide*. Wilfulness and *mala fides* will normally be inferred upon proof that the order sought to be enforced was brought to G the attention of the respondent and that he has either disobeyed the order or neglected to comply with it. The onus then shifts to the respondent to rebut the inference on a balance of probabilities. Proven inability to comply will afford protection against a committal for contempt. The defendants had proved their inability to comply with the order and that H their inability was not due to *mala fides* on their part.

Ziyambi JA

Cases referred to A

Carrick v Williams 1937 WLD 76

Clement v Clement 1961 (3) SA 861 (T)

East London Transitional Council v MEC for Health, Eastern Cape, & Ors 2001 (3) SA 1133 (Ck)

Haddow v Haddow 1974 (1) RLR 5 (G); 1974 (2) SA 181 (R) B

Leviton & Son v de Klerk's Trustee 1914 CPD 691

Sabawu v Harare West Rural Council 1989 (1) ZLR 47 (H)

Case information

D Ochieng, for the appellant

L Uriri, for the respondent

Judgment

Ziyambi JA: On 19 May 2009, the High Court (Bhunu J) granted an order C in favour of the first respondent in the following terms:

> "1. The defendants, jointly and severally, the one paying the others to be absolved deliver to the plaintiff 47 500 litres of fuel within 48 hours of service of this order, failing which the Deputy Sheriff be and is hereby authorised to recover the fuel and deliver it to the plaintiff. D
>
> 2. Costs of suit."

The defendants referred to in the order were the two appellants and the second, third and fourth respondents ("Macmillan", "Finnigan" and "Across Enterprises"). I shall refer to the second to the fifth respondents collectively as "the defendants" and, where the context requires, to the two appellants as E "the appellants". The first respondent will be referred to as "Surtee".

When the defendants failed to make delivery in terms of the order made by Bhunu J, the Deputy Sheriff was charged with the execution thereof. He served the order at 72 Eastern Road, Greendale, Harare, on the 22 July 2009 and made the following return:

> "Attempt to recover the fuel. Mrs Evans said they are no longer dealing in fuel F supplies and they do not have the fuel. *Nulla bona*. Return to attorneys."

This prompted Surtee to file an application in the High Court seeking an order that the defendants be held to be in contempt of court and committed to gaol for 90 days. Macmillan, Finnigan and Across Enterprises did not file opposing papers and were therefore in default. All five defendants were G found to be in contempt of court. Across Enterprises was sentenced to a fine of US$55 000 while the remaining four defendants were sentenced each to a term of 30 days' imprisonment. The sentences imposed were suspended on condition that the defendants jointly and severally, the one delivering the other to be absolved, deliver to Surtee 47 500 litres of fuel on or before the 30 November 2010. H

Ziyambi JA

A The appellants now appeal against the order of the court *a quo* on the grounds, *inter alia,* that the learned judge erred:

(1) in finding that the appellants were in contempt of the order made by Bhunu J;

(2) in finding that that order was one *ad factum praestandum*; B

(3) in finding that the appellants intentionally disobeyed that order, despite the Deputy Sheriff's *nulla bona* return, the import of which was that the appellants did not have the fuel.

The main issues to be determined are whether the order by Bhunu J was an order *ad factum praestandum* and, if so, whether the court *a quo* correctly C found the appellants to be in contempt of court by reason of their disobedience of that order.

Orders of court are, generally speaking, divided into two categories: orders to pay a sum of money, namely, orders *ad pecuniam solvendam;* and orders to do, or abstain from doing, a particular act, or to deliver a thing, namely, D orders *ad factum praestandum . The remedy of committal for contempt is available only in the latter category of cases. These definitions notwithstanding, the distinction between the two types of orders is, in practice, not as clear cut as it may seem. Thus, certain orders for the payment of money, namely maintenance orders (which one would have regarded as orders ad pecuniam solvendam*) have been classified by the courts as orders *ad factum praestandum.* E The principle was expressed by Schreiner AJ (as he then was) as follows:

> "The reason for holding maintenance orders … to be orders *ad factum praestandum* is that they are not really money orders at all. In their essential nature, they are orders that the defendant do something, namely, maintain the wife or the children. This duty might be performed in various ways, including the provision of housing, clothing and food in kind, or the transfer of property; but in practice the court F indicates how the defendant is to fulfil the duty by the payment of a periodical sum of money fixed in

relation to the apparent capacity of the defendant and the needs of the party to be maintained at the time of the making of the order. This direction by the court does not convert the judgment from one ordering the doing of an act by the defendant into one awarding a sum of money to the plaintiff." [2]

G And in *East London Transitional Council v MEC for Health, Eastern Cape & Ors* 2001 (3) SA 1133 (Ck), an order directing a public official to pay a certain sum of money to the judgment creditor was held to operate against

---

2012 (1) ZLR p206

Ziyambi JA

that official *ad factum praestandum.* The following extract from the judgment A of Ebrahim J at 1140F-I of the judgment is instructive:

> "In its strict sense the order that this court issued on 28 July 2000 for payment of the sum of R801 249 is an order *ad pecuniam solvendam*. But the crucial issue that falls to be considered is in what manner such an order operates against the first and second respondents and what the effect thereof is. In my view, its operation is similar to that of an order which indicates the manner in which B maintenance must be paid. See *Carrick v Williams* 1937 WLD 76 at 83.
>
> *In casu*, even though the order directs that the debt be paid, it is issued, and operates, against the respondents in their nominal capacities. At the same time, and because of their official capacities, it imposes an obligation on them to take such steps as are necessary to enable the relevant departmental procedures to be implemented so that payment of the debt can be effected. The obligation it C imposes is not of a financial nature but one that requires them to carry out one or other function which forms an integral part of their official duties. In this respect I consider that the court's order of 28 July 2000 operates against the first and second respondents as an order *ad factum praestandum*."

On this basis, Mr *Ochieng* submitted that, on the authorities, the key determinant is not the act directed but the nature of the obligation to be D enforced. He submitted that the true nature of the order by Bhunu J was one for the payment of a debt – albeit in kind – and that the fact that the court ordered the delivery of fuel does not convert the order from an order for payment of a debt into an order *ad factum praestandum* in the same way that an order for the payment of money by way of maintenance is not converted E from an order *ad factum praestandum* to an order *ad pecuniam solvendam* by the fact that it is expressed in monetary terms. He further submitted that, just as a maintenance order requires the performance of an act in a specific way (and is therefore an order *ad factum praestandum*), so the order by Bhunu J required the payment of a debt in a specific manner (and was therefore an order *ad pecuniam solvendam*). F

Mr *Uriri*, on the other hand, contended that the order was clearly one *ad factum praestandum,* since it directed the appellants to do something, namely, to deliver 47 500 litres of fuel.

The learned judge in the court *a quo* decided the first issue on the basis that:

> "As correctly acknowledged by both parties this court's order of 19 May 2009 G was the type of order normally referred to as '*ad factum praestandum*' (i.e. an order for specific performance or the performance of an act – namely the delivery of 47 500 litres of fuel)."

I can find no such acknowledgement by the appellants on the record. On the contrary, it is quite clear from the record that it was not common cause between the parties that the order was one *ad factum praestandum*. In the H

2012 (1) ZLR p207

Ziyambi JA

A supplementary heads of argument filed on behalf of the appellants in the High Court, the following appears:

> "It is submitted that the order sought to be enforced is not *ad factum.* The present case is very different from the one in *Batezat v Permassan (Pvt) Ltd* S-49-09 in that the appellant in that case was ordered to return an identified tri-axle trailer registration number 490-816V … In the case before this Honourable Court, the B order arises out of a contractual arrangement of which the applicant cannot say he has no other remedy … to cover his losses."

In taking the parties to have agreed as to the nature of the order made by Bhunu J, the learned judge misdirected himself.

Three factors persuade me to agree with Mr *Ochieng's* submissions. Firstly, C the true nature of the order sought to be enforced is the repayment of a commercial debt. In this connection:

"I am disposed to take the word *debt* in a wide and general sense as denoting whatever is due – *debitum* – from any obligation." [3]

The debt in question comprised 40 000 litres of fuel as well as arrear rentals, expressed in litres of fuel, to the amount of 7 500 litres. In terms of the D contract between Surtee, on the one hand, and Across Enterprises and the remaining defendants who were then its directors, on the other hand, Surtee, as I understand it, lent or made available to Across Enterprises 40 000 litres of fuel which would be utilised in the course of trading. At the end of the contract, an equal quantity of fuel was to be returned to Surtee by Across E Enterprises. That much can be gathered from the judgment of the court *a quo*. A copy of the contract does not form part of the record and no more is known of the facts forming the background of the events leading up to the grant of the order by Bhunu J despite the averment in paras 3- 4 of the founding affidavit attested by Surtee that:

"3. I instituted legal proceedings in this Honourable Court on 4 June 2008, F under case number HC2926/08 against the first, second, third, fourth and fifth respondents claiming supply and delivery of forty-seven thousand five hundred (47500) litres of fuel from the first, second, third, fourth and fifth respondents, jointly and severally, within 48 hours of service of the court order upon them.

4. I beg leave of this Honourable Court to incorporate herein by reference G the averments as stated in plaintiff's declaration filed of record and abide by the same."

Needless to say, the record of those proceedings was not attached to the record of proceedings in this appeal, but it was not disputed that the arrears of rent

Ziyambi JA

were to be paid in fuel or that the defendants were indebted to Surtee in the A amount of 47 500 litres of fuel. The purpose of the order by first, second, third, fourth and fifth J was therefore to secure payment of that debt.

Secondly, it would appear that, prior to the grant of the order in question, no inquiry was conducted into the means of the appellants to comply with it. The Deputy Sheriff's issuance of a *nulla bona* return would, without more B (for example, evidence that the fuel had been available but was spirited away before his arrival at the premises), appear to bear this out.

From a reading of the authorities on this subject, it appears that in each case where an order *ad factum praestandum* was granted, the court was satisfied that the defendant was able to comply with it, so that a refusal so to comply C would be *mala fide* and therefore contemptuous of the court. Thus in the *Batezat case supra* an order of committal to gaol was granted because there was clear evidence that the defendant was in possession of an identified tri-axle trailer and had given a number of excuses for failing to deliver it. In *Sabawu v Harare West Rural Council* 1989 (1) ZLR 47 (H) the defendant wilfully disobeyed an order to pull down certain buildings which he had D unlawfully erected.

In view of the dire consequences attendant upon the failure to obey an order *ad factum praestandum*, namely, committal to gaol, it is my respectful view that, before granting an order which is *ad factum praestandum,* a court ought to satisfy itself as to the ability of the defendant to comply with the order, E otherwise it takes the risk of issuing a "hollow and unenforceable" order. There is also an obligation on the court before whom an application for an order of committal for contempt of an order of court is made to examine the order sought to be enforced in order to ascertain its true nature and to determine in which of the two categories the order falls. F

Thirdly, there were other remedies available to Surtee, for example, an alternative order for the value of the fuel. Such an order would have been enforceable in the usual manner, namely by a warrant of execution over the appellants' property and, if necessary, a warrant for civil imprisonment. Orders *ad factum praestandum* are usually granted only where there is no other remedy available to the applicant, the rationale being that the successful G party has other options to enforce an order *ad pecuniam solvendam*.

I therefore conclude that, in its essential nature, the order by Bhunu J was one for the repayment of a debt and therefore one *ad pecuniam solvendam*. The fact that the order was framed as it was did not convert that order to one *ad factum praestandum*. H

Ziyambi JA

A In any event, the appellants, in my judgment, were wrongly found to be in contempt of that order. While it is trite that disobedience by a litigant of an order *ad factum praestandum* is punishable by committal to gaol, it is also true that the disobedience must be wilful and *mala fide*. Punishment for contempt of such an order by committal to gaol is aimed at enforcing civil orders of court, and to bring to its logical conclusion an order given by a B judge, which the court finds has been deliberately disobeyed. The principal object of the proceeding is to compel, by means of personal attachment and committal to gaol, the performance of the court's order. Thus the court has enforced by committal for contempt, *inter alia,* orders to give up possession of and quit a farm; to pass transfer of a plot of ground; in the case of an C executor, to file estate accounts; to frame an account showing profits of a partnership business; to give discovery. [4]

Wilfulness and *mala fides* will normally be inferred upon proof that the order sought to be enforced was brought to the attention of the respondent and that he has either disobeyed the order or neglected to comply with it. The onus then shifts to the respondent to rebut the inference on a balance of D probabilities. Proven inability to comply with the order of court will afford protection against a committal for contempt. [5] Thus in *Haddow v Haddow* 1974 (1) RLR 5 (G); 1974 (2) SA 181 (R), the court did not grant an order of committal for contempt because the defendant's disobedience of its order was not shown to be *mala fide*. See also *Clement v Clement* 1961 (3) SA 861 (T).

E In the court *a quo*, the appellants expressed their inability to comply with the order by Bhunu J. The company (Across Enterprises) had stopped operations and they were not able to comply with the order because they did not have the fuel. Their failure to comply with the order was due to inability to do so ,as appears from the *nulla bona* return made by the Deputy Sheriff, and not to wilfulness and *mala fides* on their part. They expressed their respect for F the court and averred that their failure to deliver the fuel did not constitute contempt of the court. No evidence was placed before the court *a quo* to contradict the averments by the appellants that they were unable to comply with the order.

In my view, the appellants rebutted, on a balance of probabilities, the inference G of wilfulness and *mala fides.* The court *a quo* therefore erred in granting an order for committal to gaol in circumstances where the appellants proved, on a balance of probabilities, their inability to comply with the order and failure to comply therewith was not due to *mala fides* on their part.

Ziyambi JA

The appeal is therefore allowed with costs. A

The judgment of the court *a quo* is set aside and substituted as follows:

> "The application is dismissed with costs."

GARWE JA and CHEDA AJA concurred. B

Mujeyi Manokore Attorneys, appellant's legal practitioners

Ahmed & Ziyambi, first respondent's legal practitioners C

1 Herbstein and van Winsen *The Civil Practice of the Superior Courts of South Africa* 3 ed at 652-653.
2 *Carrick v Williams* 1937 WLD 76 at 83.
3 *Per* Kotzé J in *Leviton & Son v de Klerk's Trustee* 1914 CPD 691, cited in C.J.Claassen *Dictionary of Legal Words and Phrases*
4 Herbstein and van Winsen *op cit* at p 653
5 Herbstein and van Winsen *op cit* at pp 657-8

© 2015 Juta and Company (Pty) Ltd.

Document 26 of 75

Source:

S v MADZOKERE & ORS 2012 (1) ZLR 211 (S)

Citation	2012 (1) ZLR 211 (S)
Case No	Judgment No. S-8-12
Court	Supreme Court, Harare
Judge	Malaba DCJ (In chambers)
Heard	7 February 2012; *CAV*
Judgment	13 February 2012
Counsel	*C Kwaramba*, for the appellants *E Nyazomba*, for the respondent
Case Type	Bail appeal
Annotations	No case annotations to date

Flynote

Criminal procedure – *bail – grant of – factors to be considered – when bail should be refused – need for court to be satisfied that accused not likely to stand trial – factors indicating likelihood of not standing trial*

Headnote

D The purpose of the exercise of the discretionary power vested in the court considering a bail application under s 117 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] is to secure the interests of the public in the administration of justice by ensuring that a person charged with a criminal offence upon a reasonable suspicion of having committed it will E appear on the appointed day to stand trial. It is for that purpose that the section provides, in effect, that upon sufficient evidence being available to justify it, a finding that an accused person is likely not to stand trial when released on bail is a relevant and sufficient ground for ordering his or her continued detention pending trial. Section 117 is also based on the principle that, regard being had to the presumption of innocence F which is a fundamental right guaranteed under the Constitution to an accused person awaiting trial, he or she must be released on bail on appropriate conditions if the same object of ensuring his appearance at the trial can be achieved.

The question for determination is whether, on the facts available and regard G being had to the presumption of innocence to which the accused is entitled, the court would be justified in finding that there is a likelihood that the accused would not stand trial if released on bail, even with stringent measures to ensure close monitoring by the police. Only if such a finding is justified by the available evidence can it be said that the likelihood of the accused not standing trial if released on bail is a relevant and H sufficient ground for depriving him or her of his or her liberty pending

Malaba DCJ

trial. The following factors are a useful guide in deciding whether an A accused person would abscond if released on bail:

- the nature of the charge and the severity of the punishment likely to be imposed on the accused upon conviction;

- the apparent strength or weakness of the State case;
- the accused's ability to reach another country and the absence of B extradition facilities from that country;
- the accused's previous behaviour when previously released on bail; and
- the credibility of the accused's own assurance of his intention and motivation to remain and stand trial. C

Cases referred to

Aitken & Anor v Attorney-General 1992 (1) ZLR 249 (S)

Barros & Anor v Chimphonda 1999 (1) ZLR 58 (S)

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

S v Jongwe 2002 (2) ZLR 209 (S) D

Legislation cited

Criminal Procedure and Evidence Act [*Chapter 9:07*], s 117

Case information

C Kwaramba, for the appellants E

E Nyazomba, for the respondent

Judgment

Malaba DCJ: This is an appeal against the entire judgment of the High Court given on 1 July 2011, refusing bail in respect of the seven appellants. The appellants pray that the judgment of the court *a quo* be set aside and substituted with F an order that they be admitted to bail with appropriate conditions.

The facts of the case are as follows. The appellants are facing a charge of contravening s 47 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] (the Act), it being alleged that, on 29 May 2011, they killed Petros Mutedza, who was an inspector in the Zimbabwe Republic Police. G Inspector Mutedza was called to disperse an unlawful gathering of members of the youth league of the Movement for Democratic Change (MDC-T) party at Glen View 3 shopping centre. The same group of about 50 youths had earlier on been dispersed by other police officers from Glen View 4 shopping centre. The deceased and his team of police officers in uniform arrived at Glen View 3 shopping centre where the youths were participating H

Malaba DCJ

A in an "MDC (T) T-shirt visibility day" campaign strategy. They all wore MDC (T) red and white T-shirts and chanted slogans and sang party songs. The youths were also braaing meat and drinking beer at Munyarari Night Club. The deceased and five other police officers entered the night club to tell the leaders that the gathering had to disperse, because it had not been B authorized by the police.

It is alleged that the group of youths then shouted "*matatya ngaurawe*" which, literally translated, means:"kill the frogs". The police were then attacked with various missiles including stones, bricks and bar stools. They were forced to run out of the night club. The deceased mistook a Nissan Hardbody motor vehicle allegedly being driven by the fourth appellant for the police vehicle. C He ran to it for cover. When the deceased tried to open the door of the car to seek refuge, the fourth appellant is alleged to have driven away from the deceased for about 4 metres. That is when the deceased was struck on the head with a half brick. He fell to the ground. The mob of youths set upon him kicking and trampling his body until he lost consciousness and died.

D It is alleged that some of the youths jumped into the Nissan Hardbody and the fourth appellant drove them away from the scene at high speed. Cynthia Manjoro is also alleged to have driven away her vehicle from the scene with some of the youths who had attacked the deceased. It is alleged that MDC (T) youths who remained behind removed their party T-shirts to avoid detection and left the scene. Another police officer was seriously injured.

E All the appellants were arrested at different times and places within 48 hours of the death of Inspector Mutedza. Together with thirteen co-accused persons the appellants appeared before the High Court. They applied for bail. After reading documents filed of record and hearing argument for and against the application the court *a quo* granted bail on conditions to twelve accused F persons. Bail was refused in respect of eight accused persons, including the appellants. Cynthia Manjoro was later granted bail. In the determination of the application the court *a quo* applied s 117 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] (the CPE Act) which provides:

> **"117. Entitlement to bail**
>
> (1) Subject to this section and section 32, a person who is in custody in respect G 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 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 H established –

Malaba DCJ

> (a) where there is a likelihood that the accused, if he or she were released on A 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 B evidence; or
>
> (iv) undermine or jeopardize 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." C

In the court *a quo,* the learned judge interpreted the provisions of s 117 of the CPE Act. He said:

> "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 be detained in custody. The detention of the accused person in custody can only be in the interests of justice if one or more of the factors mentioned in s 117(2) D is or are established against him or her. The release of an accused person on bail is aimed at enabling him to attend trial while out of custody. It does not mean that he or she has no case to answer. On the other hand the detention of an accused person in custody is meant to secure his or her attendance to stand trial if there are genuine grounds for believing that the factors set out in s 117 (2) have been established against him or her. That is why the seriousness of the E charge that the accused is facing is not on its own enough to deny an accused person bail."

The learned judge continued:

> "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 F 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'. The intention of the legislature is obviously to make s 117 consistent with the presumption of innocence until proven guilty. The proof or lack of it can only be established at the accused's trial." G

The learned judge then said:

> "I am satisfied that with stringent bail, applicants who 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 an assessment of each applicant's circumstances as per the state and applicant's evidence and submissions. I appreciate the need to treat jointly H

Malaba DCJ

> A charged accused persons equally, but where a distinction can be shown between bail applicants their individual cases can be treated differently."

The learned judge found that each of the seven appellants had shown a propensity to abscond. They were found to be flight risks and not suitable candidates for admission to bail. The appellants who were not admitted to bail can be divided into three categories for the purpose of examination of B

the facts on which the court *a quo* found that there was a likelihood that the accused, if he or she were released on bail, will not stand his or her trial. The categories are:

(a) those who were found to have been hiding at a lodge and at the workplace in order to evade arrest;

(b) those who were found to have contacts outside Zimbabwe;

(c) those who fled the scene of crime in motor vehicles to evade law enforcement agents and allegedly aided and abetted other alleged perpetrators of the offence, to evade justice.

The first category consists of the first, sixth and seventh appellants. The following are the facts found by the court *a quo* in respect of each of them:

Tungamirai Madzokere – First appellant

He was arrested while allegedly hiding from the police at Palm Lodge along Selous Avenue in Harare. The court *a quo* found that:

> "He did not explain what he was doing at the lodge leaving the police's allegations that he was hiding to avoid arrest unchallenged. Mr *Kwaramba* for the applicants alleged that Ollyn Madzokere and Mavis Madzokere were arrested by the police as bait for first applicant who they were looking for, and were only released when the first applicant was arrested. Though not a proper way of pursuing the arrest of an accused person, as it interferes with the rights of innocent third parties, however, it proves that the first applicant was avoiding arrest. This coupled with the fact that he had left home and was staying at a lodge several kilometres from his house in Glen View is proof that he is a flight risk. He also made indications at the scene, which were captured on video. This further strengthens the respondent's case against him and may cause him to abscond."

Yvonne Musarurwa – Sixth appellant

She was arrested at Palm Lodge and this is not disputed, although counsel for the applicant contended that this does not mean that she was hiding from the police. The court *a quo* found that:

> "This is clearly not of any help to the applicant's case. A serious allegation was made that she abandoned her residence to avoid the police, yet all that could be said is that that information is colourless. It certainly colours the applicant as a flight risk. While there could be nothing wrong with booking oneself into a lodge under normal circumstances, there is certainly something wrong if one does it

> for purposes of avoiding arrest. That indicates an intention to avoid having to answer charges. It makes her a flight risk."

Rebecca Mafukeni – Seventh appellant

She, like the first and sixth appellants, was arrested at Palm Lodge, and the court's findings are exactly identical to those of the sixth appellant, above. In addition to the first, sixth and seventh appellants who were arrested at Palm Lodge and found to have been hiding to evade arrest, making them flight risks, another appellant was arrested at his work place.

Stanford Mangwiro – Fifth appellant

The court *a quo* found that:

> "He is a flight risk. The investigating officer, in his affidavit of 10 June 2011, said he had deserted his residential address and was staying at his work place where he told some workmates that his hands were painful because of the assault he did on some police officers."

The second category of appellants consists of those who were found to have a propensity to abscond and to be flight risks for the reason that they had relatives outside Zimbabwe, in Botswana.

Lazarus Maengahama – Second appellant

The court *a quo* found that:

> "The fact that the applicant works in Botswana tilts the scales in favour of the interests of justice. Granting the applicant bail on the promise that he will abandon his employment in Botswana and surrender his travel documents, is taking a serious risk as the applicant is most likely to abscond as no explanation has been given as to how he will survive without a job. He is experienced at living outside the country and is

going to be constantly thinking about the case, which I have already said is fairly strong. He might while waiting for his trial succumb to the temptation to flee back to Botswana or any other country as he has obvious contacts outside the country." F

Stanford Maengahama – Third appellant

Mr *Nyazamba*, in his heads of argument, conceded that the court *a quo* erred, and misdirected itself in its finding in regard to this appellant. The court *a quo* found that:

"He is not employed, and he stays at his brother's house. He is single. He therefore G has no attachments to Zimbabwe which would persuade him to wait the trial of this case. He lied in his application that he has no connections outside Zimbabwe. This is a lie as his brother the third applicant is working in Botswana. He is a strong, reliable contact person, who will have an obvious interest in helping him once he leaves the country. The fact that he lied to the court makes it difficult for the court to believe him when he says he is prepared to stand trial." H

Malaba DCJ

A The third category of appellants consists of those who were found to have a propensity to abscond and to be flight risks, on the basis of allegations that they evaded arrest by fleeing from the scene of the crime, and aided and abetted other perpetrators of the offence to evade justice.

Phineous Nhatarikwa – Fourth appellant

B The court *a quo* found that:

"Mr *Kwaramba* submitted that the state's allegation that he drove off when the deceased tried to get into his vehicle proves he was not involved in the attack against the deceased. He further submitted that the fact that he parked a few metres away does not get him involved in the crime charged. Mr *Nyazamba,* for the respondent, submitted that the fact that people who had attacked the C deceased got into his car and he drove away with them at high speed means he was aiding and abetting those who attacked and killed the deceased.

I agree with Mr *Nyazamba's* reason. In fact, that he was driving those who attacked the deceased from the scene is an indication that he is likely to abscond. It is known that the car he was driving was traced to him through the Central Vehicle Registry. He now knows he is facing a serious offence. His instincts D towards fleeing from brushes with the law may have been reactivated. He is not a good candidate for bail."

All seven appellants were not admitted to bail. They now appeal to this Court against the refusal to admit them to bail. Leave to appeal in terms of s 121 of the CPE Act, as read with s 44(5) of the High Court Act [*Chapter 7:06*], E was granted by the High Court on 5 December 2011.

The grounds of appeal are as follows:

1 The court *a quo* erred by finding that appellants were flight risks, there being insufficient evidence showing any inclination to abscond.

2 The court *a quo* grossly misdirected itself by making findings which F were not supported by the facts and evidence placed before the court.

3. The distinctions drawn by the court for granting bail to other jointly charged applicants and denying others are improper distinctions. Where there is an improper distinction there is no distinction at all. The court ought to have treated like-accused-alike. G

4 The first, sixth and seventh appellants were denied bail for the reason that they were hiding at lodges to avoid arrest, and as such were flight risks. This finding was not supported by the facts and evidence placed on record. The court *a quo* mistook the facts.

5 The court *a quo* erred in coming to the conclusion that the second H appellant's assurances to give up his employment in Botswana was not

---

Malaba DCJ

sufficient if he could not explain how he would survive without a job. A In doing so the court allowed an extraneous matter to guide or affect it.

6 The court *a quo* erred in coming to the conclusion that, because of second appellant's experience travelling outside the country and his contacts outside Zimbabwe, he could be

tempted to avoid trial. In doing so the court failed to treat the second appellant like other applicants who were B granted bail but had travel documents and had travelling experience outside the country.

7 The court *a quo* erred in accepting the allegations of the State as fact. In doing so it allowed extraneous matters to guide or affect it.

8 The court *a quo* erred in finding that the video evidence strengthened C the respondent's case and would induce the first appellant to abscond. In that regard the court *a quo* erred in taking all the allegations of the State to be factual truths, even where there was insufficient evidence to support them.

9 The court *a quo* misdirected itself as to the evidence. The finding that the State case is "fairly strong" was not supported by the evidence placed D on record.

10 The court *a quo* erred in coming to the conclusion that the third appellant lied that he had no connection outside the country when he had a brother in Botswana. It failed to consider that the brother was no contact at all as he was also in custody together with him. In doing so the court failed E to take into account a relevant consideration.

11 The court *a quo* erred in failing to treat like accused alike. The third appellant and his brother, Last Maengahama, had both stated in their bail application that they had no connection outside the country when they both had a brother who worked in Botswana. Yet the court granted bail F to Last Maengahama and refused to grant bail to the third appellant.

12 The court *a quo* was wrong in denying the fourth appellant bail. The court could not have taken it as a proven fact that fourth appellant was at the scene and that he drove off at high speed. Such allegations were not proved and as such they could not be a basis for denying bail. Therefore the court mistook the facts. G

13 The court *a quo* erred by failing to come to the conclusion that, by going to the police station to give food to those who had been arrested, the fourth appellant had not exhibited any evasive tendencies.

14 The court *a quo* denied the fifth appellant bail on the basis of an allegation by a police officer that the fifth appellant had deserted his home to stay at H

Malaba DCJ

A his work place and that he had bragged to his workmates about beating police officers. This finding was not based on any evidence. The court seriously misdirected itself on the facts which amounts to a misdirection in law.

15 The court *a quo* failed to consider that whatever the State's fears were B in regard to the seven appellants, they could be taken care of by the imposition of appropriate bail conditions. In fact all those denied bail were not shown to possess any special means which would enable them to breach stringent bail conditions.

In his submission before the court, in support of the grounds of appeal, Mr *Kwaramba* for the appellants argued as follows. The respondent had conceded C that the third appellant, Stanford Maengahama, is a suitable candidate for admission to bail, and that he ought to have been admitted to bail by the court *a quo*. In effect, the concession was to the effect that the court *a quo* erred and misdirected itself when it refused to admit the third appellant to bail.

Mr *Kwaramba* submitted that it was common cause, or accepted by both D parties in their heads of argument, that the lower court declined to admit all seven appellants to bail, on the basis that "there was a real likelihood of appellants not standing trial if released on bail." He urged the court to consider the circumstances of Tungamirai Madzokere (first appellant), Yvonne Musarurwa (six appellant) and Rebecca Mafukeni (seventh appellant) as the same because all three were denied bail on the basis that they were flight E risks after having been arrested while they were hiding from the police at a lodge in Harare.

It was argued that the Investigating Officer's conclusion that these three appellants were hiding in order to evade arrest, was accepted by the court *a quo*. The court *a quo* took it a step further and found that the appellants ought F to have explained their presence at the lodge when they were arrested. Mr *Kwaramba* said that another judge of the High Court held in a subsequent bail application that the explanation offered that the appellants were at the lodge on frolics of their own, could not be accepted because it should have been given at the initial bail hearing.

G Mr *Kwaramba's* view was that the crux of the matter is whether the nature of the evidence placed before the court *a quo* was of sufficient cogency as to prove that the three appellants were hiding from arrest. He relied on *S v Hussey* 1991 (2) ZLR 187 (S) as authority for the proposition that a certain level of cogency of evidence must be reached capable of justifying a decision not to release an accused person on bail. He argued that the evidence placed H before the court *a quo* through the affidavit by the investigating officer was

Malaba DCJ

not cogent enough for the purpose of a finding that the appellants were at A the lodge to avoid arrest

It was further submitted that the affidavit does not state how long each of the three appellants had stayed at the lodge, bearing in mind that they were arrested within 48 hours of the commission of the offence that they were subsequently charged with. The affidavit did not state whether the appellants B were booked at the lodge under their own names, or whether they had packed any clothing to indicate an intention to stay at the lodge for a long period. Lastly, counsel for the appellants submitted that the affidavit does not state that the appellants knew, at the time of their arrest, that the police were looking for them in connection with the alleged murder. He said that had such evidence been in the affidavit it would have satisfied the test of "cogency" C to justify a finding, by the court *a quo*, that the three appellants intended to evade justice and were hiding at the lodge for that purpose.

Mr *Kwaramba* submitted that there was no reason why the court *a quo* disbelieved the appellants' explanation that they were at the lodge to conduct romantic liaisons. He said the sixth and seventh appellants are single and at D liberty to do as they please. He argued that the burden was on the State to place sufficient evidence before the court to show that the three appellants were hiding to evade arrest. According to him, the State failed to discharge the onus.

Mr *Nyazamba* pointed out that the allegation that the first appellant made indications at the scene of the crime which were captured on video is subject E to being proved at the trial. He said that the court *a quo* erred and misdirected itself in taking the allegation into consideration when it refused to admit the first appellant to bail. It was submitted that the first appellant would tell the trial court that the video was inadmissible because it was obtained by torture. He said that he was denied access to legal representation. F

In short, the admissibility of the video would be put in issue before the trial court. The evidence contained therein which the court *a quo* relied on without viewing the video was not proven. It was submitted that the court *a quo* misdirected itself in relying on the allegation that the evidence in the video made the State case against the first appellant stronger. It was argued that the first appellant has strong ties to his community, and that, as a local G councillor, he was anxious to go to trial in order to clear his name. The failure by the court *a quo* to take this fact into consideration amounted to a failure to take into account a relevant consideration.

According to Mr *Kwaramba*, the allegation that the first appellant was evading arrest as shown by a text message on his wife's cellphone was insufficient H

Malaba DCJ

A to prove that the first appellant was hiding to evade arrest. By relying on the allegation the court a quo allowed an extraneous or an irrelevant fact to guide it. That is a misdirection.

The court was urged to compare the circumstances of the first appellant with those of Zwelibanzi Dube and Simon Mudimu, the fourteenth and fifteenth B applicants in the lower court. Both were admitted to bail, despite the fact that Dube was arrested after a night raid at his home. The court *a quo* found that there was no explanation as to why repeated police efforts to arrest him during the day had failed. It held that the lack of explanation should be resolved in Dube's favour. With the first appellant, the court *a quo* held that failure to explain his presence at Palm Lodge did not leave room for an C innocent explanation. The court held that Dube should be given the benefit of the doubt for the lack of clarity in the Investigating Officer's affidavit.

Similarly, it was argued that Simon Mudimu, the fifteenth applicant in the court *a quo,* was arrested during a night raid after police efforts to arrest him during the day had failed. Yet the *court a quo* found that failure to D show that Mudimu was aware that the police were looking for him was in his

favour. Mr *Kwaramba* argued that there is clear failure by the court *a quo* to treat like accused alike. That is a misdirection. It was argued that the court *a quo* failed to treat the first, sixth and seventh appellants the same as Dube and Mudimu.

On the application of the principle of "propensity to abscond", Mr *Kwaramba* E submitted that there was no evidence before the court *a quo* justifying a finding that the appellants were guilty of such propensity. He defined propensity as: "an inclination to repeat behaviour the third time; to repeat a similar act; likelihood to behave in a certain way", and submitted that propensity is a strong word and is best described as "evidence of inclination towards F repetition of behaviour." The court was asked to consider whether being found in a lodge within 48 hours after allegedly participating in the commission of a criminal offence supported a finding of propensity to evade justice. It was submitted that no evidence of intention to hide and evade arrest or of propensity to abscond was placed before the court *a quo*.

G The fifth appellant was arrested at work. Mr *Kwaramba* submitted that there was no evidence placed before the court *a quo*, to show that he was aware that police were looking for him, and that he was hiding from them at his work place. There was no evidence as to how long he had been allegedly hiding, no clothes, blankets or other items were recovered to show that he was living there. Such evidence would have been sufficient to justify an H inference that he was hiding from the police.

Malaba DCJ

It was argued that Gabriel Shumba, the fifth applicant in the court *a quo*, was A admitted to bail, yet he was arrested in a night raid at his home where he was found hiding in a wardrobe in a bid to evade arrest. The Investigating Officer did not aver that Shumba had a propensity to abscond. To the contrary, the fifth appellant was alleged to have a propensity to abscond. The circumstances of the arrest are similar. In Shumba's case it is a fact that he was hiding in a wardrobe to avoid arrest. It was submitted that, in the fifth appellant's B case, the allegation that he was hiding from the police at his work place is subject to proof. Mr *Kwaramba* submitted that is evidence of the failure by the court *a quo*, to treat like accused alike. That, he said, was misdirection on the part of the lower court.

The second appellant worked in Botswana. He was found to have a propensity C to abscond. It was submitted by Mr *Kwaramba* that this was a serious misdirection on the part of the court *a quo*. He said most of the applicants who were admitted to bail have passports and are frequent travellers outside the country. They had contacts outside the country. Last, Tamai Maengahama, is a brother to the second appellant. He is one of three brothers who were arrested in similar circumstances and is facing similar charges. He is the most D affluent of the three brothers and better travelled to other countries, yet he was admitted to bail and ordered to surrender his passport. The court *a quo* did not find that he was likely to abscond because he had contacts outside the country. There was a failure to treat like accused alike.

It was submitted that the court *a quo* appreciated the elements of the principle E of propensity. It however misapplied the principle and confused itself by the phrase "propensity to abscond". The court *a quo* said:

> "What would establish a strong propensity is evidence that the applicants have previous convictions for public violence and are facing several similar cases … it should be carefully considered to ascertain whether that likelihood is present."

Mr *Kwaramba* argued that the fourth appellant was treated by the court *a quo* F as if the allegation by the Investigating Officer that he fled from the scene of the crime had been proved. It was submitted that this was a misdirection, because the fourth appellant disputed the averment. No witnesses were called to testify that he indeed fled from the scene, despite the fact that the Investigating Officer alludes to the fact that the fourth appellant was observed G by undercover agents. It was argued that, even if it were accepted that the fourth appellant fled from the scene of the crime with the intention of evading arrest, it would not establish a "propensity to abscond."

Mr *Kwaramba* submitted that, for a finding of a propensity to abscond to be justified, there has to be evidence of repeated or habitual acts of evading the arm of the law. He said the court *a quo* misdirected itself because there H

Malaba DCJ

A was no evidence of such behaviour by the fourth appellant. On the contrary, it was argued that the fact that the fourth appellant took food to some of his colleagues who were at a police station should have been treated as evidence of lack of intention to evade the police.

The court was asked to compare the circumstances of the fourth appellant with those of Cynthia Manjoro, the eleventh applicant in the court *a quo*. B She was alleged to have sped off from the scene of the crime in a motor vehicle with some of the deceased's assailants. The Investigating Officer alleged that this showed an intention to evade arrest on her part. The court *a quo* initially found her to be a flight risk, but later admitted her to bail on the basis of changed circumstances. Mr *Kwaramba* submitted that the fourth C appellant should have been treated in the same manner as Manjoro. He said the court *a quo* misdirected itself in failing to do so.

Mr *Nyazamba* indicated to the court that, after a careful consideration of the submissions by Mr *Kwaramb*a, taking into account the principles of law applicable in an appeal of this nature and the findings of the court *a quo,* D the State was prepared to make the following concessions. It conceded that:

1 The court *a quo* may have misdirected itself by failing to apply the principle of treating like accused alike, or of equal treatment of accused persons facing similar charges, in an application for bail pending trial.

2 The misdirection was of such a serious nature as to justify the court's interference with the exercise of discretion by the lower court, and E substituting its own discretion, in respect of the second, third, fourth, fifth, sixth and seventh appellants.

3 Gabriel Shumba was hiding in a wardrobe when he was arrested and he was admitted to bail. His circumstances are similar to those of the first, sixth and seventh appellants who were arrested while allegedly F hiding at Palm Lodge. The court *a quo* erred in granting Shumba bail and denying it to the appellants in similar circumstances.

4 The court *a quo* was correct not to take the seriousness of the offence alone, as a factor in denying the appellants admission to bail.

Mr *Nyazamba* submitted that the respondent was not making the same G concession in respect of the first appellant. He said, apart from being arrested at a lodge and found to have been hiding to evade the police, the first appellant made indications at the scene of the crime. He said the first appellant made a statement in which he allegedly gave details of his participation in the commission of the offence. He argued that the evidence that the first appellant was hiding at the lodge is different from what the Investigating Officer said H about the sixth and the seventh appellants. The first appellant allegedly sent

---

Malaba DCJ

a text message to his wife telling her not to open the door to anyone and not A to tell anyone where he was. Mr *Nyazamba* said the communication showed that he was aware that the police were looking for him and his presence at the lodge was an attempt to evade arrest.

Mr *Nyazamba* submitted that the court *a quo* was correct in finding that the first appellant was a flight risk, because of the strength of the State case B against him. It was conceded that while Gabriel Shumba's circumstances were similar to that of the first, sixth and seventh appellants, in that they were all arrested while hiding from the police, they differed materially in respect of the first appellant. He said that there was the additional circumstance of the first appellant having made indications which were captured on video. The indications distinguished his case from that of Shumba and the other C appellants.

Mr *Nyazamba* argued that the meaning of the phrase "propensity to abscond" was that the accused person "had an inclination to repeat what he has done before." He submitted that the evidence before the court *a quo* showed that the first appellant had an inclination to repeat what he had done before D which he said was that:

(a) he fled from the scene of the crime and evaded arrest by police officers. He even aided and abetted other assailants of the deceased to flee from the police;

(b) he stayed away from home and warned his wife not to open the door or E tell anyone where he was;

(c) he harboured the sixth and seventh appellants at Palm Lodge and assisted them to evade arrest;

(d) the court *a quo* refused to accept his explanation that he was at Palm Lodge for purposes of a romantic liaison.

Mr *Kwaramba* argued that consideration of the definition of "propensity" set F out by the court *a quo* will show that the first appellant cannot be found to have a propensity to abscond. The reason is that the nature of the evidence placed before the lower court consisted of bald assertions by the Investigating Officer. The admissibility of the video evidence was going to be challenged at the trial. He said there was no suggestion that the first appellant has been G convicted of similar offences or that he faced similar charges before and evaded arrest, justifying a finding that he has a "propensity to abscond." Mr *Kwaramba* said that if the court applies the principle of treating like accused alike, the first appellant should be treated in the same manner as the applicants who are alleged to have made indications at the scene of the crime. They were admitted to bail. Mr *Kwaramba* argued that as the first appellant is not H

A the only one who is alleged to have made indications there is no reason for not treating him in the same manner as those other accused persons who are facing similar allegations and yet have already been granted bail.

The granting of bail involves an exercise of discretion by the court of first instance. It is trite that an appellate court will not interfere with the exercise B of discretion by a lower court or tribunal unless there is a misdirection. It is not enough that the appellate court thinks that it would have taken a different course from the trial court. It must appear, from the record of proceedings, that there has been an error made in the exercise of discretion such as that the trial court acted on a wrong principle; allowed extraneous or irrelevant considerations to affect its decision or made mistakes of fact or failed to C take into consideration relevant matters in the determination of the question before it. See *Barros & Anor v Chimphonda* 1999 (1) ZLR 58 (S); *Aitken & Anor v Attorney-General* 1992 (1) ZLR 249 (S).

The purpose of the exercise of the discretionary power vested in the court under s 117 of the CPE Act is to secure the interests of the public in the D administration of justice by ensuring that a person charged with a criminal offence upon a reasonable suspicion of having committed it will appear on the appointed day to stand trial. It is for that purpose that s 117 of the CPE Act provides, in effect, that upon sufficient evidence being available to justify it, a finding that an accused person is likely not to stand trial when released on bail is a relevant and sufficient ground for ordering continued detention E of him or her pending trial.

Section 117 of the CPE Act is also based on the principle that, regard being had to the presumption of innocence, which is a fundamental right guaranteed under the Constitution to an accused person awaiting trial, he or she must be released on bail on appropriate conditions if the same object of ensuring F his or her appearance at the trial can be achieved.

The question for determination is whether on the facts available, and regard being had to the presumption of innocence to which the appellants are entitled, the court *a quo* was justified in finding that there was a likelihood that they would not stand trial if released on bail, even with stringent measures to ensure close monitoring by the police. Only if the finding is justified by G the available evidence can it be said that the likelihood of the appellants not standing trial if released on bail is a relevant and sufficient ground for depriving the appellants of their liberty pending trial in terms of s 117 of the CPE Act.

In *Aitken supra,* it was held that in deciding whether an accused person would H abscond if released on bail the following factors constituted a useful guide:

(a) the nature of the charge and the severity of the punishment likely to be A imposed on the accused upon conviction;

(b) the apparent strength or weakness of the State case;

(c) the accused's ability to reach another country and the absence of extradition facilities from that country,

(d) the accused's previous behaviour when previously released on bail; and B ?

(e) the credibility of the accused's own assurance of his intention and motivation to remain and stand trial.

See also *S v Jongwe* 2002 (2) ZLR 209 (S).

The court turns to apply these principles to the facts of the case. Although Mr *Kwaramba* argued strongly that the finding by the court *a quo* that C the first, sixth and seventh appellants were hiding at Palm Lodge to avoid arrest was incorrect, the evidence supports that finding. This is particularly the case when regard is had to the text message the first appellant admitted sending to his wife by cellphone, to tell anyone, including the police, who came home looking for him that he was in Malbereign. He and his wife D knew that he was not in Malbereign but at Palm Lodge. It is clear from the admitted evidence that the first appellant was hiding his whereabouts. The fact that he did not specifically tell his wife in the text message that it was the police he was hiding from does not affect the correctness of the finding by the court *a quo* that he was hiding from the police.

The first appellant was found at the lodge in the company of the sixth and E seventh appellants. It is said he was housing them. They were acting in pursuit of a common purpose to avoid arrest by the police. When regard is had to the fact that the sixth appellant made indications at the scene of the crime after her arrest, the finding that she was absconding from arrest by the police is justified. F

The same conclusion cannot be arrived at in respect of the finding by the court *a quo* that the fifth appellant was avoiding arrest when he was found by the police at his work place. A place of work is where an employee is compelled, by the contract of employment, to be. There was no allegation that the fifth appellant was at his work place at a time when he was not G expected to be there. The fact of avoiding arrest was not the only one that could reasonably be inferred from the presence of the fifth appellant at his place of work. There was nothing to support the allegation contained in the affidavit by the Investigating Officer that he was "staying" at his work place. The fifth appellant denied the allegation. In any case he was arrested within 48 hours of the offence being committed. The State needed to produce H

Malaba DCJ

A concrete evidence to show that he resided at his work place during that short period between the time of the commission of the offence and his arrest. A concession has been made by Mr *Nyazamba* that the evidence before the court *a quo* was not sufficient to support the finding that the fifth appellant was avoiding arrest. As that was the only basis on which the court *a quo* found that there was a likelihood that he would not stand trial if released on B bail, and it is correctly conceded that the finding is a misdirection, the fifth appellant is entitled to be released on bail.

The court *a quo* relied on the fact that the first, sixth and seventh appellants hid from the police to avoid arrest as evidence of the finding that they had a propensity to abscond. Mr *Kwaramba* argued that propensity was an C inclination on the part of the accused person to repeat conduct he or she had done at least more than three times before. Mr *Nyazamba,* on the other hand, argued that the word referred to an inclination to repeat what a person has done before. According to the meaning contended for by Mr *Nyazamba,* the fact that the appellants had avoided arrest was enough support for the D finding that they had a propensity to abscond and were unlikely to stand trial if released on bail. It is, however, clear that the appellants had not absconded when on bail previously in any other criminal case.

It is clear from the manner the court *a quo* went on to take into account the fact of avoiding arrest and indications made at the scene of crime by the first and sixth appellants together, that it considered that the probative value of E the evidence of avoiding arrest was not on its own sufficient to justify the finding that there was a likelihood of them not standing trial if released on bail. There was nothing said about the indications allegedly made by the first and sixth appellants other than the statement that they were made. What was indicated was not disclosed. What the first and sixth appellants indicated F as what they had done had to be known by the court *a quo* before it could make a finding to the effect that their involvement in the commission of the crime strengthened the State case.

The first appellant said he intended challenging the admissibility of the indications at the trial on the ground that they were not made freely and voluntarily. Not only does this reveal a willingness to attend trial and use G legal procedures to weaken the State case, it also shows that indications are not sufficient evidence for holding that an accused person is likely to abscond if released on bail. It is the principle of law on bail application that the seriousness of the crime the accused is charged with and the strength of the State case are on their own not enough to justify a refusal to grant bail. H See *S v Hussey* 1991 (2) ZLR 187 (S).

2012 (1) ZLR p228

Malaba DCJ

A concession has been made by the State counsel in respect of the sixth A and seventh appellants on the grounds that the court *a quo* erred in finding from the single incident of avoiding arrest that they had a propensity to abscond. The same concession which the court finds was properly made was not extended to the first appellant. When considering the case of the first appellant, it is necessary to state that the substantive grounds on which B the misdirection by the court *a quo* was conceded in respect of the sixth and seventh appellants apply to him. The principle of equality of treatment which requires that those who are in like circumstances must be treated alike would apply. This is particularly so when regard is had to the case of Gabriel Shumba. He was arrested by the police at night whilst hiding in a wardrobe at his home. The court *a quo* granted Gabriel Shumba bail. Hiding C in a wardrobe to avoid arrest is no different from hiding in a lodge to avoid arrest. Both places serve the same purpose in as far as their occupants are concerned. The court finds no reasonable basis for differentiating the first appellant from the sixth, seventh appellants and Gabriel Shumba.

The second and third appellants are brothers. There is a concession in respect of both that they be granted bail. The court finds that the concession D is properly made. The court *a quo* had refused the second appellant bail on the ground that he would be induced by the desire to go back to his work in Botswana to abscond if released on bail. The court *a quo* was also of the view that the seriousness of the offence would induce the second appellant to abscond. The important factor which was overlooked by the court *a quo* E is that the second appellant had always travelled to Botswana lawfully. He has a passport which has been taken into the custody of the police.

There was no evidence to suggest that a person who had always sought to abide by the laws relating to going out of and coming into the country would be induced by the desire to go back to work in a foreign country to abscond from judicial process. Going to a foreign country without travel documents F has its own serious hazards. There is an extradition arrangement between Zimbabwe and Botswana. It was not shown that the second appellant was prepared to risk the hazards attendant upon unlawful exit to a foreign country. The appellant had been in custody for a month at the time he appeared before the court *a quo* on an application for bail. The court *a quo* did not address G its mind to the question whether the job he had in Botswana would still be available to him.

In respect of the third appellant, the court *a quo* had refused him bail on an erroneous view of the facts. The second appellant was in custody together with the third appellant. The court *a quo,* however, placed the second appellant in Botswana and said he was available to assist the third appellant if he H

2012 (1) ZLR p229

Malaba DCJ

A absconded to that country. Needless to say, that was a clear misdirection on the facts entitling the third appellant to an order granting him bail.

There is a concession in respect of the fourth appellant. The court finds that the concession is properly made. The principle of equality of treatment applies in favour of this appellant. Cynthia Manjoro was arrested for the B same crime as the fourth appellant. The allegation against her was that after the deceased had been killed she allowed the assailants to get into her car and drove from the scene with them at high speed.

The same allegation was made against the fourth appellant. Both cars did not belong to the drivers. They were traced through the Central Vehicle Registry to the political party of which they were members. Cynthia Manjoro C was granted bail whilst the fourth appellant was refused bail. In light of the concession and the fact that there are no substantial grounds on which the case of Cynthia

Manjoro and that of the fourth appellant can be treated differently, he is entitled to be released on bail.

It is important to note that all the appellants are nationals with residence D in the country. They have roots here. With the exception of the third, sixth and seventh appellants who are single, the rest have families in the country. They have strong property links with the country. They are unlikely, in the circumstances, to be under considerable temptation to evade trial notwithstanding the seriousness of the crime with which they are charged. They all gave assurances of their commitment to attend trial if released on E bail. They also undertook to submit themselves to stringent measures as part of the conditions of their release to ensure effective monitoring by the police.

The fact that the life of a police officer was lost in the course of the execution of his duty of enforcing the law is an important factor to be considered, in striking the balance between the interests of the individual in personal liberty F pending trial and the interests of society in having those accused of crime on reasonable suspicion tried and punished if convicted. The interests of fairness and justice require that the matter be approached dispassionately, in accordance with the law.

The appeal succeeds with no order as to costs. The judgment of the court *a* G *quo* refusing the appellants bail is set aside and substituted with the following:

All the appellants are granted bail in the following terms and conditions:

(1) The first appellant shall deposit $1 000 with the Registrar of the High Court, Harare.

(2) The second, third, fourth, fifth, sixth and seventh appellants shall each H deposit $500 with the Registrar of the High Court, Harare.

Malaba DCJ

(3) The first, second, fourth and seventh appellants shall surrender their A travel documents to the Registrar of the High Court, Harare.

(4) The third and sixth appellants are hereby prohibited from procuring travel documents until the case is finalized without first applying and obtaining permission to do so from a judge of the High Court, Harare.

(5) Each appellant shall reside at the address he or she gave to the police B at the time the charge was laid against him or her, and report at Harare Central Police Station on Monday, Wednesday and Friday between the hours of 6 a.m. and 6 p.m.

Mbidzo, Muchadehama & Makoni, appellants' legal practitioners C

Attorney-General's Office, respondent's legal practitioners D

© 2015 Juta and Company (Pty) Ltd.

Document 27 of 75

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2012/Volume 1/FIRSTEL CELLULAR (PVT) LTD v SEFAIDIGA & ANOR 2012 (1) ZLR 231 (H)

FIRSTEL CELLULAR (PVT) LTD v SEFAIDIGA & ANOR 2012 (1) ZLR 231 (H)

Citation 2012 (1) ZLR 231 (H)

Case No Judgment No. HH-70-12

Court High Court, Harare

Judge	Hungwe J
Heard	22 February 2012
Judgment	22 February 2012
Counsel	*G Chingoma*, for the applicant *I Chagonda*, for the respondents
Case Type	Civil application
Annotations	No case annotations to date

Flynote

C **Contract – sale** – *option – offer – essential element of option – when offer can be said to exist – offer vague and capable of more than one meaning – effect of alleged option contained in a scheme whereby employees could purchase vehicles from employer scheme vague as to details including the purchase price – no enforceable option resulted*

Headnote

D "If an offer which is an essential element of any option is vague or capable of more than one meaning, it is open to the offeror to contend that it is not capable of being accepted and thereby converted into a binding contract" (*dicta per* Levy J in *Wasmuth v Jacobs* 1987 (3) SA 629 (SWA) followed).

E The applicant sought the confirmation of a provisional order relating to two motor vehicles which the respondents claimed to own in terms of "options" which, they said, they had exercised. The respondents, both former senior employees of applicant, sought, in a counter-application, the surrender of the vehicles upon payment to the applicant of their F value. The affidavits revealed that, consequent upon an internal audit, which had revealed possible fraudulent behaviour by the respondents, they had both tendered their immediate resignations. Both, however, had refused to return their respective vehicles to the applicant, alleging that they were entitled to purchase them. The "option" upon which they relied G for their claim resulted from a scheme devised by the applicant so as to retain and motivate its key staff by the provision of vehicles for their personal use. While, in terms of the scheme, the vehicles were registered in the names of the senior employees, including the respondents, the scheme did not disclose for how long the "option" would remain open. The terms of the sale were not fully set out, as the sale price remained H unfixed. It was doubtful whether there was any formula to fix the sale

price and, in any event, the applicant retained the final decision to sell A those vehicles which were part of the scheme.

Held, that an option is an "offer" which is irrevocable by the grantor during the period stipulated in the contract or, if there is no such provision, within a reasonable time. If the option is exercised, the potential contract contemplated by the parties to the option agreement is complete. The B 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. An option constitutes nothing more than an offer coupled with an arrangement (express or implied) to keep the offer open for a certain period of time. It is fundamental to the nature of any offer that it should be certain and definite in its terms. It must be C firm, that is, it must be made with the intention that, when it is accepted, it will bind the offeror. If an offer, which is an essential element of any option, is vague or at all capable of more than one meaning, it is open to the offeror to contend that it is not capable of being accepted and thereby convert it into a binding contract. Where there is an "offer" which provides that certain terms were to be "renewed" or to be "negotiated" D or to "stand over" for decision at a later stage, then, pending agreement on

such outstanding terms, neither party has any rights against the other. Similarly, where no time is specified and no price is fixed or ascertainable, no option can be said to exist.

Held, further, that the option set out in the scheme upon which the respondents E relied was no option at all. Notwithstanding that the applicant allowed its vehicles to be registered in the names of its senior employees, the scheme could not, having regard to the terms thereof, be construed as bestowing any right upon the respondents to purchase the vehicles.

Held, further, that the motor vehicles remained the property of the applicant. The provisional order must be confirmed and the respondents' counter F application be dismissed with costs.

Cases referred to

Annamma v Moodley 1943 AD 531

Biloden Properties (Pty) Ltd v Wilson 1946 NPD 736 G

Brandt v Spies 1960 (4) SA 14 (E)

Film & Video Trust v Mahovo Entprs (Pvt) Ltd 1993 (2) ZLR 191 (H)

Hersch v Nel 1948 (3) SA 695 (A)

van Pletsen v Henning 1913 AD 82

Wasmuth v Jacobs 1987 (3) SA 629 (SWA) H

Hungwe J

Case information

A *G Chingoma*, for the applicant

I Chagonda, for the respondents

Judgment

Hungwe J: On the return day of the rule *nisi* I confirmed the provisional order and dismissed the counter application indicating that the reasons will B follow. These are the reasons. This is the return day of the rule *nisi* issued by this court on 10 May 2007 interdicting the two respondents (applicants in the counter application, hereinafter referred to as "the respondents" or "the first and second respondents") from using the applicant's (respondent in the counter application, hereinafter referred to as "the applicant") two Mercedes Benz motor vehicles, registration numbers AAA 3378 and AAA C 4417 and directing the respondents to surrender to applicant the said motor vehicles immediately. The applicant undertook not to re-allocate two of its senior staff members the motor vehicles pending the return day. The respondents complied with the terms of the order requiring them to surrender to the applicant but have filed a counter application seeking an order that D the present applicant be ordered to surrender the two motor vehicles to the respondents, upon tender and payment of the amount due to it for the value of the two motor vehicles. This application and counter application arose out of the following facts:

The applicant employed the first and second respondents as financed E director and operations director respectively. The applicant is the lawful owner of the two Mercedes Benz motor vehicles. It allocated the use of the motor vehicles to the respondents in terms of its company vehicle policy. Sometime in February 2007, the applicant's board of directors had reason to cause a forensic audit to be carried out within the applicant. A forensic audit report produced after the audit investigations revealed possible fraudulent F and prejudicial conduct by the two respondents. The forensic audit report which is part of the papers reveals that the investigations included seeking explanations from the respondents and recording such explanations as they would have given. When the findings and conclusions of the forensic audit report were put to the respondents, they both offered to resign with immediate G effect. They both refused to hand over the two vehicles on the ground that they were entitled to purchase the motor vehicles from the applicant. This necessitated the chamber application, resulting in the present litigation. The applicant argues that the provisional order should be confirmed as the final order since (a) the applicant has not, in the exercise of its discretion, granted the two respondents the option to purchase the two motor vehicles and (b) H the employees leaving its service are required to surrender the vehicles.

Hungwe J

The first and second respondents, on the other hand, contend that the A provisional order be discharged and that the applicant be directed to surrender the two motor vehicles to them upon tender of the value of the motor vehicles.

The respondents ground their counter application on the following basis.

During their term of employment with the applicant, the applicant came up with an executive car policy which governed the acquisition and use of motor B vehicles by senior employees. The first and second respondents contend that the scheme entitled them to exercise an option to purchase the motor vehicles which they were using at the time of resignation. Upon resignation, the respondents notified the applicant that they were exercising the option to purchase the motor vehicles for which the purchase price would be fixed in accordance with the applicant's executive car policy. C

The right to the motor vehicle accrued at the time of the purchase of the motor vehicle. This is demonstrated by the registration of the motor vehicle in the respondents' names. They contend that they are entitled, upon exercise of the option, to the motor vehicles. The respondents also draw the court's attention to the fact that they are in possession of the two motor vehicles' D registration books.

The issue in this dispute, in my view, is whether, upon a proper interpretation of the applicant's motor vehicle policy scheme, the respondents have an enforceable right to purchase the two motor vehicles. Put differently, did the counter applicants hold an option exercisable against the counter respondents to purchase the two motor vehicles upon their resignation from E employment? In order to answer this question, regard must be had to the document which both parties agree governed the use of motor vehicles by the first and second respondents.

In interpreting the document, the court will give effect to the ordinary grammatical meaning of the words used unless the context clearly requires F otherwise. It will be clear from the opening paragraph of the executive car policy document that it was formulated so as to uphold the principle of ensuring improved welfare of the applicant's key staff through the provision of a motor vehicle benefit designed to motivate and retain skilled personnel.

Clause 4 deals with the replacement period of the vehicle. It states that a G company vehicle shall be due for a replacement or renewal after a period of five years from the date of manufacture. Clause 5 goes on to spell out that the executive using the vehicle due for a replacement will be given the first option to purchase the vehicle and the fixing of the price. It states that an application to exercise the option to purchase the vehicle will be processed in line with the relevant provisions of the policy. That same paragraph sets out H

Hungwe J

A what happens when an employee is promoted to a higher grade. Clause 6 is titled "Vehicle Operating Expenses" and sets out what the employer will pay for. Clause 7 spells out the responsibilities of the company vehicle operator. Clause 8 is titled "Administration and Control". In terms of this clause the Group Company Secretary keeps custody of the motor vehicle registration B books at all times even though at purchase, the motor vehicle is registered in the name of the employee in terms of clause 2. Management reserved the right to withdraw the company car facility at its discretion where there is evidence of abuse of allocated vehicle in terms of clause 8. Under clause 8 as well, an employee who leaves the company is required to surrender the vehicle and all accessories to the group managing director with the option C provided for them to purchase the vehicle as provided for under clause 5.

Clause 9 deals with interpretation and application of the policy and states that this is the responsibility of the board. Clause 10 specifically states that "…all provisions under this policy are at the discretion of the group managing director or chairman of the board subject to cash flow availability." The D first and second respondents argue that clause 8 creates the option which they exercised by written notice of election to purchase the vehicles upon their resignation. The question that arises is whether the option in clause 8 creates legally binding consequences between the parties. In other words, is the "option" an option in the legal sense of the word?

E *The Dictionary of Legal Words and Phrases* 2 ed Vol. 3 at p 45 defines an option as follows:

> "An option is an 'offer' which is irrevocable by the grantor during the period stipulated in the contract or, if there be no such provision, within a reasonable time. See also *van Pletsen v Henning* 1913 AD 98; *Annamma* ***v*** *Moodley* 1943 AD 538 *; Hersch v Nel* 1948 (3) SA 695 (A) *; Brandt v Spies* 1960 (4) SA 14 (E). F
>
> If the option be exercised, the potential contract contemplated by the parties to the option agreement is complete."

It is contended on behalf of both the respondents that the applicant made an irrevocable offer in clause 8 of its policy.

G In *Bilodem Properties (Pty) Ltd v Wilson* 1946 NPD 736 at 744 an option was defined thus:

> "A true option is nothing more than an offer by one party to the 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 H him and the other party…."

2012 (1) ZLR p236

Hungwe J

In *Wasmuth v Jacobs* 1987 (3) SA 629 (SWA) it was explained by Levy J A at 633 that:

> "An option constitutes nothing more than an offer coupled with an arrangement (express or implied) to keep the offer open for a certain period of time ……It is fundamental to the nature of any offer that it should be certain and definite in its terms. It must be firm, that is, made with the intention that when it is accepted, it will bind the offeror. (*Efroiken v Simon* 1921 CPD 367 at 370; *Finestone* v B *Hamburg* 1907 TS 629 at632)…….
>
> Therefore, if an offer which is an essential element of any option is vague or capable of more than one meaning, it is open to the offeror to contend that it is not capable of being accepted and thereby converted it into a binding contract. Where there is an 'offer' which provides that certain terms were to be 'renewed' or to be 'negotiated' or to 'stand over' for decision at a later stage, then pending C agreement, on such outstanding terms neither party has any rights against the other. *OK Bazaars v Bloch* WLD 37; *Wilson Bros Garage v Texas Co (SA) Ltd* 1936 NPD 386."

See also *Film and Video Trust v Mahovo Enterprises (Pvt) Ltd* 1993 (2) ZLR 191 (H)

The contention by the respondents is that the provisions of clause 8 constitute D an option exercisable against the applicant. Once exercised, it became binding. I disagree.

It will be clear from the above authorities that, even assuming in favour of the first and second respondents that the "option" existed, there is no offer capable of such acceptance by the offeree as would legally bind the offeror. E There is no definite period within which the "option" would remain open. The terms of the offer cannot be implied. It is not contended that the terms of the sale agreement was spelt out expressly, since the price of the motor vehicles was not yet fixed. In any event, there is repeated reference to the discretion of the management in clause 5 to which clause 8 refers, such that it cannot be said with certainty that there existed a formula to fix a price as F the decision to sell depended on the discretion of management.

I am fortified in my interpretation by the principle espoused at the commencement of the policy document that the intention was never to make the document a contract which a binds the employer to sell its motor vehicles once an employee applied for that. The document makes it clear that the G policy is to retain personnel, not to reward ex-employees. Such a benefit can only be extended to an ex-employee if, in the discretion of management or board of directors, such employee merited it. That is not the position here. In any event, that is not the interpretation given to the policy document by the parties. The fact that the applicant allowed its vehicles to be registered in its employees' names cannot, in my view, be construed as bestowing any H

2012 (1) ZLR p237

Hungwe J

A right to purchase the motor vehicles on the employees. It does not advance the respondents' argument nor does it to destroy the applicant's argument. It merely reinforces the spirit espoused by the policy which is to retain key personnel and nothing more. In my view the two motor vehicles remain the property of the applicant. It is therefore ordered as follows:

B The provisional order is confirmed. The counter application by the respondents is dismissed with costs.

Dube, Manikai & Hwacha, applicants' legal practitioner

C *Atherstone & Cook*, respondent's legal practitioners

© 2015 Juta and Company (Pty) Ltd.

Document 28 of 75

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2012/Volume 1/S v ROSE 2012 (1) ZLR 238 (H)

S v ROSE 2012 (1) ZLR 238 (H)

Citation	2012 (1) ZLR 238 (H)
Case No	Judgment No. HH-71-12
Court	High Court, Harare
Judge	Hungwe J
Heard	17 June 2008; *CAV*
Judgment	22 February 2012
Counsel	*G C Chikumbirike*, for the applicant No appearance for the respondent
Case Type	Application for review of unterminated proceedings
Annotations	No case annotations to date

Flynote

Criminal procedure – *review – incomplete proceedings – High Court's power to interfere in incomplete proceedings – limited circumstances when such power may be exercised*

Headnote

The statutory powers of review under ss 26, 27 and 29 of the High Court Act D [*Chapter 7:06*] can be exercised at any stage of criminal proceedings before an inferior court. In any event, the High Court has inherent powers of review. A wrong decision of a magistrate in circumstances which would seriously prejudice the rights of a litigant would justify the High Court in interfering by way of review at any time during the course of the E proceedings. This principle would apply with greater force in criminal proceedings, where a miscarriage of justice might result from a wrong decision of the magistrate or where the rights of an accused person are seriously affected thereby.

Ordinarily the High Court's power of review is exercised only after termination of the criminal case, but the court is entitled to exercise that F power before the termination of the case, if there is a gross irregularity in the proceedings. It is, however, a power that is sparingly exercised. While the attitude of the Attorney-General is obviously a material element, his consent does not relieve the High Court from the need to decide whether or not the particular case is an appropriate one for G intervention. In addition, the prejudice inherent in the accused being obliged to proceed to

trial, and possible conviction, in a magistrate's court before he is accorded an opportunity of testing in the High Court the correctness of the magistrate's decision overruling a preliminary, and perhaps fundamental, contention raised by the accused, does not in itself necessarily justify the High Court in granting relief before conviction. H

Hungwe J

A Under s 29(4) of the High Court Act, the High Court may set aside a conviction on the grounds of irregularity if a substantial miscarriage has actually occurred. It may do this after conviction but before sentence. The irregularity would, however, have to be so gross that it is incapable of correction by way of ordinary review or appeal. The High Court may also interfere where it would be unconscionable to await the conclusion B of the proceedings before seeking redress in the normal way.

Cases referred to

Ellis v Visser & Anor 1956 (2) SA 117 (W)

Ginsburg v Additional Magistrate of Cape Town 1933 CPD 357

C *McComb v Assistant Resident Magistrate & Anor* 1917 TPD 717

Rascher v Min of Justice 1930 TPD 810

S v Hutchings 1970 (2) RLR 176 (G)

S v Sibanda HB-139-88

Wahlhaus v Additional Magistrate, Johannesburg & Anor 1959 (3) SA 113 (A)

Legislation considered D

High Court Act [*Chapter 7:06*] ss 26, 27(1)(2), 29(1)(b), (2), (3) & (4)

Case information

G C Chikumbirike, for the applicant

E No appearance for the respondent

Judgment

Hungwe J: This is an application for an order declaring the applicant not guilty and acquitting her after a review of the proceedings leading to her conviction. The matter was placed before me as an ordinary court application although the proceedings in the magistrate's court are not yet concluded in F that she has not yet been sentenced. There are certain deficiencies to which I shall later return. The question raised in this application is whether this court has the power to intervene in unterminated criminal proceedings in the exercise of its inherent powers of review. In order to answer this question it is important to draw a distinction between an appeal and a review.

G Herbstein & van Winsen *Civil Practice of the Supreme Court of South Africa* 4 ed p 932 explain the distinction:

> "The reason for bringing proceedings under review or appeal is usually the same, to have the judgment set aside. Where the reason for wanting this is that the court came to a wrong conclusion on the facts or the law, the appropriate procedure is by way of appeal. Where, however, the real grievance is against the method of H the trial, it is proper to bring the case on review. The first distinction depends,

---

Hungwe J

> therefore, on whether it is the result only or rather the method of trial which is A to be attacked. Naturally, the method of trial will be attacked on review only when the result of the trial is regarded as unsatisfactory as well. The giving of a judgment not justified by the evidence would be a matter of appeal and not a review, upon this test. The essential question in review proceedings is not the correctness of the decision under review but its validity."

It will be useful for purposes of this decision for me to summarise the law B that is applicable. The power of a superior court to review the proceedings of an inferior court covers various stages in a criminal proceeding before an inferior court, that is, prior to conviction, after conviction but before sentence, and after sentence has been passed by an inferior court.

Part IV of the High Court Act [*Chapter 7:06*] enumerates the High Court's C statutory powers of review. Section 26 provides that, subject to the provisions of the Act and any other law, the High Court has review powers over all proceedings and decisions of all inferior courts of justice, tribunals and administrative authorities. Section 27(1) provides that, subject to the provisions of that Act and any law, the grounds of review are absence of jurisdiction, bias D and gross irregularity in the proceedings or decision. Section 27(2) provides that nothing in that particular section shall affect the provisions of any other law relating to review of inferior courts, tribunals or authorities. Section 29(1)(b) provides that for purposes of reviewing any criminal proceedings the High Court may hear any evidence in connection with the proceedings. E Section 29(2) states that if on review of any criminal proceedings the High Court considers that the proceedings are not in accordance with real and substantial justice it has the power to do various things, including the power to alter and quash the conviction or to set aside or correct the proceedings or "generally give such judgment or make such order as the inferior court or F tribunal ought, in terms of any law, to have given, imposed or made on any matter which was before it in the proceedings in question." Section 29(3) specifically provides that no conviction or sentence shall be quashed or set aside in terms of s 29 by reason of any irregularity or defect on the record of proceedings unless the High Court considers that a substantial miscarriage of justice has actually occurred. Section 29(4) states that, subject to the rules G of court, the powers under s 29(1) and (2) may be exercised whenever it comes to the notice of the High Court that any criminal proceedings are not in accordance with real and substantial justice, notwithstanding that such proceedings are not the subject of an application to the High Court or have not been submitted to the High Court for review. H

2012 (1) ZLR p241

Hungwe J

A It is clear from the foregoing that the statutory powers of review under the High Court Act [*Chapter 7:06*] can be exercised at any stage of criminal proceedings before an inferior court.

Further, the authorities indicate that this court has an inherent power of review. In *Rascher v Minister of Justice* 1930 TPD 810 at 820 Krause J said:

> B "... a wrong decision of a magistrate in circumstances which would seriously prejudice the rights of a litigant would justify the court at any time during the course of the proceedings in interfering by way of review ...
>
> The above principles were laid down in a civil case, and they would apply with greater force where the proceedings are of a criminal nature and a miscarriage of justice might result in the circumstances from a wrong decision of the magistrate or where the rights of an accused person are seriously affected thereby."

C In *Ginsberg v Additional Magistrate of Cape Town* 1933 CPD 357 at 360 Gardiner JP observed:

> "Now, as a rule, the court's power of review is exercised, only after termination of the criminal case, but I am not prepared to say that the court would not exercise that power ... before a termination of a case, if there were gross irregularity in the proceedings."

D In *Wahlhaus v Additional Magistrate, Johannesburg & Anor* 1959 (3) SA 113 (A) at 119-120 Ogilvie Thompson JA (as he then was) said:

> "It is true that, by virtue of its inherent power to restrain illegalities in inferior courts, the Supreme Court may, in a proper case, grant relief – by way of review, interdict or *mandamus* – against the decision of a magistrate's court given before E conviction ...
>
> This, however, is a power which is to be sparingly exercised. It is impracticable to attempt any precise definition of the ambit of this power; for each case must depend upon its own circumstances. The learned authors of *Gardiner and Lansdowne* (6 ed Vol 1 p 750) state:
>
> > 'While a superior court having jurisdiction on review or appeal will be F slow to exercise any power, whether by *mandamus* or otherwise, upon the unterminated course of proceedings in a court below, it certainly has the power to do so, and will do so in rare cases where grave injustice might otherwise result or where justice might not by other means be attained ...In general, however, it will hesitate to intervene, especially having regard to the effect of such a procedure upon the continuity of proceedings in the court below, and to the fact that redress by means of review or appeal will G ordinarily be available.'

In my judgment, that statement correctly reflects the position in relation to unconcluded criminal proceedings in the magistrates' courts. I would merely add two observations. The first is that, while the attitude of the Attorney-General is obviously a material element, his consent does not relieve the Superior Court from the necessity of deciding whether or not the particular case is an appropriate one H for intervention. Secondly, the prejudice, inherent in an accused's being obliged

---

2012 (1) ZLR p242

Hungwe J

to proceed to trial, and possible conviction, in a magistrate's court before he A is accorded an opportunity of testing in the Supreme Court the correctness of the magistrate's decision overruling a preliminary, and perhaps fundamental, contention raised by the accused, does not *per se* necessarily justify the Supreme Court in granting relief before conviction."

In *Ellis v Visser & Anor* 1956 (2) SA 117 (W) at 120-122 Murray J (as he then was) considered *Ginsberg v Additional Magistrate of Cape Town supra* B and observed that the learned Judge President in that case dealt with a case in which the trial magistrate tried the accused in his absence in circumstances where such trial was not permitted. The learned Judge President said this was one of the exceptional and unusual cases where the trial magistrate had acted with gross irregularity and had not discharged the functions entrusted to him. Gardiner JP's view was that where a trial magistrate performs C his functions in a proper and regular manner the superior court would not interfere. Referring to *Rascher v Minister of Justice supra*, Murray J indicated that, as far as what Krause J had said was concerned, if that meant that any wrong decision by a trial magistrate on a point of law which was given in the course of a criminal trial was subject to immediate interference by the D superior court, he would hold that he did not agree with that. Murray J went on to state at 123-124:

"Even assuming that I have the discretion to interfere in exceptional cases I see no reason whatsoever for using that discretion in the applicant's favour, and see considerable reason against exercising my discretion in the applicant's favour ...

The grounds counsel asked me to consider were really this: that the title to E prosecute is a *sine qua non* and the applicant in this case would be subjected to hardship if the case was allowed to proceed further, and that there would be repetition of matters which would cause him to be involved in publicity of an extremely undesirable character from his point of view. It was also pointed out that he would be put to costs and that he was not certain that he would be able to recover from the prosecutor if acquitted. It was also pointed out that the case would be a protracted one and that there would be claims on the applicant's F time as a result of this.

I cannot see that, in regard to these matters, the applicant is in any worse position or suffers any greater hardship than any person who is prosecuted and eventually acquitted.

... There are a number of objections which may be taken apart from embarrassment in a case against an accused person; there are the special pleas … and there G are matters of exception or objections to the plea and the indictment presented. All of these matters can be decided and are decided by the magistrate. If the applicant's contention in this case is correct, then in every one of these cases where a decision is taken by a magistrate there would be just as much reason as in the present case for the accused person to claim that this matter must be decided *in limine* without awaiting the results of the merits of the case. The result would, I think, create chaos – one envisages a succession of appeals…. H

2012 (1) ZLR p243

Hungwe J

A whereas it is desirable that the actual merits should be speedily disposed of; and any decisions which are wrong in law should be corrected in the ordinary way by way of appeal, as there can be no miscarriage of justice, no abuse of process of the court if the ordinary procedure is followed."

Mr *Chikumbirike*, for the applicant, submitted that by virtue of s 26 of the High Court Act [*Chapter 7:06*] this court has power of review to quash a B conviction before the resumption of the proceedings for sentencing and that s 29(4) enables this court to intervene at any stage of the proceedings of an inferior court to correct injustice which is brought to its notice. But the power of this court under s 26 is specifically made subject to the provisions of that Act and, as already mentioned, s 27 provides the grounds of review are an C absence of jurisdiction, bias and gross irregularity in the proceedings or the decision. None of the foregoing grounds are alleged by the applicant as the basis for this court's review. The applicant urged this court to hold that the decision arrived at in the interpretation of the Gold Trade Act is "irregular" so as to make that decision liable to be set aside on review. Mr *Chikumbirike* was at pains to convince this court that the proceedings

are indeed liable to D be reviewed before sentence is passed because to allow the sentencing of the applicant would result in an injustice.

The test as to when a superior court could intervene in unterminated proceedings has already been discussed above. A superior court having jurisdiction on review or appeal will be slow to exercise any such power, E whether by *mandamus* or otherwise, and will only do so in rare cases where "grave injustice might otherwise result or where justice might not by other means be attained."

On the other hand s 29(2) and (4) provides that when any criminal proceedings are not in accordance with real and substantial justice this court may alter or quash the conviction or set aside the proceedings. However, s 29(3) states that F no conviction shall be quashed or set aside by reason of any irregularity or defect in the record of proceedings unless substantial miscarriage of justice has actually occurred.

What is permitted is intervention by this court in a ruling that is so gross that it is incapable of correction by way of ordinary review or appeal; or G where it is unconscionable to await the conclusion of the proceedings before seeking redress in the normal way. It seems to me that such instances will be rare. In *S v Hutchings* 1970 (2) RLR 176 (G) this court interfered prior to sentencing for the purpose of quashing an erroneous conviction brought to its attention by the trial magistrate. While in *S v Sibanda* HB-139-88 this court, after the proceedings had, as far as conviction and sentence were H concerned, been confirmed, decided to set aside the proceedings on the basis

---

of an irregularity that had occurred in a guilty plea having been recorded as A a result of undue influence.

McComb v Assistant Resident Magistrate & Attorney-General 1917 TPD 717 was a case where the magistrate had refused to allow certain questions to be put to a Crown witness. The matter was postponed in order to allow an application to be made for a *mandamus* that the magistrate allows the B questions. This is what the court said at 718:

> "Moreover, as pointed out by my brother Gregorowski, if the court is called upon to intervene whenever a magistrate disallows a question in cross-examination, it might protract a hearing of the case indefinitely. After having got the court's ruling on this question, when the matter comes before the magistrate again the attorney may wish to put other questions which the magistrate deems wholly C irrelevant, and the magistrate may disallow them, and an application may again be made to this court for a *mandamus* to compel the magistrate to allow the questions. That only shows how undesirable it is for the court, in the absence of good reason, to intervene in the middle of (or rather, as in this case, at the beginning) of criminal proceedings upon an application of this nature."

In the present matter, the record shows that when an application was made to D the trial magistrate for the adjournment of the proceedings pending a review of his decision convicting the accused, the trial magistrate quite rightly refused to stop the proceedings until after sentence. For some reasons which do not appear on record the matter did not proceed to sentence. Later these review proceedings were initiated. It was now represented on the applicant's papers that the trial court had stopped the proceedings in order for the review E process to get under way. This is incorrect. The fact is that all the authorities confirm that the reason why a review of unterminated proceedings is not countenanced is to avoid creating a situation such as here where proceedings are unnecessarily interrupted. In light of the above, the "decision" which it is sought to bring on review can properly be brought on appeal or review after F the proceedings are fully concluded. In any event I see no basis to think that the magistrate's interpretation was wrongly arrived at, if that is the basis of bringing a review of the decision.

It has come to my attention that in all probability the presiding magistrate may not be available to sentence the accused. In terms of the Magistrate Court Act [*Chapter 7:06*] this matter may be placed before another magistrate for G sentence. In the result, therefore, I dismiss the application for review and order that the matter be placed before another magistrate for sentencing of the applicant.

Chikumbirike & Associates, applicant's legal practitioners H

© 2015 Juta and Company (Pty) Ltd.

Document 29 of 75

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2012/Volume 1/STUPENDIS ENTERPRISES (PVT) LTD v KASI & ORS 2012 (1) ZLR 245 (H)

STUPENDIS ENTERPRISES (PVT) LTD v KASI & ORS 2012 (1) ZLR 245 (H)

Citation	2012 (1) ZLR 245 (H)
Case No	Judgment No. HH-72-12
Court	High Court, Harare
Judge	Hungwe J
Heard	22 February 2012
Judgment	22 February 2012
Counsel	*E T Matinenga*, for the applicant *H Zhou*, for the first and second respondents No appearance for the third and fourth respondents
Case Type	Opposed application
Annotations	No case annotations to date

Flynote

C **Contract** – *sale – validity – jointly owned matrimonial property – wife not consenting to sale – sale to innocent purchaser – whether specific performance should be granted – wife having right to her share of sale price – specific performance granted to purchaser*

Headnote

D The applicant company bought a house from the first two respondents, who were husband and wife. Litigation ensued over the sale, and default judgment was obtained, ordering the transfer of the property to the applicant. The default judgment was rescinded on the application of the wife. The applicant then sought specific performance of the contract E of sale. The wife objected, on the basis that she was joint owner of the property and had not agreed to the sale and that the power of attorney in which she had purportedly agreed to the sale was a forgery. She averred that the marriage had foundered and that a divorce was pending.

It was argued for the applicant that the court should order specific performance as the wife would not suffer any prejudice since she could still call F upon the husband to account for the sale of the proceeds of the sale of the matrimonial assets in the pending divorce action. Since at common law she was regarded as co-owner of the asset in issue, she would be entitled to a share in the property proportionate to her shareholding. The husband need not have obtained his wife's consent before disposing of G his half-share and the sale of his half share to the applicant could not be impugned. If the applicant did not obtain transfer, the result would be that the applicant, a company, and the wife would become co-owners of a residential property, which would be absurd.

The wife applied for an order declaring the sale to be null and void.

Held, that a co-owner may not purport to alienate the property which is H jointly co-owned without the consent of the other owners; and that

Hungwe J

alienation of jointly owned property can only be effected by the joint A action of all the owners. However, there may be circumstances in which a court may be called upon to consider whether or not to recognise an alienation which violates this principle of law. A common occurrence of such a circumstance occurs in matrimonial property, where a court, in the interests of justice and fair play, has the power to take part of a B spouse's share in property jointly owned to give it to the other spouse if, by doing so, it could place the spouses in the position they would have been had a normal marriage relationship continued between them.

Held, further, that although the husband misrepresented that he had the power of attorney to enter into the agreement of sale in respect of his wife's half share in the property, the applicant had no reason to suspect that C there was such a misrepresentation and there was no reason to find that the applicant was not an innocent party. A plaintiff is always entitled to specific performance and, if he makes out a case, his claim will be granted, only subject to the court's discretion. Although this discretion must be exercised judicially, it is not confined to specific types of cases, nor is it circumscribed by rigid rules. Each case must be judged in the D light of its own circumstances.

Held, further, that an order of specific performance should be granted, because:

(a) the applicant entered into the agreement of sale without any suspicion that the first defendant may have forged his wife's signature to the agreement; E

(b) the applicant had made full payment for value to the husband, who was obliged to disgorge his ill-gotten gains in favour of his estranged wife;

(c) in view of the pending divorce proceedings, the wife would not suffer any prejudice by making a claim for her share in those proceedings, taking into account the findings against her husband made in this F matter; and

(d) the balance of convenience favoured the applicant.

Cases referred to

Bennett NO v le Roux 1983 (2) ZLR 301 (H) G

Farmers' Co-op Soc (Reg) v Berry 1912 AD 343

Heynes v Kingwilliamstown Municipality 1951 (2) SA 371 (A)

Masubey v Masubey 1993 (2) ZLR 36 (H)

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

Rother's Est v Sandig's Est 1943 AD 47

Runciman v Schultz 1923 TPD 45 H

Hungwe J

Case information

A *E T Matinenga*, for the applicant

H Zhou, for the first and second respondents

No appearance for the third and fourth respondents

Judgment

Hungwe J: The applicant seeks an order for specific performance of a B contract of sale of an immovable property called Lot 1 of Subdivision 2 of Lot 382A Highlands Estate, measuring 4043 m2 held under title deed No. 13635/2001, registered in the names of the first and second respondents, husband and wife respectively. The third respondent is the Registrar of Deeds. No papers were filed on behalf of the third respondent so I take it that that office will abide the court's decision. The

fourth respondent is the C Commissioner-General of the Zimbabwe Revenue Authority. He indicates that he is not opposed to the order sought by the applicant. He has not filed any papers.

The second respondent is opposed to the order sought by the applicant. She counter-applies for an order declaring the agreement of sale relied upon by D the applicant null and void *ab initio.* She avers that, as joint owner of the property in question, she never consented to the sale of the property. She states that the signature appended to the power of attorney executed in favour of the first respondent granting him power to transfer her half-share is a forgery.

The applicant makes the following averments regarding the circumstances leading to this application. On 15 February 2005, the first and second E respondents sold the property to one Wonderful Chizema. On 1 July 2005, the first and second respondents sold the same property to the applicant. At the time of the sale the applicant was unaware of the prior sale to Chizema.

On 20 July 2005, the first and second respondents sought to cancel the sale of the property to Chizema. Chizema did not accept the cancellation. He F obtained a provisional order on 23 August 2005 in this court, interdicting the first and second respondent from alienating the property in any way. The provisional order was never confirmed. The applicant states that Chizema has since fallen out of the picture.

On 2 August 2005, the first respondent sought to cancel the sale of the property to the applicant. The applicant did not accept the cancellation. It obtained G a provisional order in this court on 2 September 2005 interdicting the first and second respondent from alienating the property in any way, pending the determination of an application compelling transfer of the property to it.

On 5 October 2005, the applicant obtained default judgment against the respondents in terms of the order in the present application. Consequently, H the property was transferred to it. On 10 October 2005, a writ of eviction

---

was issued out in favour of the applicant for the eviction of both the first A and second respondents from the property. The first and second respondents obtained an order staying eviction pending the filing of an application for rescission of judgment.

On 20 December 2006, the second respondent applied for and obtained rescission of the judgment granted on 5 October 2005. B

This application deals with the merits of the main application. The issue is whether the applicant is entitled to the order sought in the application for specific performance. The first respondent has not opposed the order sought.

The second respondent states that her marriage to the first respondent, around 24 February 2004, the date the power of attorney in favour of the C first respondent was signed, was on the rocks due to the first respondent's association with one Ivy Kombo. As such, she could not possibly have executed the power of attorney as alleged. In any event she had already executed such power of attorney in favour of her sister.

Mr *Matinenga,* for the applicant, urged this court to find for the applicant on the following grounds. Firstly, he contended that, as the second respondent D was fully aware of the sale of the joint matrimonial property to the applicant, she must be ordered to pass transfer to applicant. Secondly, if this court held that she was unaware of the sale to applicant and therefore found that her signature consenting to the sale is a forgery, the court must still order specific performance, as she will not suffer any prejudice since she can still call upon the first respondent to account for the sale of the proceeds of the sale of the E matrimonial assets in the pending divorce action. Thirdly, since at common law the second respondent is regarded as co-owner of the asset in issue, she will be entitled to a share on the property proportionate to her shareholding. See *Runciman v Schultz* 1923 TPD 45 where the following appears;

> "The principle of our law on this point seems to me to be contained in the first F paragraph of Digest (10.3.6.2), where Ulpian says: 'A joint owner (*socius*) will be bound by the *actio communi dividendo* to account for whatever he has acquired from the common property, whether by letting the common property or by cultivating it himself."

The applicant argues that the first respondent need not have obtained the second respondent's consent before disposing of his half-share. As such, the G sale of the first respondent's half share to

the applicant cannot be impugned. If the applicant does not obtain transfer, the result will be that the applicant, a company, and the second respondent will become co-owners of a residential property which, for strangers, is absurd. The the applicant urged the court to exercise its wide discretion to make such an order as the justice of the case may require. *Estate Rother v Estate Sandig* 1943 AD 47. H

Hungwe J

A In *Bennett NO v le Roux* 1983 (2) ZLR 301 (H) the relevant authorities are discussed and set out as follows;

> "The task of the court is to decide how the property should be sold, and in doing that it is being guided by the following passage in Oosthuizen's *The Law of Property* at p 63:
>
> > 'If the joint owners are unable to agree upon the manner in which the B property is to be divided, any one of them may approach the court for relief by instituting the *actio communi dividendo*. The court has a wide discretion in regard to the partition and may make such order as appears to be fair and equitable in the circumstances. It may, for example, order one joint owner to pay a certain sum to each of the others in order to equalise the division; the court may award it to one of the joint owners, subject to the payment C of compensation to the other; or it may order that the property be sold by public auction and the proceeds to be divided among the joint owners in accordance with their shares. "

The second respondent is vehemently opposed to the grant of the order sought and, as I said, makes a counter-application for an order declaring the agreement of sale null and void *ab initio.* She raised a point *in limine* that, as D there is dispute of fact incapable of resolution on the papers, the matter must be referred to trial. It seems to me that there are sufficient facts which are common cause on the papers upon which this court can, adopting a robust approach to the whole matter, rely upon to resolve the dispute.

As I understood it, the contention by Mr *Zhou*, for the second respondent, is E that, despite the fact that a divorce is pending, at law she is still married to the first respondent. By virtue of her marriage, she is a joint owner of an equal and undivided share in the property. She was never party to the agreement of sale which the applicant seeks to enforce. The power of attorney used to effect the agreement of sale was forged in favour of the first respondent. As such, she is not bound by the agreement.

F It is true that a co-owner may not purport to alienate the property which is jointly co-owned without the consent of the other owners; and that alienation of jointly owned property can only be effected by the joint action of all the owners: *Masubey v Masubey* 1993 (2) ZLR 36 (H). There may, however, be circumstances in which a court may be called upon to consider whether G or not to recognise an alienation which violates this principle of our law. A common occurrence of such a circumstance occurs in matrimonial property. In *Ncube v Ncube* 1993 (1) ZLR 39 (S) the court was called upon to do exactly that. At p 46 the Supreme Court expressed itself thus:

> "It is true that joint owners of property own each and every part of the property equally and, therefore, own equal shares in the value of the property. But when H property comes to be apportioned or divided under s 7 of the Act, even though

---

Hungwe J

> the spouses may be joint owners of the property, the Act confers on a court of A law, in the interests of justice and fair play, power to take part of a spouse's share in property jointly owned to give it to the other spouse if, by doing so, it could place the spouses in the position they would have been had a normal marriage relationship continued between them."

In the present case, it is my finding that the first respondent misrepresented to the applicant that he had the power of attorney to enter into the agreement B of sale in respect of the the second respondent's half share in the immovable property. I also find that the applicant had no reason to suspect that there was a misrepresentation of fact in respect of the authority to pass transfer by the first respondent. The papers do not suggest that it was in the public domain that the first and second respondent's marriage was on the verge of collapse in 2005. It therefore cannot be argued that the applicant was not C an innocent purchaser for value when it bought the property. Indeed, that is not the second respondent's contention. She relies on her lack of knowledge and consent to the sale of her half-share by her husband only.

Having come to that conclusion, I must decide whether or not I should order specific performance. Our law is clear that a plaintiff is always entitled to D specific performance and, if he or she makes out a case, his or her claim will be granted, only subject to the court's discretion. The *locus classicus* for this view is the judgment of Innes J in *Farmers Co-operative Society (Reg) v Berry* 1912 AD 343 at 350 where he says:

> "*Prima facie* every party to binding agreement who is prepared to carry out his own obligation under it has a right to demand from the other party, so far as it is E possible, a performance of his undertaking in terms of the contract. As remarked by Kotzé CJ in *Thompson v Pullinge***r** (1894) 1 OR at p 301:
>
> > 'the right of s plaintiff to the specific performance of a contract where the defendant is in a position to do so is beyond doubt.'
>
> It is true that courts will exercise a discretion in determining whether or not decrees of specific performance will be made. They will not, of course, be issued F where it is impossible for the defendant to comply with them. And there are many cases in which justice between the parties can be fully and conveniently done by an award of damages. But that is a different thing from saying that a defendant who has broken his undertaking has an option to purge his default by the payment of money. For, in the words of Storey *Equity in Jurisprudence*, sec 717 (a): G
>
> > 'it is against conscience that a party should have a right of election whether he would perform his contract or only pay damages for the breach of it.'
>
> The election is rather with the injured party, subject to the discretion of the court."

In exercising the court's discretion, I am aware that

> "… (t)he discretion which a court enjoys, although it must be exercised judicially, is not confined to specific types of cases, nor is it circumscribed by rigid rules. H

Hungwe J

> A Each case must be judged in the light of its own circumstances" (*per* de Villiers AJA in *Heynes v Kingwilliamstown Municipality* 1951 (2) SA 371 (A) at 378G).

In this case, what I find to weigh heavily in favour of the granting of the order sought is the fact that the applicant entered into the agreement of sale without any suspicion that the first defendant may have forged his wife's B signature to the agreement. Secondly, the applicant has made full payment for value to the first respondent. It is for the first respondent to disgorge his ill-gotten gains in favour of his estranged wife. Thirdly, in view of the pending divorce proceedings, the second respondent will not suffer any prejudice by making a claim for her share in those proceedings taking into account the findings against her husband made in this judgment. Further a balance C of convenience favour the making of an order in favour of the applicant in the terms sought.

In the premises therefore the second respondent's counter-claim is dismissed with costs.

In the premises I make the following order: D

1 The third respondent be and is hereby ordered to transfer a certain piece of land situate in the district of Salisbury known as Lot 1 of Subdivision 2 of Lot 382 A Highlands Estate measuring 4043 m2 held under eeed of transfer No. 13635/2001 to the applicant.

2 The Sheriff of the High Court of Zimbabwe or his lawful deputy be E and is hereby authorised to sign all papers necessary to transfer title in favour of the applicant in terms of para 1 above.

3 The fourth respondent be and is hereby ordered to issue a duplicate capital gains tax clearance certificate to Matipano and Musimwa, legal practitioners, of the certificate he issued to Musunga and Associates F upon application and in fulfilment of his requirements for him to issue such certificate.

4 Matipano and Musimwa, legal practitioners, be and are hereby authorized to process the conveyancing of the property referred to in para 1 above to the applicant. G

5 The Deputy Sheriff be and is hereby ordered to evict the first and second respondents and all those claiming through them from a certain piece of land situate in the district of Salisbury known as Lot 1 of Subdivision 2 of Lot 382 A Highlands Estate measuring 4043 m2 held under deed of transfer No. 13635/2001 otherwise known as 4 Knightsbridge Crescent, Highlands, Harare with the assistance of the members of the Zimbabwe H Republic Police, if necessary, upon giving five days' notice.

Hungwe J

6 The first and second respondents jointly and severally, the one paying A the other to be absolved, be and are hereby ordered to pay costs of suit.

Matipano and Musimwa, the applicant's legal practitioners

Debwe and Partners, the second respondent's legal practitioners B

© 2015 Juta and Company (Pty) Ltd.

Document 30 of 75

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2012/Volume 1/BELINSKY v CHIPERE 2012 (1) ZLR 253 (H)

BELINSKY v CHIPERE 2012 (1) ZLR 253 (H)

Citation	2012 (1) ZLR 253 (H)
Case No	Judgment No. HH-74-12
Court	High Court, Harare
Judge	Hungwe J
Heard	14 January 2009; *CAV*
Judgment	22 February 2012
Counsel	*D Kufaruwenga*, for the excipient *P C Paul*, for the respondent
Case Type	Exception
Annotations	No case annotations to date

Flynote

Practice and procedure – *res judicata – dismissal of claim due to failure to appear at pre-trial conference – not a judgment on merits – defaulting party entitled to issue fresh process, provided order for costs met*

D **Practice and procedure** – *summons – issue – whether plaintiff allowed to issue fresh summons after claim dismissed for failure to appear to pre-trial conference*

Headnote

The excipient had been sued by the respondent for damages arising out of a motor vehicle accident. A pre-trial conference had been set down, but E the respondent failed to appear. The excipient applied for, and obtained, an order dismissing the respondent's claim with costs. The respondent then issued fresh process and the matter was set down for trial. The excipient took exception to the fresh process issued by the respondent, arguing that the respondent ought to have applied for rescission of the default judgment in terms of either r 63 or r 449 of the High Court F Rules 1971. Without having obtained rescission of that judgment, the respondent's claim stood dismissed with

costs and the respondent was barred from instituting fresh action. The respondent argued that r 63 was permissive and gave the party against whom default judgment was entered two options: (a) to seek rescission of that default judgment, G and, after obtaining it, to proceed on the same papers; or (b) to abandon those papers and issue fresh ones. As long as the order for costs had been complied with, it was open to the respondent to commence a fresh action, since the dismissal of the action at the pre-trial conference stage was akin to absolution from the instance.

Held, that that the excipient's argument should fail for two reasons. First, H the excipient had expressly abandoned the special plea of *res judicata*.

2012 (1) ZLR p254

Hungwe J

If this was meant to be just a preliminary objection, then he ought to A have sought the dismissal of the respondent's case, as he did, and in addition a stay of proceedings until the respondent had paid the costs in terms of the order for dismissal of the original claim. Second, rr 58, 59, 59A, 60, 61 & 62 of the High Court Rules grant the power to the court to enter judgment or make such order as it may think fit depending on B the circumstances without hearing evidence. A judgment obtained in this manner amounts to a default judgment. The respondent failed to appear in person or through counsel at the pre-trial conference, and generally, in such a situation, an order for dismissal of his claim is entered. Such an order is at law not a judgment for the other party. The respondent C was entitled to issue a fresh summons.

Cases referred to

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

Western Cape Housing Development Bd & Anor v Parker & Anor 2005 (1) SA 462 (C) D

Legislation considered

High Court Rules 1971 (RGN 1047 of 1971), rr 58, 59, 59A, 60, 61, 62, 63 & 449 E

Case information

D Kufaruwenga, for the excipient

P C Paul, for the respondent

Judgment

Hungwe J: The defendant filed a special plea on 20 October 2008. The following facts constitute the basis of the special plea. F

1. The respondent (plaintiff in the main matter, hereinafter called "the plaintiff") issued summons claiming damages arising from a road traffic accident on 14 January 2008.
2. Pleadings were exchanged between the parties, leading to a convening of the pre-trial conference before the judge in chambers in terms of r G 182 of the High Court Rules, 1971 ("the Rules").
3. The pre-trial conference was set down for 22 April 2008 for the parties to attend, with a view to either settle the matter or defining the issues to be referred for trial.
4. The plaintiff's legal practitioner or his representative failed to turn up. H

2012 (1) ZLR p255

Hungwe J

A 5. The defendant made an oral application for the dismissal of the plaintiff's claim to the judge in chambers and obtained an order dismissing the claim with costs on the same day.
6. Thereafter the plaintiff issued fresh summons based on the same cause of action claiming the same relief from the same party. This is the present B action.
7. The matter has been set down for trial.

The defendant took exception to a fresh process issued by the plaintiff. He argues that the plaintiff ought to have applied for rescission of the default judgment in terms of either r 63 or r 449 of the Rules. Without having obtained rescission of the judgment, so the defendant contends, the plaintiff's

claim C stands dismissed with costs. He contends that the plaintiff is barred from instituting fresh action.

As I understood it, Mr *Kufaruwenga's* argument on behalf of the defendant is this. Since the claim was dismissed in terms of r 182(11) of the Rules, the plaintiff cannot, without first obtaining rescission of that judgment, issue D fresh process as the dismissal still stands. The only course of action open to a party eager to pursue an action so dismissed is to first to seek rescission in terms of r 63 of the Rules.

The plaintiff disputes this contention. Mr *Paul*, for the plaintiff, argued that r 63 of the Rules was permissive. It gives the plaintiff against whom default E judgment was entered two options. The first option was to seek rescission of that default judgment and, after obtaining it, proceed on the same papers. The second option was to literally abandon those papers and issue fresh ones. So long as the order for costs has been discharged, according to his argument, it is open to the plaintiff to commence fresh action since the dismissal of the action at pre-trial conference stage is akin to absolution from the instance. F This interpretation, argued Mr *Paul,* accords with the tenor of rr 59, 59A, 60, 61, 62 and 63 of the Rules.

It seems to me that the defendant's argument should meet with failure for two reasons. First, the defendant expressly abandoned the special plea of *res judicata,* notwithstanding the fact that he had expressly couched that special G plea which he had filed with this court on 20 October 2008, as the basis of the special plea. If this was meant to be just a preliminary objection (which it sounds more like), then the defendant ought to have sought the dismissal of the plaintiff's case as he did, but a stay of proceedings till the plaintiff had paid the costs in terms of the order: see *Western Cape Housing Development Board & Anor v Parker & Anor* 2005 (1) SA 462 (C). Second, the Rules H grant the power to the court to enter judgment or make such order as it may

---

Hungwe J

think fit, depending on the circumstances, without hearing evidence: rr 58, A 59, 59A, 60, 61 and 62 of the Rules. It is said that a judgment obtained in this manner amounts to a default judgment. When the plaintiff had failed to appear in person, or through counsel, for trial or in obedience to the directive, generally an order for dismissal of his claim is entered. Such an order dismissing the plaintiff's claim is at law not the judgment for the defendant. B

In *Munemo v Muswera* 1987 (1) ZLR 20 (S**)** at 22 McNally JA put the matter this way

> "… The judgment relied upon was not the judgment for the plaintiff, nor was it a judgment for the defendant … However, the judgment in 1979 was a judgment which read: 'the plaintiff's claim for ejectment is dismissed with costs.' It is well established that such a judgment is in effect one of absolution from the C instance. – see *Hassan v Billiat* S-132-86 (not reported); *Bulford v Bob White's Service Station (Pvt) Ltd* 1972 (2**)** RLR 224 (A); *Makayiseni v Musarurgwa* 1947 SR 160 at 162. The matter is succinctly put by Hoffmann & Zeffertt *op cit* at p 263 in the following words;
>
> > 'The decree of absolution from the instance (or an order dismissing the plaintiff's claim) is specifically intended to enable the plaintiff to bring another action if he can find better evidence to support his claim. Absolution D can never found a cause for action estoppel.'"

The dismissal of the plaintiff's claim, where it is obtained by default, is not as drastic and order as it may sound. In my view, this accords with the rationale of the Rules which is to achieve justice only after each party has had his or her day in court. To hold the otherwise would, in my view, subject E the procedure to mere technicality without achieving the desired end, which is to do justice between the parties.

It is instructive that in terms of r 61 of the Rules, the defendant may obtain an order dismissing the the plaintiffs' claims where the plaintiff has been barred from declaring or making a claim. In terms of r 62 of the Rules the defendant may also obtain an order absolving him where the plaintiff makes default of F appearance. Both rules use the permissive "may", not the peremptory "shall", to make provision for the options open to the party who has complied with the Rules. Similarly, r 63 of the Rules also uses the permissive "may" to confer discretionary power to the court before which the matter is placed. The court is not obliged to give judgment for either party, hence in practice G the matter is generally dismissed or postponed, depending on the force of the application made by the party appearing before it.

Thus, where an order such as the one granted on 22 April 2008 is in issue, it can hardly be said that such an order determined the matter finally. In my view the plaintiff correctly opted to issue fresh summons, as it was entitled to do, rather than seek rescission of the judgment granted in default. H

Hungwe J

A In the premises, the preliminary issue raised by the defendant is dismissed.

Wintertons, the plaintiff's legal practitioners

B *Dzimba Jaravaza & Associates*, the defendant's legal practitioners

© 2015 Juta and Company (Pty) Ltd.

Document 31 of 75

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2012/Volume 1/SABETA v COMMISSIONER-GENERAL, ZIMBABWE REVENUE AUTHORITY 2012 (1) ZLR 258 (H)

SABETA v COMMISSIONER-GENERAL, ZIMBABWE REVENUE AUTHORITY 2012 (1) ZLR 258 (H)

Citation	2012 (1) ZLR 258 (H)
Case No	Judgment No. HH-79-12
Court	High Court, Harare
Judge	Mathonsi J
Heard	3 February 2012; *CAV*
Judgment	22 February 2012
Counsel	*A Muchandiona*, for the applicant *S P Musitu*, for the respondent
Case Type	Civil application
Annotations	No case annotations to date

Flynote

Evidence – *documentary – admissibility – handwritten notes of an undisclosed author – inadmissible as evidence*

Revenue and public finance – *Commissioner-General of Zimbabwe Revenue* D *Authority – duties and powers – duty to assess and collect taxes – not entitled to set conditions for fulfilment of statutory obligations – where capital gains tax due on sale of property, such tax should be collected – Commissioner-General not entitled to refuse to assess such tax on grounds that no tax paid in respect of previous transfer of same property* E

Headnote

In terms of a sale agreement, the applicant had purchased a stand. The seller had been paid the full purchase price. The seller, however, did not co-operate in the transfer process and, as a result, the applicant was obliged to obtain a court order compelling it to do so. In terms of the order,

should the seller fail to obey, the deputy sheriff was empowered to do all that F necessary to enable transfer to be effected in accordance with the sale agreement. One of the things which needed to be done was the payment of capital gains tax in terms of the Capital Gains Tax [*Chapter 23:01*].

The assistance of the deputy sheriff was required and he duly approached the respondent's office for the assessment of the capital gains tax due in respect of the sale of the stand. The respondent, however, refused G to do so. He referred to an earlier sale involving the same stand, in respect of which no capital gains tax had been paid. In spite of that, transfer had been affected into the name of the present seller and duly recorded in the deeds registry. The respondent maintained that, before he could assess the capital gains tax in respect of the present purchase, the tax due in respect of the earlier sale must be paid to him. Referring H

Mathonsi J

A to handwritten notes of an interviews involving as undisclosed author and without explanation therefor, the respondent also claimed that the applicant had previously bought the stand from the original seller before purchasing it from the present seller. The respondent claimed that this was evidence of collusion in a fraudulent transaction by the applicant.

B *Held,* that the handwritten notes of an undisclosed author were clearly inadmissible and should be disregarded. That left the evidence of the applicant, a *bona fide* purchaser, who was entitled to take transfer upon assessment and payment of such capital gains tax as was due by the seller.

Held, further, that there was a court order clothing the deputy sheriff with authority to enter the shoes of the seller and, upon assessment of the C capital gains tax due by the seller, to pay such tax so that transfer of the stand to the applicant could be affected. In terms of the Capital Gains Tax Act [*Chapter 23:01*], the respondent was obliged to assess and collect such tax and was not empowered to set conditions for the performance of his statutory obligations. If the respondent had proof that a previous D owner avoided paying capital gains tax, he had the right in terms of the Capital Gains Tax Act to pursue the defaulter and recover that tax. He had both criminal and civil remedies at his disposal. The respondent should, in the meantime, assess and collect capital gains tax from the current seller.

Legislation considered E

Capital Gains Tax Act [*Chapter 23:01* ,ss 6 & 22B

Deeds Registries Act [*Chapter 20:05*], ss 8(1) & 14(a)

Revenue Authority Act [*Chapter 23:11*], ss 3 & 4

Case information

F *A Muchandiona*, for the applicant

S P Musitu, for the respondent

Judgment

Mathonsi J: This is an application for an order compelling the respondent to assess capital gains tax payable in respect of the sale of stand 965 Mabelreign Township Harare and to receive such tax from the Deputy Sheriff for Harare G on the pain of costs of the application. The said property is currently registered in the name of a company known as Ellseck Investments (Private) Ltd.

The genesis of the matter is that the applicant concluded a sale agreement with Ellseck Investments (Pvt) Ltd for the purchase of stand 965 Mabelreign Township for US$48 000 on 14 January 2010. She says she paid the full H purchase price to the seller through mortgage finance from ZB Building

---

Mathonsi J

Society. Conveyancers, Danziger & Partners, were instructed to attend to A the transfer of the property into the applicant's name.

The applicant states that before purchasing the property aforesaid, she had diligently conducted a deeds office search and satisfied herself that indeed the property was registered in the name of the seller and was not encumbered in any way. B

It turns out that the seller did not co-operate in the process of transfer of the property to the applicant, resulting in the applicant approaching this court in case No. HC6737/10 for an order compelling the seller to perform its obligations in terms of the agreement of the parties and the law.

On 8 December 2010, this court, *per* Mavangira J, issued an order against C Ellseck Investments (Pvt) Ltd in favour of the applicant which reads as follows:

> "It is hereby ordered that:
>
> 1. The respondent shall, within ten days of service of this court order upon it, provide Danziger & Partners Legal Practitioners with all the information and documents necessary for the registration of transfer of stand 965 D Mabelreign Township, Harare into the name of the applicant.
> 2. The respondent shall, also within ten days of service of this court order upon it, appoint a representative and execute all the necessary legal documents authorizing such representative to do everything necessary for the purpose of effecting transfer of Stand 965 Mabelreign Township, Harare into the name of the applicant including complying with all the administrative E requirements of the registration of the transfer.
> 3. In the event of the respondent failing to comply with paragraphs 1 and 2 above, the Deputy Sheriff for Harare shall be authorized to carry out all the acts required of the respondent to enable transfer of stand 965 Mabelreign Township, Harare to be registered into the name of the applicant.
> 4. The respondent shall bear the costs of this application on the legalpractitioner F and client scale."

One of the acts required to enable transfer of the property to the applicant is payment of capital gains tax assessed by the respondent in this case in terms of the Capital Gains Tax Act [*Chapter 23:01*].

It would appear that Ellseck Investments (Pvt) Ltd did not comply with the G court order issued by Mavangira J. forcing the applicant to fall back on the alternative term of the order, that of the Deputy Sheriff performing the acts necessary to give transfer to the applicant. When the Deputy Sheriff approached the respondent's office for assessment and payment of capital gains tax, he did not get any joy. The respondent refused to perform his statutory duties According to the Deputy Sheriff's return of 20 April 2011: H

Mathonsi J

> A "Attempted to obtain assessment of capital gains tax in the presents (sic) of instructing attorney, Mrs Dzangare advised that they could not comply with the requirements since there were outstanding payments."

In a letter written to the conveyancer on 21 March 2011 on behalf of the respondent, his position on the matter was set out thus:

> "We wish to draw your attention to the fact that the initial transfer of the above B mentioned stand from Clyde Chitsinde to Ellseck Investments Private Limited was done fraudulently as no capital gains tax was paid as is required by the law. The Zimbabwe Revenue Authority is therefore not in a position to accept payment of capital gains tax from Ellseck Investments Private Limited or to issue a capital gains clearance certificate in respect of the transfer from Chivhu Property Limited to your client as the initial transfer was tainted with illegability. C Thus, the original seller of the property that is, Clyde Chitsinde should first come and pay capital gains tax in respect of the sale of the property to Ellseck Investments Private Limited before capital gains tax in respect of the sale in question."

It was not explained why the sins of the previous seller should be visited upon the doorsteps of the current seller, or indeed the applicant who, for all D intents and purposes, is the only interested party to the whole exercise. Neither was it explained what prejudice would be suffered by the collector of taxes if capital gains tax was assessed and paid by or on behalf of Ellseck (Pvt) Ltd, which tax is now due, the property having been sold to the applicant.

In his opposing affidavit, the respondent also made reference to the fact E that his investigations have revealed that the applicant purchased the same property from Clyde Chitsinde and he wondered why she had to buy the same property again from Ellseck. In support of that claim he attached handwritten office notes of interviews whose author is not disclosed.

He did not explain why an affidavit could not be obtained from the author F to buttress his case especially as those notes have no evidentiary value whatsoever. I therefore reject those notes.

Counsel for both parties are agreed that the only issue to be determined is whether the respondent is empowered by the legislation that he administers to refuse to assess and receive capital gains tax on the basis that it has come to his attention that the previous owner of the property sold did not pay G capital gains tax when he sold the property himself.

Mr Muchandiona for the applicant argued that neither the Revenue Authority Act [*Chapter 23:11*] or the Capital Gains Tax Act [*Chapter 23:04*] empower the respondent to refuse to assess and collect capital gains tax. He further submitted that the respondent has both criminal and civil remedies to deal with H tax defaulters without resorting to the unorthodox actions he has employed in

---

this matter. He is aware of the particulars and whereabouts of the defaulter, A Clyde Chitsinde, and should pursue those remedies against him.

On the other hand, *Mr Musitu,* for the respondent, strongly argued that the respondent is not obliged to issue a tax clearance certificate to the applicant because she is not a person entitled to it in terms of s 34 (c) of the Revenue Authority Act and is not covered by s 6 of the Capital Gains Tax Act, which B is the charging section. He took the view that only the seller, Ellseck, was entitled to be issued with the clearance certificate. In terms of the court order referred to above, it is the Deputy Sheriff who is entitled to the clearance certificate.

When his attention was drawn to the Deputy Sheriff's return of service to the effect that the respondent still refused to issue the clearance certificate C to him, Mr *Musitu* could not explain that.

In my view, there is a court order clothing the deputy sheriff with authority to enter the shoes of Ellseck Investments and pay capital gains tax on its behalf in order to facilitate transfer of the property to the applicant. That court order is still binding and must be complied with. The respondent has refused to D let the Deputy Sheriff satisfy the terms of that order. For him to then argue that the applicant is not entitled to a clearance certificate is an irrelevancy.

The Zimbabwe Revenue Authority, which the respondent heads, is established in terms of s 3 of the Revenue Authority Act [*Chapter 23:11*] and its functions and authority are set out in s 4 as read with the Second Schedule thereof. Its E main function is to act as an agent of the State in assessing, collecting and enforcing the payment of all revenues.

In respect of capital gains tax, s 6, as read with s 22B of the Capital Gains Tax [*Chapter 23:01*], provides for the charging, levying and collection of it against any person receiving a capital gain. As a creature of statute ZIMRA is required to act in terms of the enabling statute. The relevant statutes enjoin F it to assess and collect the tax that is due. On the face of it, it cannot set conditions for the performance of its statutory obligations.

Regarding proof of title to immovable property, s 14(a) of the Deeds Registries Act [*Chapter 20:05*] provides:

> "Subject to this act or any other law the ownership of land may be conveyed from G one person to another only by means of a deed of transfer executed or attested by the registrar."

Section 8 (1) of the same Act provides:

> "Save as is otherwise provided in this Act or in any other enactment, no registered deed of grant, deed of transfer, certificate of title or other deed confirming or conveying title to land, or any real right in land other than a mortgage bond, H

> A and no cession of any registered bond not made, as security, shall be cancelled by a registrar except upon an order of court."

It is common cause that Ellseck Investment holds title to stand 965 Mabelreign Township which is registered at the deeds office. The registrar is the custodian and keeper of such titles. It must therefore be accepted that B the title deed held by Ellseck Investment is *prima facie* proof of

ownership and an announcement to the whole world to deal with the title holder in accordance with the deed of transfer.

The Registrar of Deeds had not questioned the validity of that deed which, in any event, cannot be cancelled without a court order in terms of s 8(1).

C What we have here is a case in which the applicant has relied on the records at the deeds office to purchase the property. She has gone ahead to obtain an order authorizing the Deputy Sheriff to pay capital gains tax. The respondent has refused to assess the tax, thereby frustrating the execution of a court order. His reasons for doing so are that the applicant may have colluded with a previous owner to avoid tax. I have already said that the respondents' claim D is not only unsubstantiated but premised on inadmissible evidence, the notes of an unnamed officer, and have rejected that claim.

Therefore, all that remains is evidence of a *bona fide* purchaser who is entitled to take transfer upon assessment and payment of tax. I do not agree with Mr *Musitu* that the respondent is entitled to refuse to assess and receive tax in E the circumstances of this matter.

I agree with Mr *Muchandiona* that, if the respondent has proof that a previous owner avoided paying capital gains tax, he has the latitude that in terms of the Capital Gains Tax Act, to pursue the defaulter and recover that tax as he has both criminal and civil remedies in that regard. The respondent should, F in the meantime, collect capital gains tax from the current seller.

The issues arising out of this dispute are such that it would not have been obvious that the respondent could not contest the application. I am of the view that he was entitled to bring his argument before the court for adjudication and cannot be said to have acted unreasonably. For that reason, this is a case G in which each party should bear its own costs.

In the result, I make the following order that:

1. The respondent shall, within ten days of service of this order upon him assess the capital gains tax payable in respect of the sale of stand 965 Mabelreign Township, Harare by Ellseck Investments (Pvt) Ltd to the H applicant.

Mathonsi J

2. The respondent should receive payment of the capital gains tax payable A by Ellseck Investment (Pvt) Ltd from the Deputy Sheriff for Harare and issue a capital gains tax withholding Tax Certificate to the Deputy Sheriff upon receipt of the payment.
3. Each party shall bear its own costs. B

Danziger & Partners, applicants' legal practitioners C

© 2015 Juta and Company (Pty) Ltd.

Document 32 of 75

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2012/Volume 1/BARNSLEY v HARAMBE HOLDINGS (PVT) LTD & ANOR 2012 (1) ZLR 265 (H)

BARNSLEY v HARAMBE HOLDINGS (PVT) LTD & ANOR 2012 (1) ZLR 265 (H)

Citation	2012 (1) ZLR 265 (H)
Case No	Judgment No. HH-84-12
Court	High Court, Harare
Judge	Mathonsi J

Heard	2 February 2012; *CAV*
Judgment	22 February 2012
Counsel	*P Kawonde*, for the applicant *N Bvekwa*, for the respondents
Case Type	Opposed court application
Annotations	Link to case annotations

Flynote

Company – corporate veil – lifting of – when permissible – companies forming part of a single economic entity – when permissible to treat such companies as a whole instead of as separate units

Headnote

D The applicant was employed as group engineering director by the first respondent, which represented itself as a holding company, comprising several subsidiaries, with the second respondent as its chief executive officer. The applicant remained in employment for 11 months, and when he did not receive his salary and allowances in accordance with the E employment contract, he referred the dispute to arbitration. An arbitral award was issued in his favour. He was unable to execute against the first respondent's property to recover the judgment debt because, each time an attachment of property was made, such property was claimed by a third party, one of the holding companies.

F *Held*, that the cardinal principle of our company law is that a company enjoys separate legal personality, generally referred to as the legal *persona* principle. For that reason, its property and its liabilities should be maintained distinct and separate from those of its members. However, the courts have always readily lifted the corporate veil where the company is used as a vehicle for fraud or to justify wrong. Although the companies G in a group are separate legal entities, the courts have in the mercantile context dealt with the group as an economic entity. This lifting of the corporate veil is indicated, especially when a parent company owns all the shares of the subsidiaries, so much so that it can control movement of the subsidies. The present case was a classic one for the lifting of the H corporate veil: not to do so would enable the first respondent to rely on

---

Mathonsi J

its legal personality to defeat a lawful claim, to justify wrong and indeed A to protect fraud. If this were to be allowed, an injustice would occur.

Editor's note: see also *Deputy Sheriff v Trinpac Invstmts (Pvt) Ltd & Anor* 2011 (1) ZLR 548 (H), a judgment of Patel J, where the corporate veil was lifted in similar circumstances.

Cases referred to B

DHL International Ltd v Madzikanda 2010 (1) ZLR 201 (H)

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

Mangwendeza v Mangwendeza 2007 (1) ZLR 216 (H)

Manyathela v Manyathela HB-44-11

Moyo v Gwindingwi NO & Anor 2011 (2) ZLR 368 (H) C

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

Van Niekerk v Van Niekerk & Ors 1999 (1) ZLR 421 (S)

Case information

P Kawonde, for the applicant

N Bvekwa, for the respondents D

Judgment

Mathonsi J: The applicant was employed as Group Engineering Director by the first respondent, which represented itself as a holding company comprising several subsidies with the second respondent as its Chief Executive Officer.

The letter of his appointment containing the terms of employment dated 7 E May 2009 was signed by the second respondent in his capacity as the Chief Executive Officer. It reads as follows:

"Ref: Appointment to the position of Group Engineering Director effective 1 June 2009

Following the initial discussion with me and the subsequent interview conducted at our Head office, I wish to confirm your appointment to the above position F whose duties include the following:

(i) Management of all Group Engineering Projects and Installations.
(ii) Production Process improvements to include automation and plant simplifications.
(iii) Advice and liaison with divisions on safety matters. G
(iv) Advice and liaison with divisions on procurement issues.
(v) Developing preventive maintenance programmes for all divisions.
(vi) Building inspections for structured works.
(vii) Introduction to best practices in all manufacturing processes.

As a Director you will be expected to undertake full executive functions for the group from time to time at fora and engagements inside and outside the group. H

Mathonsi J

A Your initial package will be as follows:

Basic salary:	US$3 000 per month
Education Allowance:	US$ 500 per month
Cellphone Allowance:	US$ 250 per month
Total	_____

Salaries are reviewed upward periodically in line with group performance. After B your 3 months probation you will be offered participation in the share options. I have no doubt that you will be able to make immense contributions given your attitude to work and vast experience and that you will work well with our executive dynamic team that has created a very robust and fast growing organisation.

Yours faithfully

D Govere

CHIEF EXECUTIVE OFFICER"

C The appointment letter, which was copied to Chief Operations Officer and Chief Finance Officer clearly refers to a "Group" of entities and "divisions" of what was presumably a family of businesses falling under the umbrella of Harambe Holdings. In addition, an organogram was generated and made available to the applicant showing the structural lay out of the group of D subsidies making up the first respondent holding company.

The applicant remained in employment for 11 months and when he did not receive his salary and allowances in accordance with the employment contract, he referred the dispute to arbitration. An arbitral award was issued in his favour in the sum of US$61 879. He has been unable to execute

against E thefirst respondent's property to recover the judgment debt because each time an attachment of property is made, such property is claimed by a third party.

This has prompted the applicant to make this application seeking an order to compel the respondents to disclose the addresses and places of business of the subsidies of the first respondent. In the event of failure to disclose, he wants the second respondent to be held personally liable for what is owed to him.

F The basis of the application is that the respondents represented to him that the first respondent was a holding company or a conglomeration comprising *inter alia*, of The Vinyl Tile Company; Freshbake, Downings, Superbake, Ecoplastics (Pvt) Ltd, Horeca, Household Converters, Intertec (Pvt) Ltd &Tacoola Beverages (Pvt) Ltd. By such fraudulent misrepresentation he G was persuaded to take up employment as the Group Engineering Director of these entities only for the employer to fail to pay him.

In support of that claim the applicant has submitted, in addition to the organogram I have alluded to, a letter-head and trading brochures of the various entities representing each entity as "a division of Harambe Holdings." This, according to the applicant, shows that both the first respondent and H these other entities have been announcing to the whole world and indeed

---

Mathonsi J

the applicant that they are one family. He would therefore want the veil of A incorporation to be lifted to expose them for what they are.

The application is contested by the respondents on the basis that no fraud has been established and therefore there is no basis for lifting the corporate veil. In his opposing affidavit, the second respondent states in para 4 as follows:

> "The correct position is that the first respondent holds shares in these companies. B I deny that I ever told him that it carries its operations through the subsidies. These companies do their own business and like any other shareholder the first respondent would get a dividend whenever it is declared. This is not the same as operating through other entities or in the name of these entities."

Significantly, the second respondent does not take the court into his confidence as to the nature of the shareholding and does not even bother to produce C the respective share certificates held by the first respondent. True to his refusal to let out any information relating to the affairs of the businesses, the second respondent states at para 6 that "silence does not disclose any fraud" and that himself and the first respondent "have no duty to make the disclosures asked for." D

The respondents also half heartedly sought to challenge the jurisdiction of this court to entertain the application on the basis that it is a labour matter. It is now settled that this court has jurisdiction over all matters where the cause of action and remedy are at common law while the Labour Court retains jurisdiction on those matters provided for in the Labour Act [*Chapter* E *28:01*]. See *DHL International Ltd v Madzikanda* 2010 (1) ZLR 201 (H) at 204B-D; *Moyo v Gwindingwi NO & Anor* 2011 (2) ZLR 368 (H).

Happily, though, Mr *Bvekwa* for the respondents abandoned that line of argument in his submissions in court.

The cardinal principle of our company law is that a company enjoys separate F legal personality, generally referred to as the legal persona principle. For that reason, its property and its liabilities should be maintained distinct and separate from those of its members.

However, the courts have always readily lifted the corporate veil where the company is used as a vehicle for fraud or to justify wrong. Mr *Kawonde*, for the applicant, has strongly argued that the second respondent represented G to the applicant, and produced an organogram to justify his representation, that the entities from which the applicant now seeks relief were the first respondent's subsidies. He submitted further that both the first and second respondents stood akimbo as all the entities masqueraded as subsidies of the first respondent even through brochures. H

Mathonsi J

A For instance, one of the entities advertised on its brochures as "The Vinyl Tile Company is a subsidiary of Harambe Holdings, a wholly owned Zimbabwean Company." Mr *Kawonde* insisted that the entities are all vehicles through which Harambe Holdings (Pvt) Ltd fraudulently avoids its obligations, including the payment of the applicant's salary and allowances. B I am persuaded by that argument. This is particularly so as both the first and second respondents have signally failed to even produce the certificates of incorporation of these entities and their lists of directors. They have simply remained mum on anything to do with the status of both the first respondent and its subsidiaries.

In respect of holding companies, my attention has been drawn to seminal C words of Lord Denning in *DHN Food Distributors Ltd v London Borough of Tower Hamlets* [1976] 3 All ER 462 (CA) at 467 where that celebrated Law Lord said;

> "Professor Gower in his book on company law says: 'there is evidence of a general tendency to ignore the separate legal entities of various companies within a group, and to look instead at the economic entity of the whole group'. This is D especially the case when a parent company owns all the share of the subsidiaries so much so that it can control every movement of the subsidiaries."

I am in total agreement with that pronouncement. As stated by Corbett CJ in *The Shipping Corp of India Ltd v Evdomon Corp & Anor* 1994 (1) SA 550 (A) at 566C-E which was quoted with approval by Sandura JA in E *Van Niekerk v Van Niekerk & Ors* 1999 (1) ZLR 421 (S) at 427G-H to 428A:

> "It seems to me that 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 justify 'piercing' or 'lifting' the corporate veil … I do not find it necessary to consider, F 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 in the establishment or use of the company or the conduct of its affairs."

See also *Mangwendeza v Mangwendeza* 2007 (1) ZLR 216 (H) at 217F and *Manyathela v Manyathela* HB-44-11.

G The second respondent, purporting to be the Chief Executive Officer of the first respondent, engineered the employment of the applicant as Group Engineering Director on the understanding that he would work within a conglomeration of companies all of whom gave themselves out to the whole world as subsidiaries of the first respondent. Eleven months down the line H he had not been sufficiently remunerated, only for the respondents to turn

---

round and deny what they claimed to stand for at the beginning, that is, a A group of companies.

The applicant was made to shift his position to his prejudice on the strength of a representation that he was joining a group of companies, complete with an organogram to that effect, as the Group's Engineering Director. His duties also traversed all the entities given that the employment contract made reference B to "all Group Engineering Projects and Installations"; "advise and liaison with divisions"; "undertake full executive functions for the group" *et al*.

In my view, this is a classic case for the lifting of the corporate veil because the applicant is alleging the reliance on the legal personality of the first respondent to defeat a lawful claim, to justify wrong and indeed to protect C fraud. If this were to be allowed to perpetuate an injustice would occur.

It remains for me to deal with the issue of costs. The respondents have been extremely un-cooperative. If indeed they were acting in good faith and have nothing to hide, they would have no difficulty with divulging the true status of the businesses and proving that the applicant has no recourse to D the entities. They have, however, seen it fit to hedge behind incorporation while at the same time saying nothing that would assist both the court and the applicant to understand the dynamics of the businesses. If anything the second respondent's declaration that "silence does not disclose any fraud" is arrogance of a very high order.

This conduct has put the applicant unnecessarily out of pocket. He deserves E to be compensated and in my view this is a case calling for costs to be awarded on a higher scale.

In the result, I make the following order: that

1. The first and second respondents should within seven days of the date F of this order disclose to the applicant or his legal practitioners the incorporation status of entities which operated as subsidiaries of the first respondent during the period extending from 1 May 2009 to 30 April 2010 namely Freshbake, Downings, Superbake, Ecoplastics (Pvt) Ltd, Horeca, The Vinyl Tile Company, Household Converters, Intertec (Pvt) Ltd & Tacoola Beverages (Pvt) Ltd. G
2. The first and second respondents should within seven days of the date of this order furnish the applicant or his legal practitioners the addresses and places of businesses of the entities of the first respondent mentioned in paragraph 1 above during the period extending from 1 May 2009 to 30 April 2010. H

2012 (1) ZLR p271

Mathonsi J

3. In A the event of the first and second respondents' failure to comply with para(s) 1 and 2 above, then the second respondent be and is hereby held personally liable for the judgment debt of the first respondent registered under case number HC 6651/10.
4. The first and second respondents shall bear the costs of this application B jointly and severally on a legal practitioner and client scale.

Kawonde & Company, applicant's legal practitioners

C *Bvekwa Legal Practice,* first & second respondents' legal practitioners

---

© 2015 Juta and Company (Pty) Ltd.

Document 33 of 75

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2012/Volume 1/S v MUCHEKAYAWA 2012 (1) ZLR 272 (H)

S v MUCHEKAYAWA 2012 (1) ZLR 272 (H)

2012 (1) ZLR p272

Citation	2012 (1) ZLR 272 (H)
Case No	Judgment No. HB-42-12
Court	High Court, Bulawayo
Judge	Makonese J
Heard	23 February 2012
Judgment	23 February 2012
Counsel	Details not supplied
Case Type	Criminal review
Annotations	No case annotations to date

Flynote

Criminal procedure *(sentence) – statutory offence – domestic violence – need for deterrent sentences to be passed*

Headnote

Cases of domestic violence are on the increase and in some instances death has resulted. Unless sufficiently deterrent sentences are imposed by the courts as provided for under the Domestic Violence Act [*Chapter 5:16*], D the whole purpose of this piece of legislation will never be realized. Men will continue to brutalize their wives and, equally so, some men will continue to be subjected to physical abuse by their spouses in the knowledge that they will go to court and pay a small fine. Whilst each case should be decided on its own merits, in serious cases custodial E sentences are appropriate.

Cases referred to

S v Anock 1973 (1) RLR 154 (A); 1973 (3) SA 128 (RA)

S v Mushangwe HH-80-07 F

Legislation considered

Domestic Violence Act [*Chapter 5:16*], ss 4 & 5(2)

Judgment

Makonese J: This matter was placed before me for review and a perusal of the record revealed that nothing turned on the conviction, but the sentence G was disturbingly lenient.

The accused is a male adult aged 29 years. He is employed as a miner at a small scale mine. He appeared before a magistrate at Zvishavane on 8 December 2011 facing a charge of contravening s 4(1) as read with s 3 of the Domestic Violence Act [*Chapter 5:16*]. He pleaded guilty and was duly convicted and was sentenced to pay a fine of US$150 or in default of H

Makonese J

A payment 30 days' imprisonment. In addition, three months' imprisonment were wholly suspended for three years on condition that the accused does not within that period commit any offence involving domestic violence and for which he is sentenced to imprisonment without the option of a fine .

The brief facts of the matter are that on 2 December 2011, the complainant, B the complainant's sister, Loreen, and the accused went for a beer drink in downtown Zvishavane at around 2100 hours. The accused and the the complainant are husband and wife. At around 0200 hours the accused ordered the complainant and her young sister to board a taxi to go home. It would appear that the complainant refused to get into the taxi chosen by the accused but eventually the trio boarded a taxi picked by the complainant. C This angered the accused. As soon as they got home the accused quizzed the complainant as to why she had declined to board the taxi he had called.

The accused started assaulting the complainant with a log several times all over the body until she fell to the ground. Whilst on the ground, the accused picked up a stone and struck the complainant above the right eye resulting in D her sustaining a deep cut. The complainant did not seek medical attention so there is no medical report in the record.

In his reasons for sentence the magistrate comments as follows:

> "I have noted that the complainant did not sustain serious injuries as a result of this assault on her by accused person. That is shown by the fact that she did not seek medical attention …"

E The magistrate then goes on to say;

> "… When they got home, he picked up a log, and hit the complainant several times all over the body. He picked a stone and struck the complainant once on top of her right eye. As a result she sustained a deep cut thereby showing that the force used to assault her was excessive ..."

F I must say that I find the magistrate's reasoning to be somewhat muddled and confusing. He is alive to the fact that he is dealing with a serious case of assault. He makes the startling conclusion that the injuries are not serious because the complainant did not seek medical attention. Magistrates should always request the complainants in such cases to obtain medical reports for G the court to assess not only the degree of injuries suffered but the likelihood of any permanent disability. I note here that both prosecutors and magistrates pay little regard to the provisions of s 5 of the Domestic

Violence Act [*Chapter 5:16*] which places duties on police officers in relation to domestic violence in the following terms under s 5 (2):

> "A police officer to whom a complaint of domestic violence is made or who H investigates any such complaint shall … obtain for the complainant, or advise

Makonese J

> the complainant how to obtain, shelter or medical treatment, or assist the the A complainant in any other suitable way."

It is clear that the magistrate could have easily postponed the passing of sentence pending the production of a medical report. The importance of medical reports in such cases cannot be overemphasized. See *S v Anock* 1973 (1) RLR 154 (A); 1973 (3) SA 128 (RA). B

The attack upon the complainant was clearly a brutal and severe upon a defenceless woman who could have easily died, given that she was hit indiscriminately all over the body until she fell to the ground. A sentence of a paltry US$150, in my view, trivializes the offence. Cases of domestic violence are on the increase and in some instances death has resulted.

The penalty provided under s 4 of the Act is in the following terms: C

> "… any person who commits an act of domestic violence within the meaning of section 3 shall be guilty of an offence and liable to a fine not exceeding level fourteen or imprisonment for a period not exceeding ten years or to both such fine and such imprisonment."

I am of the view that, unless sufficiently deterrent sentences are imposed by the courts as provided for under the Act, the whole purpose of this piece of D legislation will never be realized. Men will continue to brutalize their wives and, equally so, some men will continue to be subjected to physical abuse by their spouses, in the knowledge that they will go to court and pay a small fine. Whilst each case should be decided on its own merits, in serious cases custodial sentences are appropriate. *In casu,* the assault was sustained and E vicious. I note that both husband and wife may have been under the influence of intoxicating liquor, but this does not lower the moral blameworthiness of the accused.

I am of the considered view that the sentence is manifestly lenient. See *S v Mushangwe* HH-80-07. The sentence must fit both the offender and the offence. Had the trial magistrate applied his mind properly to sentence he F would not have imposed a wholly suspended sentence coupled with a small fine. He fell into error and I accordingly withheld my certificate. G

© 2015 Juta and Company (Pty) Ltd.

Document 34 of 75

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2012/Volume 1/S v KUROTWI & ANOR 2012 (1) ZLR 275 (H)

S v KUROTWI & ANOR 2012 (1) ZLR 275 (H)

Citation	2012 (1) ZLR 275 (H)
Case No	Judgment No. HH-106-12
Court	High Court, Harare
Judge	Bhunu J
Heard	21 February 201; CAV
Judgment	28 February 2012

Counsel *C Mutangadura* with *E Mpofu,* for the State
Mrs *B Mtetwa,* for the first accused
L Uriri, for the second accused

Case Type Exception to charge

Annotations No case annotations to date

Flynote

Criminal procedure – *charge – particulars – allegation of misrepresentation – misrepresentation to a juristic person – not necessary to specify natural person to whom misrepresentation was made*

Headnote

D The accused were charged with fraud. The charge made allegations of misrepresentations to the Ministry of Mines and the Zimbabwe Mining Development Corporation, but did not specify to which natural person the misrepresentation was made. The accused excepted to the charge, arguing that, both entities being artificial persons, they could only act E though natural persons. It was therefore necessary to specify the natural persons to whom the misrepresentation was made, otherwise the accused would be prejudiced in their defence if they were left in the dark or to speculate as to which natural person they are alleged to have made the misrepresentation.

Held, that s 146 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] F requires the State so to frame a charge, among other things, as to inform the accused person of the offence that he is facing, together with the particulars or essential elements of that offence. The section also requires the State to inform the accused of the person against whom the offence was committed and the nature of the property involved if any. The G allegation against the accused was that they defrauded the Government of Zimbabwe of two billion United States dollars. The Government of Zimbabwe is a legal entity with full legal personality, capable of suing and being sued in its own name. It has a separate legal existence from its officials and servants. The Government of Zimbabwe is, therefore, undoubtedly a juristic person. As such, it ought to be treated like any H other juristic person. The law makes no distinction between the framing of

---

Bhunu J

charges involving natural persons and those involving artificial persons. A Thus, the Government of Zimbabwe, like any other juristic person, has full *locus standi in judicio* to appear and to be heard as the complainant in any court without being carried on the back of any natural person. It is therefore sufficient for the State to allege that the misrepresentation was made to a juristic or artificial person, without naming any natural B person. The failure to mention or specify the natural person to whom the alleged misrepresentation was made could not possibly prejudice the accused in their defence because the State elaborated, in its summary, that the misrepresentation was made to the juristic person through written letters which would be produced in court through named competent witnesses, including the Permanent Secretary in the Ministry of Mines. C

Legislation considered

Criminal Law (Codification and Reform) Act [*Chapter 9:23*], s 136

Criminal Procedure and Evidence Act [*Chapter 9:07*], ss 146 & 177

Case information

C Mutangadura with *E Mpofu,* for the State D

Mrs *B Mtetwa,* for the first accused

L Uriri, for the second accused

Judgment

Bhunu J: Both accused persons are charged with fraud as defined in s 136 of the Criminal Law (Codification and Reform) Act [*Chapter 09:23*]. They E are alleged to have, on various occasions during the period extending from 29 March 2009 to 14 August 2009, defrauded the Government of Zimbabwe of two billion United States dollars.

The charge sheet is framed as follows:

> "Accused are guilty of FRAUD as defined in s 136 of the Criminal Law (Codification F and Reform) Act [*Chapter 9:23*].
>
> In that on various separate occasions but during a period beginning 29 March 2009 to 14 August 2009 and at the Ministry of Mines and Mining Development and at Zimbabwe Mining Development Corporation's Offices in Harare, both accused persons and in common purpose unlawfully and fraudulently made misrepresentations with intent to defraud the Government of Zimbabwe, that is to say, Lovemore Kurotwi misrepresented to the Ministry of Mines and G Mining Development and Zimbabwe Mining Development Corporation that Core-Mining and Mineral Resources (Pty) Limited (a shelf company in South Africa) was a special purpose vehicle of a company known as Benny Steinmeitz Group Resources (BSGR) (which was supposed to be the guarantor in a joint venture agreement between Core-Mining and ZMDC) in common purpose with Dominic Mubaiwa who later joined in the criminal enterprise and unlawfully H

Bhunu J

> A prepared and entered into an unapproved and uncirculated memorandum of agreement between Marange Resources (Pty) Ltd, signed on 24 July 2009, and later acquired cabinet authority to proceed to South Africa to conduct a due diligence Exercise on Core-Mining (a mere shelf company) which both accused persons purported to be a special purpose vehicle of Benny Steimeitz Group (BSGR) thereby ending up concluding a share holder agreement between B Zimbabwe Mining Development Corporation and Core-Mining and Mineral Resources (Pty) Ltd instead of Benny Steinmeitz Group (BSGR) which all along had been held out by both accused persons as the guarantor of Core-Mining, thereby causing an actual prejudice of two billion United States dollars to the Government of Zimbabwe."

Both accused persons pleaded not guilty and thereafter proceeded to except C to the charge.

Their main complaint is that, although the charge makes allegations of misrepresentation to the Ministry of Mines and Mining Development and the Zimbabwe Mining Development Corporation, none of the papers indicate to which natural person the misrepresentation was made. It was argued D that both entities, being artificial persons, could only act through natural persons. It was therefore necessary to specify the natural person to whom the misrepresentation was made, otherwise the accused will be prejudiced in their defence if they were left in the dark or to speculate as to which natural person they are alleged to have made the misrepresentation.

E The accused's second complaint is that, although the State alleges actual prejudice of two billion United States dollars, it does not inform them as to how the prejudice came about. In light of such objections the accused requested the court to order the delivery of the relevant particulars in terms of s 177 of the Criminal Procedure and Evidence Act [*Chapter 09:07*] to enable them to prepare their defence. That section reads:

> F "**177 Court may order delivery of particulars**
>
> (1) The court may either before or at the trial, in any case if it thinks fit, direct that particulars be delivered to the accused of any matter alleged in the indictment, summons or charge, and may, if necessary, adjourn the trial for the purpose of the delivery of such particulars.
>
> (2) Such particulars shall be delivered to the accused or to his legal representative G without charge, and shall be entered in the record, and the trial shall proceed in all respects as if the indictment, summons or charge had been amended in conformity with such particulars.
>
> (3) …."

Section 146 of the Criminal Procedure and Evidence Act prescribes the H essentials of a valid and competent charge. It states that:

Bhunu J

> "**146 Essentials of indictment summons or charge** A

> (1) Subject to this Act and except as otherwise provided in any other enactment, each count of the indictment, summons or charge shall set forth the offence with which the accused is charged in such manner, and with such particulars as to the alleged time and place of committing the offence and the person, if any, against whom and the property, if any, in respect of which the offence is alleged to have been committed, as may be reasonably sufficient to inform the accused of the B nature of the charge."

Thus the State is under an obligation to frame a charge, among other things, so as to inform the accused person of the offence he is facing together with the particulars or essential elements of that offence. The section also requires the State to inform the accused of the person against whom the offence was C committed and the nature of the property involved if any. Failure to give such particulars would render the charge defective and exceptionable. It is therefore necessary to examine and see if the charge complies with the essentials laid down in s 146 of the Criminal Procedure and Evidence Act.

It is common cause that the accused were informed that the offence they were facing is fraud, committed against the Government of Zimbabwe, in D the sum of two billion United States dollars. In short, they are being accused of defrauding the Government of Zimbabwe of two billion United States dollars. It is trite that the Government of Zimbabwe is a legal entity, with full legal *persona* capable of suing and being sued in its own name. It has a separate legal existence from its officials and servants. The Government of E Zimbabwe, duly constituted by the Constitution of Zimbabwe, is therefore, undoubtedly, a juristic person. *Hahlo's South African Company Law through the Cases* 6 ed (1999) defines a juristic person as:

> "a body corporate or association other than a natural person , that is endowed by law with the capacity to have rights and duties apart from its members."

The State, being a juristic person, ought to be treated like any other juristic F person. See Tett and Chadwick *Zimbabwe Company Law* 2 ed at p 13 where it is stated that:

> "The effect of a company having separate legal personality is that it can engage in any activity and is entitled to the same rights and remedies as any other juristic person."

The law therefore, makes no distinction between the framing of charges G involving natural persons and artificial persons. Thus the Government of Zimbabwe, like any other juristic person, has the full *locus standi in judicio* to appear and be heard as the complainant in any court without being carried on the back of a natural person. Thus, it is sufficient for the State to allege that the misrepresentation was made to a juristic or artificial person without H

Bhunu J

A naming any natural person. It is instructive to note that s 146 of the Criminal Procedure and Evidence Act does not make it a requirement that, where the complainant is a juristic person, the charge must specify the natural person to whom the misrepresentation was made.

The failure to mention or specify the natural person to whom the alleged B misrepresentation was made cannot possibly prejudice the accused in their defence, because the State elaborated in its summary that the misrepresentation was made to the juristic persons through written letters, which will be produced in court through named competent witnesses, including the Permanent Secretary in the Ministry of Mines. Written documents which the accused can interrogate speak for themselves. In the normal run of things, letters C disclose their author, addressee and the communication conveyed from one party to the other. I can therefore perceive no prejudice to the accused if they have been provided with access to the relevant documents upon which the alleged misrepresentations are founded.

As regards the quantum of prejudice, the State elaborated that the D amount of prejudice was occasioned in one capital sum arising from the misrepresentation. In the light of that explanation, it would be illogical to order the State to provide a non-existent breakdown when it alleges that the prejudice was not incurred in instalments.

The purpose of an indictment is to inform the accused of the case he is E going to meet in court, without necessarily providing the evidence required to prove the allegations. The summary of the State case provides a précis of the evidence upon which the State intends to rely on in proving its case. *Viva voce* evidence, documents, exhibits and any other evidence constitute the actual poof of the allegations against the accused as alleged in the indictment and summarized in the outline of the State case. It is important F not to confuse one stage with the other.

Having carefully perused the charge sheet and the State's response, it appears to me that the particulars required by the accused persons in respect of the indictment are properly contained in the summary of the State case that is yet to be read in open court. For that reason alone, both the exception G and application for further particulars cannot succeed. Both objections are accordingly dismissed.

Attorney-General's Office, the State's legal practitioners

Mtetwa & Nyambirai, the first defendant's legal practitioners

H *Kantor & Immerman,* the second defendant's legal practitioners

---

© 2015 Juta and Company (Pty) Ltd.

Document 35 of 75

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2012/Volume 1/SIMBI v MAZUWA & ORS 2012 (1) ZLR 280 (H)

SIMBI v MAZUWA & ORS 2012 (1) ZLR 280 (H)

Citation	2012 (1) ZLR 280 (H)
Case No	Judgment No. HB-54-12
Court	High Court, Bulawayo
Judge	Ndou J
Heard	23 March 2011; *CAV*
Judgment	1 March 2012
Counsel	Ms *H M Moyo,* for the applicant *I Murambasvina,* for the first respondent
Case Type	Civil application
Annotations	No case annotations to date

Flynote

Appeal – *noting of – effect – suspension of judgment pending an appeal – common law rule only applicable to superior courts of inherent jurisdiction*

Mines and minerals – *mining dispute – resolution of – mining commissioner's* D *court – appeal from such court – appeal lies to High Court – Secretary of Mines – judicial powers – same as those of a mining commissioner – Secretary having no appellate powers*

Headnote

The accepted common law rule of practice, whereby the execution of a judgment is automatically suspended by the noting of an appeal, does E not apply to any court, tribunal or authority other than a superior court of inherent jurisdiction. Any other court, tribunal or authority is a creature of statute and bound by the four corners of its enabling legislation. Where the enactment does

not provide for suspension pending an appeal, an aggrieved person is not left without a remedy. He may approach the High Court and move an appropriate stay or interdict. F

A boundary dispute between the applicant and the first respondent relating to a shaft, which the latter maintained and was situated on his mining claim, was referred to the mining commissioner for his adjudication. After hearing submissions from both parties and ordering a survey of the claims, he ruled that the shaft was situated on the applicant's claim. G

The first respondent thereupon purported to take the decision of the mining commissioner on appeal to the Secretary of Mines. Upon receipt of the notice of appeal, the latter ordered that, pending the appeal, all mining operations were to cease and, acting thereon, three of the four respondents removed certain property belong to the applicant and chased away the workers on site. The applicant thereupon sought relief from the High H

Ndou J

A Court. He submitted that there was no valid appeal pending and that any order purporting to stop mining operations was of no force and effect. He also sought the return of all property which had been removed from the site.

Held, that s 346 of the Mines and Minerals Act [*Chapter 21:05*] gives the mining commissioner of the mining district to which he is appointed B judicial powers in the resolution of disputes. The mining commissioner's court is a court of first instance, with more or less similar powers to those of a magistrates court in civil cases.

Held, further, that s 341 of the Act confers on the Secretary of Mines both administrative and judicial powers. In terms of those powers, he may C assume all the judicial powers of the mining commissioner but he is not empowered to hear appeals from a mining commissioner's court. Such powers are reserved for the High Court in terms of s 361 of the Act.

Held, further, that save for the property removed about which there was a dispute of facts, the applicant must be granted the relief he sought. The first respondent had appealed to the wrong court. As a result there was D no valid appeal pending and the question of a stay of execution pending appeal did not, therefore, arise.

Case cited

Vengesai & Ors v Zimbabwe Glass Industries Ltd 1998 (2) ZLR 593 (H)

Legislation considered

Mines and Minerals Act [*Chapter 21:05*], ss 341, 346, 348, 352, 353 & 361

Case information

Ms *H M Moyo,* for the applicant

I Murambasvina, for the first respondent

Judgment

Ndou J: The applicant seeks an order in the following terms:

"It is ordered that:

1. The memorandum dated 16 March 2012 written by the third respondent to the Mining Commissioner Gweru be and is hereby set aside.
2. The respondents be and are hereby jointly and severally, interdicted from hindering the applicant from carrying out mining operations on Thunderbird 42 or in any way interfering with such operations or encroaching onto the applicant's said claim.
3. The first and fourth respondents be and are hereby directed to return to the applicant within 48 hours of the date of this order, the following property or assets:

Ndou J

(a) 28 pan dishes of gold ore and rubble worth US$4 480; A

(b) 5 by 30 metres of rope worth US$50;

(c) 2 by 8 pound hammers worth US$20;

(d) 5 chisels worth US$30;

(e) 2 cylindrical hand held driving wheels used to lower equipment into the mine shaft worth US$40;

(f) 4 pairs of shoes (tackies) worth US$20;

(g) 4 pairs of trousers worth US$40;

(h) 3 jackets worth US$20;

(i) 4 shirts worth US$20;

(j) 10 kg mealie meal worth US$5;

(k) 2 litres cooking oil worth US$2;

failing which the Deputy Sheriff be and is hereby authorized to attach and sell in execution the said respondents' property to the total value of US$187 *.

4. The first respondent pays costs of this application."

The facts leading to this application are the following. The applicant is a small scale miner who is the registered owner of Thunderbird 42 mining claim. A boundary dispute has arisen between him and first respondent pertaining to a shaft which the first respondent claims is situated on his mining claim. The dispute was taken to the local mining commissioner who, after taking submissions from both parties and ordering a survey of the claims, ruled in favour of the applicant *viz* that the disputed shaft was situated on the applicant's claim. Dissatisfied with the mining commissioner's determination, the first respondent noted an appeal to the Secretary of Mines. The latter after receiving the appeal wrote a memorandum instructing the parties to stop mining operations pending the determination of the said appeal. In executing the said instructions, the first, third and fourth respondents removed the items listed in paragraph 3 of the abovementioned draft order which belong to the applicant from the mining site. They also chased away the applicant's workers. The applicant is currently not operating as a result. It is the applicant's contention that there is no valid appeal which is pending before the Secretary of Mines and further that even if there was such a valid appeal pending (which is denied by the applicant), the second respondent does not have authority to stop mining operations pending the determination of the appeal. The dispute between the applicant and the first respondent was dealt with by the Gweru Mining Commissioner in accordance with the provisions of Part XXV of the Mines and Minerals Act [*Chapter 21:05*] ("the Act"). Section 346 of the Act gives the Mining Commissioner judicial powers in the resolution of disputes. Section 346 provides:

Ndou J

"**Judicial powers of mining commissioners**

(1) A mining commissioner may hold a court in any part of the mining district to which he is appointed or at his discretion in such place outside the said mining district as may be convenient to the parties interested, and may adjourn such court from time to time and from place to place as occasion may require.

(2) A mining commissioner shall hear and determine in the simplest, speediest and cheapest manner possible, all actions, suits, claims, demands, disputes and questions arising within his jurisdiction as set forth in section *three hundred and forty-five* and make such orders as to costs as he may deem just.

(3) For the purpose of such hearing a mining commissioner shall examine witnesses on oath, which oath he is hereby empowered to administer, take down the evidence in writing to be signed by the person giving the same, and do all things which he may deem necessary for a proper decision …"

Further, s 348 provides:

"**348.Summary hearing of complaints**

Notwithstanding requirements of sections *three hundred and forty-five* and *three hundred and forty-six*, the mining commissioner may, if the parties concerned consent thereto in writing and are both present at the hearing, hear and determine any such complaint as above mentioned, summarily, and without any formal proceedings taken before him.

A minute of the decision shall be made by him in a register of complaints in which shall be entered every complaint laid before him, together with particulars thereof."

Section 352 is also relevant to the facts of this matter. It provides:

"**352. Mining commissioner may direct surveys for purposes of trial of case**

> If before or during the hearing of any complaint it appears to the mining commissioner that it will be necessary for a survey to be made of any land or mining location in dispute, such mining commissioner may order either party F to cause such survey and a plan thereof to be made, and the costs thereof shall be in the discretion of the mining commissioner."

After such survey, the mining commissioner's powers, when encroachment is alleged, are prescribed in s 353. In s 353 it is provided that magistrates court procedure and fees in civil cases should, so far as is practicable, be observed in the mining commissioner's court. Section 361 provides:

> G "**361. Appeal from mining commissioner's court to High Court**
>
> Any party who is aggrieved by any decision of a mining commissioner's court 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."

Having cited the provisions of the Act, I propose to determine the issue H whether the first respondent has lawfully appealed the decision of the Gweru

---

Ndou J

mining commissioner. As alluded to above, the first respondent has appealed A to the permanent Secretary of Mines ("the Secretary"). It is contended by the first respondent that such appeal to the Secretary is proper because of the provisions of s 341 of the Act. Section 341 provides:

> "**341. Administration of Ministry**
>
> (1) The Secretary shall be and is hereby vested with authority generally to B supervise and regulate the proper and effectual carrying out of this Act by Mining Commissioners or other officers of the Public Service duly appointed thereto, and to give all such orders, directions or instructions as may be necessary.
>
> (2) The Secretary may at his discretion assume all or any of the powers, duties and functions by this Act vested in any mining commissioner, and may lawfully perform all such act and do all such things as a mining commissioner may perform C or do, and is further empowered in his discretion to authorize the correction of any error in the administration or in the carrying out the provisions of this Act, or to perform any other lawful act which may be necessary to give due effect to its provisions.
>
> (3) The Secretary may exercise such of the powers by the Act vested in the Minister as may be delegated to him by the Minister. "

It seems to me that s 341 confers on the Secretary both administrative and D judicial powers. The judicial powers given to the Secretary are limited to those enjoyed by the mining commissioner. This is so because of the phrase – "at his discretion assume all or any of the powers, duties and functions by this Act vested in a mining commissioner …". The mining commissioner's court is a court of first instance with more or less similar powers to those of E a magistrates court in civil cases. The Secretary may assume these powers of a court of first instance. Appellate powers are conferred on the High Court as enshrined in s 361 *supra*. The Secretary is not empowered to hear appeals from a mining commissioner's court. There is no provision for an appeal to the Secretary. These wide powers of appeal are given to the High F Court. The first respondent, in his wisdom, chose not to appeal to the High Court pursuant to the provisions of s 361. He instead, complained to the Secretary, but such an administrative complaint is not an appeal. The issue was raised early in these proceedings and one would have expected the first respondent to have endeavoured to regularize his appeal. He has been represented by a legal practitioner all along and I do not understand why he G sought to equate a complaint to the Secretary to a proper and formal appeal to the High Court in terms of s 361. There is no appeal to the High Court so the question of stay of execution of the decision of the Gweru mining commissioner (pending appeal) does not arise at all. In any event, the Act does not give the Secretary the authority to suspend the operation of a judgment of the mining commissioner pending the determination of an appeal. It is H

Ndou J

A trite that the accepted common law rule of practice whereby the execution of a judgment is automatically suspended by the noting of an appeal does not apply to any court, tribunal or authority other than a superior court of inherent jurisdiction. This rule of practice is peculiarly appropriate only to superior courts of inherent jurisdiction. Any other court, tribunal or authority is a creature of statute and bound by the four corners of its enabling legislation. B Where the enactment

does not provide for suspension pending appeal, an aggrieved person is not left without remedy because he may approach the High Court to move an appropriate stay or interdict – *Vengesai & Ors v Zimbabwe Glass Industries Ltd* 1998 (2) ZLR 593 (H).

The directive to suspend the mining operations pending appeal has no legal C basis as there is no valid appeal noted against the judgment of the Gweru mining commissioner's court. As far as the property taken is concerned, there is a dispute of fact as to the property taken. The dispute cannot be resolved on the papers even if I adopt a robust approach. The first respondent admits taking the rope and the pipe only. I am prepared to make an order in respect of these items only.

D Accordingly, it is ordered that:

1. The memorandum dated 16 March 2010 written by the third respondent to the Gweru mining commissioner be and is hereby set aside.
2. There is no appeal pending against the decision of the Gweru mining commissioner arising from the facts of this case. E
3. The respondents be and are hereby jointly and severally interdicted from carrying out mining operations on Thunderbird 42 or in any way interfering with such operation except authorized to do so by the law.
4. The respondents be and are hereby ordered to return the rope and pipe to the applicant within 48 hours of the date of this order. F
5. The first respondent pays the costs of this application on the ordinary scale.

Jumo, Mashoko & Partners, applicant's legal practitioners

I Murambasvina, c/o Coghlan & Welsh, first respondents' legal practitioners

* *Sic* – the sum of these items is $4727. – *Editor.*

© 2015 Juta and Company (Pty) Ltd.

Document 36 of 75

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2012/Volume 1/KM AUCTIONS (PVT) LTD v SAMUEL & ANOR 2012 (1) ZLR 286 (S)

KM AUCTIONS (PVT) LTD v SAMUEL & ANOR 2012 (1) ZLR 286 (S)

Citation	2012 (1) ZLR 286 (S)
Case No	Judgment No S-15-12
Court	Supreme Court, Harare
Judge	Gowora AJA (in chambers)
Heard	5 March 2012
Judgment	5 March 2012
Counsel	*N Bvekwa*, for the appellant *S M Bhebhe*, for the respondent
Case Type	Application for condonation of late filing of appeal
Annotations	No case annotations to date

Flynote

Appeal – condonation – *failure to comply with rules – alleged inadvertence* C *on part of legal practitioner – when may be an reasonable explanation justifying condonation – repeated failure to comply for same reason – not a reasonable explanation*

Headnote

In October 2008 the applicant appealed against a judgment granted by the D High Court. The appeal was not pursued timeously and in October 2010 the applicant filed an application for condonation and leave to file an appeal out of time. The applicant's legal practitioner averred that the notice of appeal which had been drafted by him did not specify if the appeal was against the whole or part of the judgment from the High E Court. He also averred that the prayer in the notice was not "specific". He said that the defect on the notice of appeal was due to an oversight on his part. That application for condonation was granted and the matter set down for hearing in January 2012 but was struck off the roll on the hearing date for want of compliance with the Supreme Court Rules. In a further application for condonation, the same legal practitioner F averred that the defects in the fresh notice of appeal had also been due an oversight on his part, in failing to check that his secretary had incorporated an amendment which included the matters that had been previously been omitted.

Held, that there had been a lack of diligence on the part of the applicant and G its legal practitioners. The court could not continue to be encumbered by applications for condonation caused by a legal practitioner's tardy performance of his work. The applicant was represented by a senior legal practitioner with considerable experience who was expected to be familiar with the rules of the court. Negligence or lack of attention to detail on the part of that legal practitioner could not be an explanation H

2012 (1) ZLR p287

Gowora AJA

A that the court should find satisfactory. There is a limit beyond which a litigant cannot escape the results of his lawyer's lack of diligence or the insufficiency of the explanation tendered. To hold otherwise might have a disastrous effect upon the observance of the rules of court. The legal practitioner is the representative whom the litigant has chosen himself, and there is little reason why, in regard to condonation of a B failure to comply with a rule of court, the litigant should be absolved from the normal consequences of such a relationship, no matter what the circumstances of the failure are. The fact that the legal practitioner's conduct caused the delay is not a reasonable explanation in applications such as this, particularly where previously the applicant has been granted C an indulgence in an application also premised on the inadvertent conduct on the part of his legal practitioners.

Cases referred to

Maheya v Independent African Church 2007 (2) ZLR 319 (S)

Maswaure v Nyamunda 2001 (1) ZLR 405 (S)

D *NSSA v Chipunza* S-116-04

Selk Entprs (Pvt) Ltd v Chimenya & Ors S-10-03

S v McNab 1986 (2) ZLR 280 (S)

Case information

N Bvekwa, for the appellant

E *S M Bhebhe,* for the respondent

Judgment

Gowora AJA: This is an application for condonation for the late filing of an appeal and for an extension of time within which to file the appeal. The application follows the decision of this court on 30 January 2012 to strike F the appeal off the roll due to certain defects on the notice of appeal initially filed in this case.

On 22 October 2009 the High Court dismissed with costs a claim brought by the applicant herein against the respondent wherein it, the applicant, sought an order requiring the respondent to sign all documents necessary to effect the transfer of certain premises, namely Lot 10 of Lot 24A Block G C, Avondale into the applicant's name.

The dispute was in respect of a written agreement of sale entered into by the parties on 13 March 2006. It is common cause that the respondent cancelled the agreement, citing breach of its obligations under the agreement by the applicant. The applicant had thereafter filed an application for specific H performance which was referred to trial. The trial court dismissed the claim

---

Gowora AJA

with costs. On 28 October 2008 the applicant filed an appeal against that A judgment.

On 10 February 2011 this court granted the applicant leave to file its appeal out of time and ordered that the notice of appeal be filed within seven days of the date of the order. The appeal was then set down for hearing on 30 January 2012 on which occasion the appeal was struck off the roll for want B of compliance with the rules of this court.

The applicant has now filed this application to comply with the rules. The founding affidavit has been deposed to by Mr *Bvekwa*, who is the legal practitioner of record for the applicant. He has deposed to an affidavit in which he states the following: C

> "The appeal, a copy of which I attach hereto as "A", does not explicitly state what the appellant wants this Honourable Court to grant as contained in the relief being sought. It does not explain what should be done with the order of the court *a quo.* The notice of appeal was drafted by me. It was an oversight on my part. I had filed an application in this case for the same reason. It was granted. When the fresh notice of appeal was filed it did not indicate what was to be done with the court *a quo's* judgment although I had specified in the relief. It does not D state the fate of that judgment. I was actually taken by surprise when the court raised this issue. I checked with my own draft where I was proof reading the draft notice of appeal. The relevant clause which was in long hand is there. I had added it as I had realised as well that the draft notice which was presented to the court was also wrong. I added this clause to the draft notice that had been filed with the earlier application. My secretary had not included the clause. She E told me that it was inadvertence. When the document came back for signature I thought all the amendments I had made had been attended to and I proceeded to sign the notice of appeal for filing."

It is suggested by counsel that it was only on the date of hearing that he realised after it was brought to his attention by the court that the amendments had not been effected. He had checked the position with his secretary and F she had admitted that she had, due to inadvertence, omitted the clause. The secretary has deposed to an affidavit confirming that she had omitted the clause containing the amendments.

It is also contended in the founding affidavit that the applicant has prospects of success on appeal and accordingly, the applicant has prayed for an extension G of time within which to file the notice of appeal.

The application is opposed.

It is trite that in considering an application such as this the court will amongst others consider the following factors:

(i) The degree of non-compliance H

Gowora AJA

(ii) The A explanation for it

(iii) The importance of the case

(iv) The prospects of success

(v) The respondent's interest in the finality of the case

(vi) The convenience of the court; and B

(vii) The avoidance of unnecessary delay in the administration of justice

See Herbstein & van Winsen *The Civil Practice of the Supreme Court of South Africa* 4 ed at p 897. See also *National Social Security Authority v Chipunza* S-116-04.

Further, in *Maheya v Independent African Church* 2007 (2) ZLR 319 (S) the C court at 323B reiterated the same principle in the following terms:

> "In considering applications for condonation of non-compliance with its Rules, the court has a discretion which it has to exercise judicially in the sense that it has to consider all the facts and apply established principles bearing in mind that it has to do justice. Some of the relevant factors that may be considered and weighed one against the other are: the degree of non-compliance; the D explanation therefor; the prospects of success on appeal; the importance of the case; the respondent's interests in the finality of the judgment; the convenience to the court and avoidance of unnecessary delays in the administration of justice. *Bishi v Secretary for Education* 1989 (2) ZLR (H) at 242D-243C."

It is argued on behalf of the respondent that the application *in casu* falls E short of the requirements referred to above. The respondent contends as follows. The explanation for the lack of compliance is unsatisfactory to say the least. In October 2010 the applicant filed an application for condonation and leave to file an appeal out of time. The founding affidavit was, as in the present application, deposed to by Mr *Bvekwa*. He averred therein that the notice of appeal which had been drafted by him did not specify if the appeal F was against the whole or part of the judgment from the High Court. He also averred that the prayer in the notice was not "specific". He said that the defect on the notice of appeal was due to an oversight on his part. There has been a lack of diligence on the part of the applicant and its legal practitioners. This court cannot continue to be encumbered by applications for condonation caused by a legal practitioner's tardy performance of his work.

G *In casu*, the applicant is represented by a senior legal practitioner with considerable experience. He is expected to be familiar with the rules of this court. The negligence on the part of the legal practitioner or lack of attention to detail on the part of that legal practitioner cannot be an explanation that this court should find satisfactory. In *Maswaure v Nyamunda* 2001 (1) ZLR 405 (S) H at 409E-G this court stated:

Gowora AJA

> "Even if the delay in applying for condonation were due to the fault or negligence A of the appellant's legal practitioners, the appellant would not escape the consequences of their lack of diligence. As Steyn CJ said in the *Saloojee* case *supra* at 141B-E:
>
> > 'I should point out, however, that it has not at any time been held that condonation will not in any circumstances be withheld if the blame lies with the attorney. There is a limit beyond which a litigant cannot escape B the results of his attorney's lack of diligence or the insufficiency of the explanation tendered. To hold otherwise might have a disastrous effect upon the observance of the rules of this court. Considerations *ad misericordiam* should not be allowed to become an invitation to laxity. In fact this court has lately been burdened with an undue and increasing number of applications for condonation in which the failure to comply with the rules of this court C was due to neglect on the part of the attorney. The attorney, after all, is the representative whom the litigant has chosen for himself, and there is little reason why, in regard to condonation of a failure to comply with a rule of court, the litigant should be absolved from the normal consequences of such a relationship, no matter what the circumstances of the failure are.'"

In *Selk Enterprises (Pvt) Ltd v Chimenya & Ors* S-10-03 the court held as D being manifestly inadequate an explanation to the effect that the default in complying with the rules was due to an oversight on the part of the legal practitioners. The fact that the legal practitioner's conduct caused the delay is not a reasonable explanation in applications such as this. This remark is particularly pertinent and of significance where previously an applicant has been granted an indulgence by this court in a similar application again E premised on the inadvertent conduct on the part of his legal practitioners. See also *S v McNab* 1986 (2) ZLR 280 (S).

This is the second application by this applicant for condonation and leave to appeal and an extension of time within which to file such appeal.

Taking into account the abortive hearing of 30 January 2012, this makes F this application the third occasion on which this court is being asked to deal with the matter. If the application succeeds this court would be dealing with the same matter on four occasions. Clearly it is not in the interest of the general administration of justice for a court to deal with one matter on so many occasions and

allowing the roll to be clogged. The administration of justice would be prejudiced and compromised if laxity on the part of legal G practitioners were to be encouraged.

I will then deal with the issue of the applicant's prospects of success on appeal.

The court *a quo,* correctly in my view found, that in interpreting the contract it was duty bound to give effect to the intention of the parties at the time of concluding the contract. H

Gowora AJA

A The learned judge in the court *a quo* found that from the facts the parties were agreed from the onset that time was of essence. Initially the respondent, the defendant in the court *a quo,* had wanted payment upon transfer, but the parties negotiated and compromised on payment being effected after 14 days from signing the agreement of sale.

B The learned judge found that having regard to the prevailing economic circumstances it would have amounted to an absurdity for the defendant to have given the plaintiff the freedom to pay at any time, when the circumstances clearly established that time was of the essence. He found that in terms of the agreement the applicant was required to pay the balance of the purchase price within 14 days from the date of signature. His reasoning cannot be faulted.

C In its prayer, the applicant seeks for an order for specific performance in terms of the contract against the respondent. The order, if granted, would result in the applicant having transfer of the immovable property into its name. At the time that the respondent cancelled the contract, she reimbursed the applicant with the portion of the purchase price paid by the applicant up to that date. D By November 2006 the applicant had become aware of the deposit of the purchase price in its account and it retained it. The sum total of these events is that the applicant has not paid the purchase price and it seeks therefore, in the appeal, an order that it pays to the respondent an amount of Z$16 000.

If this court were to accede to the appeal and issue an order for specific E performance, the applicant would acquire an immovable property for no value. Although the Zimbabwe dollar still is legal tender it has fallen into disuse. The respondent would have no use for it and it is most unlikely that the applicant would be in a position to effect payment of the sum tendered.

A party who claims a decree of specific performance must be willing and able to tender performance of his own obligations unless he has already F performed. As matters stand, the applicant will not be in a position to pay value for the property in terms of the contract the parties executed. I am therefore not persuaded that the applicant has prospects of success on appeal.

The respondent complains that the grounds of appeal are long and winding and that consequently the notice is defective. In my view, given the conclusion G I have come to above, it will not be necessary to determine this issue.

In the premises the application is without merit and it is hereby dismissed with costs.

Bvekwa Legal Practice, applicant's legal practitioners

H *Kantor & Immerman*, respondent's legal practitioners

© 2015 Juta and Company (Pty) Ltd.

Document 37 of 75

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2012/Volume 1/MUSUNDIRE v OK ZIMBABWE LTD 2012 (1) ZLR 292 (H)

MUSUNDIRE v OK ZIMBABWE LTD 2012 (1) ZLR 292 (H)

Citation 2012 (1) ZLR 292 (H)

Case No	Judgment No. HH-94-12
Court	High Court, Harare
Judge	Bere J
Heard	28 February 2011, 1 March 2011; 7 October 2011; *CAV*
Judgment	6 March 2012
Counsel	*D Muzawazi*, for the plaintiff *D Ochieng*, for the defendant
Case Type	Civil action
Annotations	Link to case annotations

Flynote

Contract –*exemption clause – validity – clause purporting to indemnify one party against all claims – only entitled to be protected in respect of honest mistake or honest representations*

Damages – *assessment – delict – claim for injuria and for unlawful imprisonment arising out of same facts – not permissible to claim under* D *both heads*

Headnote

The plaintiff took part in a promotional draw sponsored by the defendant company, having bought various groceries at one of the defendant's shops, as a result of which he got coupons enabling him to participate in the E competition. He and a few other persons emerged as the winners of the items on offer and they were invited to a presentation ceremony. At the hotel where the ceremony was to take place, he two of his colleagues (also winners of the promotion) were lured into a car and arrested for having committed fraud in the acquisition of the coupons which they had used in participating in the competition. For the next four days they were F shoved from one police station to another, and made to endure extremely difficult and painful experiences as they were forced to sleep in squalid condition, being routinely transferred barefoot and in handcuffs. The arrest had been instigated by the defendant's risk and services manager, a former senior police officer. He had received an anonymous telephone G call alleging fraud involving coupons for the competition. He had not investigated the veracity of the allegation before having the plaintiff arrested, nor had he investigated the plaintiff's explanation of his innocence. The plaintiff and the other arrested persons were released only after the manager had submitted an affidavit which established the plaintiff's innocence in the whole exercise. H

2012 (1) ZLR p293

Bere J

A The plaintiff claimed damages for defamation, *injuria* and *contumelia*, and unlawful arrest. The claim in respect of defamation was abandoned. The defendant argued that the plaintiff could claim for *injuria* and *contumelia* or for unlawful arrest, but not under both heads. It was also argued that the defendant was not liable because of a clause in the competition rules, which read: "All participants and winners indemnify [the defendant], B the advertising agencies and partners against any and all claims of any nature whatsoever in the promotion (including as a result of any act or omission, whether negligent or otherwise on the part of [the defendant]."

Held, that in a claim for damages one may not refer to unlawful arrest without triggering the aspect of the injury to the plaintiff's feeling caused by C such an act. Damages for unlawful arrest are awarded in recognition of the *injuria* associated with that unlawful conduct. It would be quite superfluous to claim for *injuria* under one heading and unlawful arrest under another heading. The claim should basically be under one heading.

Held, further, that the courts will protect the public from the worst abuses of exemption clauses by setting limits to the exemptions they will permit and D by interpreting exemption clauses narrowly. Contractual conditions by which one of the parties engages to verify all representations for himself and not to rely upon them as inducing a contract must be confined to honest mistake or honest representations. However wide the language, the court will cut down and confine its operations within these limits. E The risk manager was both reckless and malicious in the manner he dealt with the plaintiff and the defendant should not be allowed to avoid liability by seeking refuge in the exemption. Allowing it to do so would offend public policy considerations which demand that innocent and unsuspecting individuals be protected by the law.

Cases referred to F

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

Karimazondo & Anor v Min of Home Affairs 2001 (2) ZLR 363 (H)

Macheka v Metcalfe & Anor HH-62-07

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

Masawi v Chibata & Anor 1991 (1) ZLR 148 (H)

G *Min of Home Affairs & Anor v Bangajena* 2000 (1) ZLR 306 (S)

Wells v SA Aluminite Co 1927 AD 69

Case information

D Muzawazi, for the plaintiff

H *D Ochieng*, for the defendant

Bere J

Judgment

Bere J: The OK Grand Challenge Jackpot promotion has become an A exciting annual national event to many Zimbabweanss as it affords many lucky winners a rare opportunity to win various prizes ranging from motor vehicles to residential stands and an assortment of other items. It is an event which is aggressively advertised both in the print and electronic media.

Having responded to the OK Grand Challenge Jackpot Promotion in 2010, B the plaintiff landed himself in trouble. This civil suit is a direct result of the plaintiff's desire to participate in one such a promotion. It caused a nightmare to the plaintiff. Indeed it earned the plaintiff quite some traumatic experience.

The largely agreed facts in this matter can be summarised as follows:

The plaintiff is employed as a manager by Zimbabwe Institute of Public C Administration and is based in Darwendale, a few kilometres outside Harare. His duties entail being in charge of around 100 employees and it is his sole responsibility to oversee the day to day operations of the institute.

In 2010, and pursuant to the irresistible advertisement by the defendant inviting customers to participate in the OK Grand Challenge Jackpot Promotion, the D plaintiff went to OK Bazaars Supermarket in Marimba and bought various groceries worth $999.98 as a result of which he got coupons enabling him to participate in the exciting competition.

At the conclusion of the OK Grand Challenge Jackpot Promotion, to be precise, on 9 June 2010, the plaintiff emerged as one of the few lucky winners E of the items on offer. The plaintiff's name appeared in *The Herald* and *The Chronicle* (two national newspapers) as having won a microwave.

After attending to one or two housekeeping issues with the organizers of the promotion, the plaintiff was confirmed as a winner and invited to attend the prize giving ceremony which was to be held at Rainbow Towers, Harare on F 16 June 2010. Rainbow Towers is one of the leading hotels in Harare. On 16 June 2010 the plaintiff excitedly attended at the prize giving ceremony. To demonstrate his excitement in attending the grand occasion, the plaintiff went to the hotel in the company of his family and some workmates so that they would be witness to his rare exciting moment. G

There was a dramatic turn of events at the hotel. The plaintiff was later to regret that he had ever participated in the OK Grand Challenge Jackpot Promotion. The plaintiff and two of his colleagues (also winners of the OK Grand Challenge Jackpot Promotion) were lured into a car and arrested for having committed fraud in the acquisition of the coupons which they had used in participating in the competition. H

Bere J

A For the next four days, the plaintiff and his colleagues were shoved from one police station to the other, starting with Braeside Police Station, Ahmed House and Harare Central Police Station. They were made to endure extremely difficult and painful experiences as they were forced to sleep in squalid conditions, being routinely transferred from Ahmed House to Harare Central Police Station barefooted and in handcuffs. The plaintiff and his B colleagues were treated as criminals. To the ordinary onlooker, they were indeed criminals on parade.

The plaintiff and his co-accused were only released after the defendant's risk and services manager, Osborne Tariro Mawere, had submitted an affidavit which confirmed the plaintiff's innocence in the whole exercise.

C **The evidence**

The story told by the plaintiff was quite detailed and revealing. Having properly acquired the coupons as advertised by the defendant, the plaintiff used the coupons to participate in the competition and, in the month that followed, he was advised he was one of the lucky winners and invited to D the Rainbow Towers Hotel for the prize giving ceremony on 16 June 2010. The plaintiff attended the event with colleagues and his family members.

Things took a dramatic turn when the plaintiff and two other would be winners were lured into a parked car by Mawere.

In a dramatic movie style manner, the plaintiff and the other suspects were E bundled into a motor vehicle belonging to the defendant but being driven by Mawere, after being advised that they were under arrest, and taken straight to Braeside police station. It was the plaintiff's unchallenged evidence that when they arrived at Braeside police station they were surprised to learn that their docket had been opened a few days before they were brought to the police station. The plaintiff stated he gathered that this docket had been F opened as a result of the report made to Braeside police station by Mawere. For the first time, the plaintiff and his co-suspects were advised of the fraud charges allegedly committed against the defendant and accused of having fraudulently acquired competition coupons. The plaintiff protested his innocence to both Mawere and the Braeside police officers, but to no avail.

It was the plaintiff's further testimony that when he told the police and G Mawere that he had legitimately acquired the coupons, Mawere responded by saying that that would be established later.

The plaintiff testified that, on that day, he, together with 30 suspects, slept crammed in a dirty room, barefoot and with only one blanket which was taken by the other inmates who had been in the police cells before him. H This was the first time the plaintiff had been to a police cell and he slept on

---

Bere J

the floor with no blankets at all on a cold night. He was wearing jeans and A a T shirt. He said he was in a state of shock and that he never ate anything.

The following day the plaintiff and two of his co-suspects were transferred to CID Serious Frauds Section in handcuffs. According to the plaintiff, their transfer was caused by the alleged seriousness of their case. In the presence of Mawere, the plaintiff was questioned and continued to protest B his innocence again to no avail. Mawere was said to have indicated to the CID details that he would take the coupons to OK Marimba to verify the explanation proffered by the plaintiff.

The witness testified that from CID Serious Fraud Section they were transferred to Harare Central Police Station, still handcuffed, and passed through a C congested taxi rank and a bus terminus. This movement was made around 5 p.m., which is one of the busiest hours of the day.

At Harare Central police station the plaintiff and his co-suspects were ordered to remove their shoes and other personal items before being thrown into the cells again. The plaintiff summed up his painful experience in the following words: D

> "There was no food at the Central Police Station. I did not have anything to eat. I was in a state of shock and stress and could not take anything. The whole situation of being dragged across town and knowing I would have another night in cells, knowing I had genuinely acquired the coupons, caused me stress and shock." E

Q. What transpired after supper?

A. We moved two floors to the cells, barefooted, stamping on water, urine, on the way up.

Q. Where was this water coming from?

A. From the ablution facilities within the cell areas.

The witness went on to explain the night's ordeal – he testified they slept on F concrete slabs in the cells with no blankets at all.

When asked by his counsel to describe the cells the witness shook his head as if going down painful and heart-tearing memories and replied as follows:

> "Very dark, no lighting, ablution facilities producing serious odours. We were 12 of us crammed in a single cell." G

The witness told the court that he endured the night and the subsequent two nights sleeping in similar conditions. It was only on the fourth day of his arrest and detention that he and his colleagues were advised that their case was going to be withdrawn after Mawere had confirmed that indeed the plaintiff had genuinely acquired the coupons from OK Marimba. H

Bere J

A It was the witness's testimony that instead of the defendant moving swiftly to have them released, it was only on the following day that Mawere from OK brought an affidavit which eventually secured the plaintiff and his co-suspects' release. Their release was on 19 June 2010 after the defendant's representative had carried out investigations which confirmed the plaintiff B and his co-suspects' innocence.

The witness concluded his testimony by saying that, prior to him being arrested and bundled into custody, the defendant had made no attempt at all to seek an explanation as regards how he had acquired the coupons in question. All the investigations were only carried out after the plaintiff had been deprived of his liberty on what turned out to be false allegations.

C At the conclusion of his testimony the plaintiff said that the defendant's representative, Mawere had caused or instigated his arrest. Iin his own words:;

> "But for the report by OK about fraud I would not have gone through what I went through."

The witness's evidence was that he tried to engage the defendant with a view D to at least get an apology and his microwave which he had won as a result of his participation in the competition but nothing came his way.

The witness further stated that the allegations which were falsely raised against him portrayed him in a bad light to his family, friends and workmates, as the impression created was that, despite holding a responsible position at E his workplace, he was a dishonest person.

For all the trouble that he went through for doing nothing wrong except to innocently participate in a competition organised by the defendant, the plaintiff said he wanted damages broken down as follows:

(i) $100 000 for defamation F

(ii) $50 000 for *injuria* and *contumelia*; and

(iii) $200 000 for unlawful arrest

The plaintiff was subjected to an unusually brief but pointed cross-examination whose thrust was to show that he had targeted the wrong defendant in this case. The emphasis of the cross-examination was to show that the plaintiff's G claim did not lie against the defendant but against the police.

The cross-examination did not show that the defendant was in disagreement with the plaintiff's narration of events. The only point of divergence was the interpretation of those events.

The closure of the plaintiff's case was followed by an application for H absolution from the instance which the court considered and dismissed

Bere J

signifying the opening of the defendant's case. It was at this stage that the A claim for defamation was formally abandoned by the plaintiff.

The sole witness for the defendant was Mawere. He told the court that he has worked for the defendant for the past 13 years. He stated that following information received from an anonymous caller he lodged a report with the police which resulted in the arrest and subsequent detention of the plaintiff B and his co-suspects.

The witness' narration of events leading to the arrest and detention of the plaintiff almost tallied with the story told by the plaintiff.

He confirmed having made the arrangements with the police to have the plaintiff and his co-suspects arrested at the Rainbow Towers and using his C motor vehicle to transport them to Braeside police station. His evidence took the court through the arrest, detention and the subsequent release of the plaintiff and his colleagues.

During his testimony, the witness's attention was drawn to a portion of the advertisement by the defendant, which was to the effort that "all participants and winners indemnify OK Zimbabwe (the defendant), their agencies and D partners against any and all claims of any nature whatsoever arising out of and or from their participation in anyway whatsoever in the promotion including as a result of any act or omission, whether negligent, grossly negligent or otherwise on the part of OK Zimbabwe"

The witness testified that, to the best of his knowledge, the plaintiff's E participation in the Grand Challenge Jackpot Promotion was not excluded by this rule, implying that the defendant should be exempted from liability.

Under cross-examination, the witness disclosed that, other than the 13 years of his work as a risk and control manager for the defendant, he had, prior to his engagement with the defendant been a senior police officer with the F rank of senior assistant commissioner, and well versed in police operations. He said he knew that once he had received an anonymous call concerning the alleged fraud involving competition coupons, it was imperative for him to carry out investigations first.

It was quite revealing that during cross-examination the witness conceded that, at the time he masterminded the arrest of the plaintiff, he had himself G not carried out investigations on behalf of the defendant.

The witness further told the court under cross-examination that he was surprised to see the police officers detaining the plaintiff and that he could not remember seeing the plaintiff being handcuffed at the time of his arrest. He further revealed under cross-examination that he had escorted the plaintiff H

Bere J

A from the podium at Rainbow Towers to where the police were 200 metres away from where the winners' function was being held, and transported the plaintiff and the other suspects to Braeside police station using his motor vehicle.

He said it was he personally who conducted the investigations which eventually B led to the release of the plaintiff and his co-suspects. He also confirmed that he was present at all times when the plaintiff was being interviewed or questioned by the police.

It was quite revealing that, when questioned by the court, the witness conceded that he had not acted diligently in rushing to have the plaintiff arrested before C carrying out internal investigations, not only to verify the so called tip off from the defendant's informant, the anonymous caller, but to also check on the explanation given by the plaintiff. Mawere conceded that, with the benefit of hindsight, the plaintiff's detention could have been avoided.

At the close of the defendant's case I requested the two legal practitioners D to file written submissions. I appreciate the detailed and well thought submission out presented.

The plaintiff's counsel, Mr *Muzawazi,* moved the court to award the plaintiff at least $50 000 in form of damages for the unlawful arrest, whilst Mr *Ochieng* for the defendant maintained that the defendant should be exempted from E liability, basically on two grounds, namely, that the plaintiff had targeted the wrong defendant and that, in any event, the plaintiff's participation was governed by the defendant's rules of indemnification. He relied on rule 6 which was one of the rules regulating the conduct of the participants in the competition.

F Mr *Ochieng* further argued that there was improper splitting of claims by the plaintiff, by separately claiming for injury, on one hand and framing another claim under unlawful arrest, on the other.

I will deal with these legal issues later in this judgment after assessing the evidence that was adduced in this case.

G **Assessment of the evidence**

There was no real challenge caused by the evidence led in these proceedings, mainly because the two witnesses who testified are generally agreed on what transpired. They differ on the interpretation of that evidence.

The plaintiff felt very strongly that the evidence justified the award of the H damages as claimed, or at least as requested by his counsel during submissions.

Bere J

Mr *Ochieng's* position from the same facts was that the plaintiff had failed to A prove its case and that at most it is the police officers who actually arrested the plaintiff who ought to have been sued.

It is clear to me that the evidence as presented by the plaintiff was truthful. His narration of events, starting with his participation in the Grand Challenge Jackpot Promotion, followed by his dramatic arrest at the Rainbow Towers B Hotel and his subsequent deprivation of liberty for the three days that followed, could not be faulted.

It was quite clear from the plaintiff's testimony that his misfortune was triggered by the extremely reckless manner in which Mawere handled the alleged fraud in the acquisition of coupons for the defendant's business promotion. In my view, one should not blindly or religiously act on C information from an anonymous source without first doing basic or elementary investigations to establish the credibility or otherwise of such a report.

The position of Mawere in this case was compounded by the undeniable fact that Mawere was not a lay person. The evidence showed that he is quite a sophisticated individual. He projected himself as an experienced D former police officer who retired from the force holding the rank of a senior police commissioner. In addition, he holds a Bachelor of Commerce in risk management, backed by 13 years' experience as the risk and services manager for the defendant.

At the time Mawere received information concerning the alleged fraud, he E had all the means at his disposal to carry out investigations to verify the correctness or otherwise of such potentially very serious allegations. He chose not to do so, but instead set in motion and in a meticulous and callous manner the events leading to the arrest of the plaintiff, despite the plaintiff having protested his innocence from the very beginning.

To start with, Mawere invited the plaintiff to the Rainbow Towers under F the pretext that he was required to collect his prize won in the competition, yet he knew that he was setting a trap for the arrest of the plaintiff. Mawere himself masterminded the arrest of the plaintiff in a typical movie style andused his motor vehicle to "deposit" the plaintiff at Braeside Police Station. Mawere actively participated in interviewing or questioning the plaintiff. To G demonstrate his malice, it is quite significant that Mawere never bothered to question the plaintiff about the alleged fraud before the latter was arrested.

Mawere's reckless conduct went beyond maliciously causing the plaintiff's arrest. The uncontroverted evidence was that, even before the plaintiff had been brought to the police station, Mawere had caused the plaintiff's docket to be opened at Braeside police station. Not only this, but it was also made H

Bere J

A clear to the plaintiff that he would only be released if Mawere brought an affidavit to that effect, and indeed it was Mawere's affidavit which led to the plaintiff regaining his liberty after Mawere himself had masterminded the snatching away of that liberty.

I have no doubt in my mind that, at the time the police officers detained the B plaintiff, they had nothing on them to show there was reasonable suspicion that the plaintiff had committed the alleged criminal offence. The plaintiff's case would have been neater if he had jointly sued the police with the defendant.

Be that as it may, I am also satisfied that it would be a reckless appreciation of the role played by Mawere in the drama associated with the arrest and subsequent detention of the plaintiff to spare him. Mawere cannot, in my view, C by any stretch of imagination purport to have been an innocent bystander in the chain of events leading to the situation the plaintiff found himself in. In my view, Mawere was the architect of the injury that stalked the plaintiff. There was no reasonable justification whatsoever for Mawere to act in the manner he did. The alleged misjointer is not fatal to plaintiff's case. See D order 13 r 87(1) of the High Court Rules 1971.

Accepting that, the police might have used their discretion to arrest and detain the plaintiff, but the shadow of Mawere remains visible throughout the whole episode. It was Mawere's reckless conduct which landed the plaintiff in trouble for doing nothing really except to participate in the business promotional activities of the defendant at the invitation of the defendant. It E would be a very unfair law which fails to recognise the evil that Mawere did.

It is common cause that, when Mawere acted in the manner he did, he was acting within the scope of his employment with the defendant. Vicarious liability must by operation of law attach to the defendant.

The conduct of Mawere is not without precedent. See *Mapuranga v Mungate* F 1997 (1) ZLR 64 (H) and *Macheka v Metcalfe & Anor* HH-62-07 *per* Patel J.

Let me at this stage deal with the issues of law raised by counsel in this matter.

It will be noted, that the claim for defamation having been withdrawn during the proceedings, the plaintiff's claim remained under two headings, *viz injuria* and unlawful arrest.

G **The alleged improper splitting**

Mr *Ochieng* argued very strongly that the plaintiff's claims under these two separate headings amounted to improper splitting of claims. The argument was that the plaintiff could only claim under either head of damages but not both.

R G McKerron *The Law of Delict* 7 ed at p.53, in dealing with the aspect of H *actio injuriarum,* remarks as follows:

Bere J

> "The interests of personality protected by the *actio injuriarum* are those interests A which every man has, as a matter of natural right, in the possession of an unimpaired person, dignity or reputation …

Examples of such acts are assaults of all kinds, the unjustifiable infliction of any restraint upon the liberty of another, the use of defamatory or insulting words concerning another, the malicious and unwarranted institution of criminal proceedings against another …" B

In *Masawi v Chabata & Anor* 1991 (1) ZLR 148 (H), where the plaintiff was seeking damages for wrongful and unlawful arrest and imprisonment, Greenland J recognised that for the purpose of the *actio injuriarum* an unlawful arrest had been made and maintained by threats.

It occurs to me that, in a claim for damages, one may not refer to unlawful C arrest without triggering the aspect of the injury to the plaintiff's feelings caused by such an act.

In other words, damages for unlawful arrest are awarded in recognition of the *injuria* associated with that unlawful conduct. If this position is accepted, it appears to be quite superfluous in a civil suit to claim for *injuria* under one heading and unlawful arrest under another heading. The claim should D basically be under one heading and I take the point that there may have been improper

splitting in the plaintiff's claim. I intend to address this anomaly by awarding one globular figure for damages.

The indemnification clause

It was argued byMr *Ochieng* that the plaintiff having indemnified the defendant E by participating in the competition as per the rules of the competition, could not possibly bring the instant civil action against the defendant.

Heavy reliance was placed on rule 6 of the competition which was to the following effect:

> "All participants and winners indemnify OK Zimbabwe Limited, the advertising F agencies and partners against any and all claims of any nature whatsoever in the promotion (including as a result of any act or omission, whether negligent or otherwise on the part of OK Zimbabwe."

I note that in practice such clauses are not blindly or religiously accepted by our courts, as observed by R H Christie *The Law of Contract in South Africa* 6 ed p 191 when he states: G

> "Obviously the law cannot stand aside and allow such traps to operate unchecked, and ... the courts have protected the public from the worst abuses of exemption clauses by setting limits to the exemptions they will permit and by interpreting exemption clauses narrowly."

In the same breath, I also find the remarks by Innes CJ in *Wells v SA Aluminite Co* 1927 AD 69 quite apposite when the learned judge stated at 72: H

Bere J

> A "Hence contractual conditions by which one of the parties engages to verify all representations for himself and not to rely upon them as inducing a contract, must be confined to honest mistake or honest representations. *However wide the language, the court will cut down and confine its operations within these limits*" (my emphasis).

Questioned about this exemption clause during cross-examination, the B plaintiff explained that he could not have thrown away his constitutional rights as afforded by the Declaration of Rights by participating in the defendant's jackpot promotion. I agree with the observation by the plaintiff. I have already made a specific finding that Mawere was both reckless and malicious in the manner he dealt with the plaintiff and I am satisfied that C the defendant must not be allowed to avoid liability by seeking refuge in rule 6 of the competition. Allowing it to do so would offend public policy considerations which demand that innocent and unsuspecting individuals be protected by the law.

Quantum

D Having concluded that the defendant cannot escape liability in this case Imust now move to consider the quantum of damages.

As I have already highlighted elsewhere in this judgment, I am fully cognisant of the fact that in arresting and detaining the plaintiff, the police, who for some strange reason have not been joined in these proceedings, clearly abused E their discretion. Be that as it may, I do not consider the non joinder of the police to be fatal to the plaintiff's case because the conduct of Mawere can be clearly separated from that of the police.

Causing the unnecessary arrest of an individual has its attendant consequences and the *injuria* caused to the victim is something the courts frown at.

F The plaintiff in this case was punished for doing nothing but to participate in an activity of the defendant at the invitation of the defendant. In quantifying damages in this case I am guided by the remarks of Greenland J in *Masawi v Chabata supra* at 159 where the learned judge stated:

> "As regards quantum it must be borne in mind that the primary object of the *actio* G *injuriarum* is to punish the defendant by the infliction of a pecuniary penalty, payable to plaintiff as a *solatium* for the injury to his feeling. The court has to relate the moral blameworthiness of the wrongdoer to the inconvenience, physical discomfort and mental anguish suffered by the victim."

In casu the plaintiff explained in great detail how Mawere masterminded his arrest right in front of his wife and colleagues who had come to join him H in celebrating his moment of joy as one of the winners in the competition.

Bere J

He explained how Mawere remained firmly in charge of the whole episode A from the time of his arrest up until his release. I have not the slightest doubt that Mawere's moral blameworthiness remained significantly high. His overzealousness and evil arm remained visible throughout the pain endured by the plaintiff.

Given the aspect of dollarization, there is very little that can be derived from B cases of a similar nature in terms of *quantum* as the majority of the awards were made in the Zimbabwe dollar.

However, I consider the figures proposed by the plaintiff's counsel as overzealously high and unacceptable.

In my endeavour to arrive at a fair quantum for damages, I have had to consider the awards made in the following cases and converting the amounts C awarded from Zimbabwe dollars into United states dollars using the ruling market rate at the time;

(1) *Masawi v Chabata & Anor supra*

(2) *Karimazondo & Anor v Minister of Home Affairs* 2001 (2) ZLR 363 (H)

(3) *Minister of Home Affairs & Anor v Bangajena* 2000 (1) ZLR 306 (S) D

(4) *Botha v Zvada & Anor* 1997 (1) ZLR 415 (S) and

(5) *Macheka v Metcalfe & Anor supra*.

I consider that taking into account all the factors in this case a figure of $8 500 as damages would be appropriate. E

Order

In the result it is ordered that:

Judgment be and is hereby granted in favour of the plaintiff against the defendant for:

(a) Payment of the sum of $8 500 as damages for *actio injuriarum*. F

(b) Interest thereon at the prescribed rate calculated from 7 October 2011 to date of payment in full; and

(c) Costs of suit.

Mtombeni, Mukwesha & Muzawazi, legal practitioners for the plaintiff G

Atherstone & Cook, legal practitioners for the defendant H

© 2015 Juta and Company (Pty) Ltd.

Document 38 of 75

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2012/Volume 1/MUDISI & ORS v TOMANA NO & ORS 2012 (1) ZLR 305 (H)

MUDISI & ORS v TOMANA NO & ORS 2012 (1) ZLR 305 (H)

Citation	2012 (1) ZLR 305 (H)
Case No	Judgment No. HH-121-12
Court	High Court, Harare
Judge	Hlatshwayo J
Heard	7 March 2012

Judgment 7 March 2012

Counsel Mrs *B Mtetwa*, for the applicants
C Mutangadura and *N Mutsonziwa* for the respondents

Case Type Opposed application

Annotations No case annotations to date

Flynote

C **Constitutional law** – *Attorney-General – independence of – such independence not conferring immunity from judicial review – must act in accordance with the law*

Court – *Labour Court – exclusive jurisdiction over labour matters – does not include power to issue declaratory orders*

D **Legal practitioner** – *public prosecutor – status of – not delegate of Attorney-General – represents Attorney-General, subject to his instructions – whether Attorney-General has power to withdraw authority to prosecute*

Practice and procedure – *parties – citation – official – when official may* E *also be cited in personal capacity*

Headnote

The applicants were employees of the Public Service Commission (PSC) employed as either law officers or public prosecutors and assigned to the prosecution department of the Attorney-General's Office. They were also executive committee members of the Zimbabwe Law Officers F Association, whose membership resolved to embark on a work stoppage if certain grievances were not met by the PSC. The work stoppage took place. The Attorney-General addressed a letter to each of the applicants, condemning their actions and demanding an explanation as to why he should continue to repose his confidence in them as his representative G practising under his certificate. The applicants declined to cooperate with the Attorney-General, querying the legal basis for his demands. His reaction was to withdraw their authorities to prosecute. In implementing the Attorney-General's withdrawal of authority to prosecute, the second and third respondents directed the applicants not to carry out their duties as prosecutors, not to touch any dockets in their offices and to vacate their H offices and hand over the office keys. The applicants complied, under

---

Hlatshwayo J

protest, and brought urgent proceedings in terms of the Administrative A Justice Act [*Chapter 10:28*], seeking an order declaring that the letter withdrawing prosecuting authority from them and the actions consequent on such withdrawal be pronounced null and void. The respondents were cited both personally and in their official capacities.

The respondents contended that the Attorney-General's decision to withdraw B his authority to prosecute from the applicants could not be contested and thus the applicants had no cause of action. They contended that the exercise of discretion by the first respondent in the carrying out of his mandate was not subject to judicial scrutiny. They based this contention on s 76(7) of the Constitution, which provides that "In the exercise of C his powers under subsection (4) or (4a), the Attorney-General shall not be subject to the direction or control of any person or authority".

Held, that the entrenchment of the independence of a body or person in such terms is a well-established constitutional device, but it does not put such body or person above the law. The actions of such bodies or persons are still subject to legal review. D

Held, further, that the Attorney-General has a wide discretion to choose his representatives, but those so selected must be qualified in terms of statute. If they are not, the selection is null and void and will be struck down by the courts. And once the Attorney-General has chosen a representative, the relationship so established is governed by law. The representative E can only be dismissed lawfully and following due process, failing which the actions of the Attorney-General can be impugned and set aside by a court of law. None of this encroaches on the autonomy and

independence of the office of the Attorney-General, which remains independent and autonomous, but operating under the law. To hold otherwise would be F to make the Attorney-General's office a law unto itself, contrary to the fundamental constitutional principle that no person or office, however powerful or important, should be above the law.

Held, further, that although the Labour Court is given exclusive jurisdiction over labour matters, the issue of declaratory orders is specific to the High Court. The Labour Court does not have the competence to issue such G orders, and the applicants were accordingly justified in approaching the High Court.

Held, further, that in terms of ss 6 and 11 of the Criminal Procedure and Evidence Act [*Chapter 9:07*], where the Attorney-General does not exercise his functions directly in person, he may H

Hlatshwayo J

(a) appoint A a practising legal practitioner to whom he delegates the prosecutorial powers, with the delegate having powers to further delegate to another legal practitioner; or

(b) act through public prosecutors, who represent the Attorney-General and are subject to instructions.

B *Held*, further, that in the appointment of a legal practitioner, the powers delegated are wide, and include the power to further delegate. Under such circumstances, the delegation of the power would be evidenced by some document or certificate of authority, which document or certificate may, under certain circumstances, be withdrawn; and once it is withdrawn, the relationship between the Attorney-General and the C delegate comes to a complete end. The delegation of prosecuting authority to public prosecutors is different. The public prosecutors represent the Attorney-General, but are subject to instructions. They cannot appoint sub-delegates. The withdrawal of instructions to prosecute does not terminate their relationship with the Attorney-General, they remain open to fresh or other instructions. Even if the Attorney-General were D to disown their representation completely, they remained employed by the Public Service Commission as prosecutors until discharged. The Attorney-General thus committed a material error of law or fact when he purportedly withdrew the prosecutors' authority to prosecute. The Attorney-General may not withdraw his authority to prosecute from E a public prosecutor because, in the first place, such authority is never delegated in the complete manner in which it is done for legal practitioners so appointed; public prosecutors prosecute under instructions from the Attorney-General. If the Attorney-General is displeased with the performance of a public prosecutor, his courses are either to withdraw the instructions or to suspend the public prosecutor pending investigation F and possible dismissal by the Public Service Commission.

Held, further, that the applicants were wrong in citing the respondents both in their official and personal capacities. A challenge of an act done by a person in an official capacity must be through citation of the office and not the individual. The citation must be linked to the terms of the order G sought. If an official act must be done, then the citation must be in an official capacity, otherwise the official cited in his personal capacity cannot fulfill the terms of the order sought. Even where an order of costs is being sought against an official, if the relief is official, the citation should be in the official capacity, although the cost clause and the support thereof would be framed in the personal capacity. Personal citation is H justified only when relief is sought personally from the official, as in

---

Hlatshwayo J

damages consequent upon an official act allegedly carried out *mala fide* A or grossly negligently.

Cases referred to

Gcaba v Min of Safety & Security 2010 (1) SA 238 (CC); [2009] ZACC 26

Matida v Chairman, PSC & Anor 1998 (1) ZLR 507 (H) B

Paradza v Min of Justice 2012 (1) ZLR 1 (S)

Sibanda & Anor v Chinemhute NO & Anor HH-131-04

Tsvangirai v Electoral Supervisory Commission 2005 (2) ZLR 398 (H)

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

Legislation considered C

Constitution of Zimbabwe 1980, s 76

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

Case information

Mrs *B Mtetwa*, for the applicants

C Mutangadura and *N Mutsonziwa* for the respondents D

Judgment

Hlatshwayo J: The applicants are employees of the Public Service Commission (PSC) employed as either law officers or public prosecutors and assigned to the prosecution department of the Attorney-General's Office. The applicants are also executive committee members of the Zimbabwe Law Officers Association (ZILOA), whose membership, at a meeting held on 18 E September 2011, resolved to embark on a work stoppage from 4 October 2011 if certain grievances were not met by the PSC. The work stoppage did take place as resolved, and some of the applicants, as spokespersons of the association, gave media interviews on behalf of their membership during the work stoppage. F

The first respondent, the Attorney-General (A-G), addressed a letter dated 17 October 2011 to the applicants, requiring each one of them to respond to charges and allegations set out therein, thus:

> "I hereby write to you requesting for written reasons to justify your conduct. I am satisfied that the conduct I refer to below admits of the conclusion that you have on dates that appear in each of the publications attached to this letter G failed to conduct yourself with the decorum and integrity expected of a public prosecutor.
>
> From the publications I have attached hereto, it is apparent that in common purpose with each other, Leopold Mudisi, Petrobs Dube, Musekiwa Mbanje, Dereck Charamba and Mehluli Tshuma actively participated in the incitement of law officers to embark on an industrial action purportedly based on salary H

Hlatshwayo J

> A discrepancies between the law officers and the magistrates. I hereby narrate the history of your indecorous conduct in sequence …
>
> After the Public Service Commission revealed the correct salaries earned by prosecutors and law officers you conditionally called off the illegal strike. given the above exposition of the facts surrounding your unlawful actions i am of the firm belief that the above rendition of facts justifies me demanding an explanation B in writing showing cause why i must continue to reposing my confidence in you as my representative practising under my certificate.
>
> You are called upon to deliver your response to me within seven days of service upon you of this letter."

The applicants declined to respond individually but, under the auspices of ZILOA, in three brief paragraphs addressed some of the allegations. However, C in a final letter penned by their lawyers the applicants declined to cooperated with the Attorney General, thus:

> "We have considered the powers conferred upon your office by the Constitution together with our client's contract of employment including the governing legislation. We have come to the conclusion that your inquiry or request has no foundation at law. To that end, our clients reserve their rights until such time D they are lawfully advised of the legal basis upon which the request is made."

The Attorney-General then took the view that by ignoring his request for written responses, the applicants were admitting to all the allegations, and accordingly withdrew his authority to prosecute from the applicants, as follows:

> E "My constitutional mandate and duty to uphold the Constitution of Zimbabwe and the laws of Zimbabwe and in particular my duty to administer criminal justice, does not envisage a situation in which I would rely on a prosecutor of the disposition you admit to.
>
> I accordingly hereby and with immediate effect withdraw my authority and power to prosecute conferred upon me under section 76 of the Constitution of F Zimbabwe.
>
> I also hereby refer you to your employer for further processing according to law"

In truth, though, the applicants did proffer some response, however curt, to most of the allegations in their collective response under the auspices of ZILOA. However, no response or comment whatsoever was made by the G applicants pertaining to the most serious charge of "physically blocking access to offices and courts". In implementing the Attorney-General's withdrawal of authority to prosecute, the second and third respondents have directed applicants not to carry out their duties as prosecutors, not to touch any dockets in their offices and to vacate their offices and hand over the office keys. The applicants have complied with the respondents' instructions, albeit H under protest. They now approach this court contending that the actions of

Hlatshwayo J

the respondents constituted a breach of the provisions of the Administrative A Justice Act [*Chapter 10:28*], which requires that administrative action be taken in a fair and lawful manner allowing for the affected party to be heard.

The respondents have raised a number of points *in limine*, which are considered *seriatim* below:

No cause of action B

The respondents contend, in the first instance, that the first respondent's decision to withdraw his authority to prosecute from the applicants cannot be contested and for that reason, the applicants have no cause of action to bring this application. The contention that the exercise of discretion by the first respondent in the carrying out of his mandate is not subject to judicial C scrutiny is apparently based on s 76, particularly in subss (5), (6) and (7), of the Constitution, which states as follows:

> "**76 Attorney-General**
>
> (1) There shall be an Attorney-General who shall be the principal legal adviser to the Government and whose office shall be a public office but shall not form part of the Public Service. D
>
> (2) …
>
> (3) …
>
> (4) The Attorney-General shall have power in any case in which he considers it desirable so to do –
>
> (a) to institute and undertake criminal proceedings before any court, not being a court established by a disciplinary law, and to prosecute or defend an E appeal from any determination in such proceedings;
>
> (b) to take over and continue criminal proceedings that have been instituted by any other person or authority before any court, not being a court established by a disciplinary law, and to prosecute or defend an appeal from any determination in proceedings so taken over by him; and
>
> (c) to discontinue at any stage before judgment is delivered any criminal F proceedings he has instituted under paragraph (a) or taken over under paragraph (b) or any appeal prosecuted or defended by him from any determination in such proceedings.
>
> (4a) The Attorney-General may require the Commissioner-General of Police to investigate and report to him on any matter which, in the Attorney-General's opinion, relates to any criminal offence or alleged or suspected criminal offence, G and the Commissioner-General of Police shall comply with that requirement.
>
> *(5) The powers of the Attorney-General under subsection (4) may be exercised by him in person or through other persons acting in accordance with his general or specific instructions.*
>
> *(6) The powers of the Attorney-General under subsection (4)(b) and (c) shall be vested in him to the exclusion of any other person or authority:..* H

Hlatshwayo J

> A *(7) In the exercise of his powers under subsection (4) or (4a), the Attorney-General shall not be subject to the direction or control of any person or authority"* (emphasis added).

Now, the contention that the A-G's exercise of his discretionary powers cannot be subject to judicial scrutiny is as astounding as a similar contention made with regard to another constitutional body, the then Electoral Supervisory B Commission, in connection with which I have had occasion to comment in *Tsvangirai v Mugabe & Anor* 2005 (2) ZLR 398 at 406 thus:

> "The fourth respondent goes on to mount a final startling argument against its inclusion in this petition, *viz*., that the manner it conducts its election supervision is a matter beyond this court's jurisdiction and

therefore cannot be raised before it and may not be questioned by any court of law. This remarkable submission C is ostensibly based on s 61(6) of the Constitution, which provides thus:

> 'The Electoral Supervisory Commission shall not in the exercise of its functions in terms of subsection (3) or (5) be subject to the direction or control or any person or authority.'

Now, the entrenchment of the independence of a body or person in the above terms is a well-established constitutional device, which does not then put such body or D person above the law. The actions of such bodies or persons are still subject to legal review. For example, in s 79B of the Constitution the independence of the judiciary is entrenched in exactly the same terms, but it would be quite a novel proposition to interpret that entrenchment as removing from legal review the conduct of the judiciary in the exercise of its functions. The kind of protection that the constitutional provision extends to the ESC is the independence in the E conduct of its duties of monitoring, for example, the criticism of how its official discharged their duties quoted at length above is completely inappropriate. No court can interfere or inquire into the manner in which the ESC conducts its duties, no court can order that ESC officials be more active in the discharge of their duties, etc. But if the grievance is that the ESC was not properly constituted, acted illegally or failed to discharge its duties altogether, such a challenge cannot be answered by reference to the provision which constitutionally entrenches the F independence of the Commission."

In the same vein, I am of the firm view that the allegation of lack of cause of action in this matter cannot be sustained. Compare also *Paradza v Minister of Justice* & Ors S-46-03 [*]. The A-G has a wide discretion to choose his or her representatives, but those so-selected must be qualified in terms of statute. G If they are not, the selection is null and void and will be struck down by the courts. And once the A-G has chosen a representative, the relationship so established is governed by law. The representative can only be dismissed lawfully and following due process, failing which the actions of the A-G can be impugned and set aside by a court of law. All this does not encroach

---

on the autonomy and independence of the office of the A-G. It remains an A independent and autonomous office, but operating under the law. To hold otherwise would be to make the A-G's office a law unto itself, contrary to the fundamental constitutional principle that no person or office, however powerful or important, should be above the law.

Absence of jurisdiction of the High Court to deal with matter B

In terms of s 89(1) of the Labour Act [*Chapter 28:02*], the Labour Court has the same powers of review as would be exercisable by the High Court in respect of labour matters. Then s 89(6) of that Act provides that "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)". C

In *Tuso v City of Harare* 2004 (1) ZLR 1 (H) Bhunu J decided that this court did not have jurisdiction to consider reviews arising out of contracts of employment as that power had been bestowed upon the Labour Court by virtue of s 89(6), which also ousted the jurisdiction of the High Court to review such decisions in the first instance. In *Sibanda & Anor v Chinemhute NO &* D *Anor* HH-131-04, Makarau J (as she then was) had to consider whether or not, in the construction of s 89(6) this court still retained the power to issue declaratory orders and concluded:

> "Thus, the power to issue a declaratory order is not available in all courts that apply common law. It is specific to this court. It is common cause that the Labour E Court has not been specifically empowered to issue declaratory orders as this court has been. It cannot create such relief or the procedure for granting such relief as it is not a court of inherent jurisdiction."

The applicants in this matter seek a declarator that the letter withdrawing prosecuting authority from the applicants and consequential actions be F pronounced null and void. The withdrawal of powers of prosecution from a public prosecutor is not a "quintessential labour-related issue, based on the right to fair labour practices", as was stated in *Gcaba v Minister of Safety and Security* 2010 (1) SA 238 (CC); [2009] ZACC 26. Its impact is felt not only by the applicants, but also by the general public, whose cases may be pending or partly-heard before a given prosecutor. Thus, consideration by G the High Court rather than the Labour Court is justified even under a regime which distinguishes between purely labour and administrative law matters as the South African one apparently does. In our legal system, as already noted, the applicants are justified to approach this court on the basis of a declarator, as the Labour Court does not possess such competence. H

Hlatshwayo J

A **On the merits**

According to the Administrative Justice Act, an administrative authority which has the responsibility or power to take any administrative action which may affect the rights, interests or legitimate expectations of any person has a duty to "act lawfully, reasonably and in a fair manner" (s 3(1)(a)). The B administrative authority would not have discharged its obligation above where in the exercise of its responsibilities, *inter alia*, a "material error of law or fact has occurred" (s 5(c)). A person aggrieved by the failure by an administrative authority to comply with the provisions of s 3 is entitled to approach High Court for relief which may include the confirmation or the C setting aside of the decision concerned (s 4(2)(a)).

I have already noted above the A-G's constitutional mandate to prosecute and discretion to delegate the same. The Criminal Procedure and Evidence Act provides for further details in the actual discharge of the A-G's mandate, especially the circumstances and extent to which such prosecution powers D may be delegated, thus:

> "**PROSECUTION AT PUBLIC INSTANCE**
>
> **A. *Attorney-General***
>
> **6 Delegation of functions of Attorney-General**
>
> (1) The Attorney-General may, when he deems it expedient, appoint any legal E practitioner entitled to practice in Zimbabwe to exercise all or any of the rights and powers or perform all or any of the functions conferred upon him by subsection (5) of section 76 of the Constitution, this Act or any other enactment, whether or not they relate to criminal proceedings.
>
> (2) A legal practitioner appointed in terms of subsection (1) may, subject to any conditions which the Attorney-General may impose – F
>
> (a) sign any certificate, authority or other document required or authorized by an enactment referred to in that subsection; and
>
> (b) appoint a legal practitioner entitled to practise in Zimbabwe to exercise the rights and powers or perform the functions delegated to him in terms of subsection (1) and the provisions of this subsection shall apply, *mutatis* G *mutandis*, in respect of that appointment."
>
> "**8 Presiding officer may appoint prosecutor in certain cases**
>
> If for any reason the person appointed in terms of section six to conduct a prosecution is unable to act or if no person has been so appointed, the officer presiding over the court or examination shall, by writing under his hand, designate some fit and proper person for that occasion to prosecute or, as the H case may be, to appear."

Hlatshwayo J

> **"B. *Local public prosecutor*** A
>
> 11 Functions of local public prosecutor
>
> (1) All public prosecutors attached to a magistrates court are, as representatives of the Attorney-General and subject to his instructions, charged with the duty of prosecuting in that magistrates court, in the name and on behalf of Zimbabwe, all offences which, under any enactment governing magistrates courts or any B other enactment, that magistrates court has jurisdiction to try.
>
> (2) Criminal proceedings instituted in a magistrates court by any local public prosecutor may be continued by any other public prosecutor.
>
> (3) When there is lodged with or made before a local public prosecutor a sworn declaration in writing by any person disclosing that any other person has committed an offence chargeable in the magistrates court to which such public C prosecutor is attached, he shall determine whether there are good grounds for prosecution or not:
>
> Provided that –
>
> (i) he may refer to the Attorney-General the question whether he shall prosecute or not;
>
> (ii) any other person may be specially authorized by the Attorney-General to D prosecute in the matter."

From the statutory provisions above, it appears that where the A-G does not exercise his functions directly in person, he or she may:

(a) appoint a practicing legal practitioner to whom he or she delegates the prosecutorial powers, with the delegate having powers to further delegate E to another legal practitioner.

(b) act through public prosecutors, who represent the A-G and are subject to instructions.

The above delegation structure suggest a system where, in the appointment of legal practitioners, the powers delegated are wide and include the power F to further delegate. Under such circumstances, the delegation of the power would be evidenced by some document or certificate of authority, which document or certificate may, under certain circumstances, be withdrawn and, once withdraw,n the erstwhile relationship between the A-G and the delegate comes to a complete end. The delegation of prosecuting authority to public G prosecutors is different. The public prosecutors represent the A-G, but are subject to instructions. They cannot appoint sub-delegates. The withdrawal of instructions to prosecute does not terminate their relationship with the A-G; they remain open to fresh or other instructions. Even if the A-G were to disown their representation completely, they remained employed by the Public Service Commission as prosecutors until discharged. H

Hlatshwayo J

A Therefore, in the light of the above discussion, it can be concluded the A-G committed a material error of law or fact when he purportedly withdrew the prosecutors' authority to prosecute. The A-G may not withdraw his authority to prosecute from a public prosecutor because in the first place such authority is never delegated in the complete manner in which it is done for legal practitioners so-appointed, but public prosecutors prosecute under B instructions from the A-G. The A-G who is displeased with the performance of a public prosecutor either withdraws the instructions or suspends the public prosecutor pending investigations and dismissal by the Public Service Commission.

In this case, the A-G purported to withdraw his authority to prosecute from C the public prosecutors and referred them to the Public Service Commission "for further processing according to law". In my considered view, this was a wrong procedure for the following reasons:

(a) The withdrawal of prosecutorial authority was improper, as pointed out already. Its implementation exposed the applicants to double jeopardy, in that any hearing before the PSC would not have the effect of restoring D the prosecutorial authority even if they were found innocent.

(b) The proper procedure should have been to suspend them pending a fuller enquiry which could lead to either their discharge from the PSC or their reinstatement in their former positions. Now, suspension is a common law procedure which can be invoked summarily or following a preliminary enquiry. However, a suspension cannot be imposed for an E indefinite period. It must be for a specific reasonable period and subject to the carrying out of a fuller inquiry during that period. There can be provisions for the extension of the suspension period to allow for the completion of the inquiry.

(c) Now, the procedure adopted in this case was wrong, in that, instead of F a suspension, a withdrawal of prosecutorial authority was invoked. The suspension should have had a specific reasonable period within which a fuller and dispositive inquiry was to take place. Lacking all these quintessential qualities, the procedure adopted in this case constitutes a material error of law or fact, is not supportable and may be declared null and void together with consequential actions taken on its strength.

G **Costs**

The normal rule is that costs follow the outcome, and exemplary costs are merited where the losing party's cause or actions amounted to an abuse of the court process. However, the winning party may also be guilty of dilatory on unmeritorious pleading which may justify the court withholding any costs H they may be entitled to. This matter was brought as an urgent application

---

Hlatshwayo J

for the vindication of rights under the Administrative Justice Act. It should, A however, have been brought as a court application in terms of r 256 of the High Court Rules. This wrong procedure was

condoned and the urgent application was allowed to proceed as an ordinary court application. The applicants were wrong in citing the respondents both in their official and personal capacities. See *Matida v Chairman, PSC & Anor* 1998 (1) ZLR 507 (H). A challenge of an act done by a person in an official capacity must B be through citation of the office and not the individual. The citation must be linked to the terms of the order sought. If an official act must be done, then the citation must be in an official capacity, otherwise the official cited in his personal capacity cannot fulfill the terms of the order sought. Even where an order of costs is being sought against an official, if the relief is C official, the citation should be in the official capacity, although the cost clause and the support thereof would be framed in the personal capacity. Personal citation is justified only when relief is sought personally from the official as in damages consequent upon an official act allegedly carried out *mala fide* or grossly negligently. The applicants also fell foul of this requirement and the court had to condone this remiss conduct, which was motivated not D so much by ignorance of the law, but more by an excessive exuberance in one's own cause and a perverse desire to strip the respondents of the aura of their office. The court is thus justified in withholding the costs which the applicants were otherwise entitled to. Legal practitioner should take note and be properly warned that they do not advance their client's cause by unnecessarily pitching the political angle of their case, but by assiduously E adhering to the rules and dispassionately and diligently pursuing their claim.

Order

It be and is hereby declared that:

1. The first respondent's letter dated 3 November 2011 to the applicants F is null and void and of no force or effect and is hereby set aside.
2. All orders, verbal or written, issued to the applicants consequent upon the said letter, are equally null and void and, to the extent possible, are hereby set aside and at any rate must not, in particular, hinder the terms of para 3 below.
3. The applicants are forthwith restored to the positions they each held G prior to each one's receipt of the said letter, without loss of their rights.
4. Each party shall bear its own costs.

Mtetwa & Nyambirai, applicants' legal practitioners

Attorney-General's Office, respondents' legal practitioners H

* See above at p 1 of this volume. – *Editor.*

© 2015 Juta and Company (Pty) Ltd.

Document 39 of 75

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2012/Volume 1/KHUMALO & ANOR v MUKONDIWA-MAZHANDU & ANOR 2012 (1) ZLR 317 (H)

KHUMALO & ANOR v MUKONDIWA-MAZHANDU & ANOR 2012 (1) ZLR 317 (H)

2012 (1) ZLR p317

Citation	2012 (1) ZLR 317 (H)
Case No	Judgment No. HB-68-12
Court	High Court, Bulawayo
Judge	Ndou J
Heard	6 February 2012; *CAV*

Judgment 8 March 2012

Counsel *N Mlala*, with him *S Mguni*, for the appellants
Miss *A Munyeriwa*, with her *L Maunze*, for the respondents

Case Type Urgent chamber application

Annotations No case annotations to date

Flynote

Court – *judicial officer – when functus officio – magistrate granting bail – becomes functus officio when determination on bail is made – no basis on which to recall decision*

Headnote

The applicants were granted bail by the first respondent. The prosecutor was not opposed to the granting of the bail. For some reason the first respondent wanted the prosecutor to check with the police. This was done and the prosecutor indicated that the police were not opposed to the granting of bail. The first respondent granted the application but, in spite of the applicants' relatives having paid the bail money, they were not released. It emerged that the first respondent had directed the prison staff at the courts not to release the applicants. She had done this, she said, because the police were alleging that she had been bribed by the applicants' relatives. It was this approach by the police that caused her to revoke the bail that she had granted earlier on.

Held, that when the first respondent granted bail, she then became functus officio. There was no legal basis for denying the applicants their liberty. If the police or the applicants' relatives alleged that she had been bribed, that was not a legal ground on which to recall the matter and alter the decision that she had already taken. She should have dealt with the allegations of bribery levelled against her without denying the applicants their liberty. Magistrates should not be having informal discussions elsewhere on issues that took place in court.

Case information

N Mlala, with him *S Mguni*, for the appellants

Miss *A Munyeriwa*, with her *L Maunze*, for the respondents

2012 (1) ZLR p318

Ndou J

Judgment

Ndou J: This order was granted by consent of the Attorney-General's representative on 6 February 2012. The facts of this case are disturbing and I wish to comment thereon in this judgment.

On 1 February 2012 the applicants appeared before the first respondent, a Bulawayo provincial magistrate, jointly charged with the crime of fraud as defined in s 136 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. This was their initial appearance after their arrest. They were represented by a legal practitioner, N Dube of Cheda & Partners, Legal Practitioners. The public prosecutor was Masimba Saruwaya. In the founding affidavit in the application, the deponent avers that he was instructed by the applicants to bring to the attention of the magistrate that they were severely assaulted by the police after their arrest. The public prosecutor advised the court *a quo* that the State was not opposed to bail being granted to the applicants. The first respondent asked why the State was not opposing bail in court, whereas in the "Request for Remand" Form 242 the police were opposed to the granting of bail. The first respondent's notes reflect the following on this issue:

> "State consents to bail.

Q The form 242 says the State is opposed to bail, has the State changed its attitude?

A Yes

Q Why

A We have just changed E

Crt:

Q Can we stand the matter down, PP [Public Prosecutor] may you confirm with I/O [Investigating Officer] that indeed he is no longer opposed to bail.

[Resumes] 2:15

Q State, are you still not opposed to bail? F

A Yes

Q How much bail

A D/C [Defence Counsel] $100 and any conditions the court may impose

PP [Public Prosecutor] No conditions except that they can hand in their passports if they have any

Crt

Q Do you have any G

A PP – I don't know

Crt:

Bail granted as per State's consent in the sum of $100"

Thereafter, the applicants' legal practitioner left the court as the applicants' relatives went to pay bail at the clerk of court's office. Bail was indeed paid for the applicants, as evidenced by bail deposit receipts BR 148924 H

2012 (1) ZLR p319

Ndou J

A and 148922, respectively, issued by the clerk of court. However, the applicants were not released. The prison officer indicated to the applicants that the magistrate [first respondent] had directed them not to release the applicants. The relatives contacted the applicants' legal practitioners about this unpleasant turn of events. The legal practitioner enquired from the first B respondent why she had unilaterally stopped the release of the applicants. The first respondent told the legal practitioner that the police were alleging that she [first respondent] had been bribed to the tune of US$300 by the applicants' relatives. It was this approach by the police [presumably in her office] that caused her to revoke the bail that she had granted earlier on. The first respondent has provided her notes on the issue. The notes were written C a day after the applicants paid their bail on 1 February 2012. On 1 February 2012 the first respondent noted:

"Crt:

After getting back to my chambers I was informed by a colleague that the relatives were saying they gave me $300 bribe to grant bail. With that in mind I tried to enquire from the relatives who they gave money D to and asked them to get back their money as I did not take any bribe. I remanded the 2 accused persons I/C [in custody] to the following day.

02/02/12

Crt to relatives of the accused persons.

Q Did you get back your money

A No

E I did not get your money & I hope you get it back from whoever you gave. Because of all the above claims I have decided I may no longer be objective enough to deal with the matter I therefore recuse myself. Accused persons are remanded to 03/02/12 so that they can be moved to another court for their bail hearing.

(Signed) 02/02/12"

F The applicants, their legal practitioner and the public prosecutor were not involved in the proceedings between the first respondent and the applicants' relative. It is not clear how first respondent managed to convene a meeting between her and the applicants' relatives. It is not clear where such meeting took place. There is no record of who attended the meeting. If the allegations of G bribery were from the applicants' relatives, it is not clear why first respondent told the applicants' legal practitioner that the claims came from the police. Be that as it may, after confronting the first respondent, the applicants' legal practitioner approached the area public

prosecutor. The latter was of no assistance as he referred him back to first respondent. This culminated in this application being instituted. The actions of the first respondent are perturbing. H The first respondent had already granted the applicants bail in an open court.

Ndou J

The State was right from the start not opposed to the granting of the bail. A The State is the *dominus litis*. For some reason the first respondent wanted the prosecutor to check with the police. This was done and the prosecutor still indicated that the police were not opposed to the granting of bail. The first respondent granted the applicants and she then became *functus officio*. The applicants paid bail and would have been released had it not been for B the instruction which the first respondent gave to the prison officers. There is no legal basis for denying the applicants their liberty. If the police or the applicants' relatives alleged that first respondent had been bribed, that is not a legal ground to recall the matter and alter the decision that she had already taken. The applicants did not do anything to warrant the revocation of their bail. The first respondent should have dealt with the allegations of bribery C levelled against her without denying the applicants their liberty. A detained person's right to liberty is fundamental and should not be taken away on such grounds. In any event, the first respondent knew that the applicants were represented by a legal practitioner and there is nothing that stopped her from reconvening the court with both parties present. In the presence of the public prosecutor and applicants' legal practitioner, the issue of the alleged bribery D could have been dealt with inputs from both sides. Magistrates should not be having informal discussions elsewhere on issues that took place in court. The approach adopted by the first respondent can easily lead to anarchy and negatively affect the criminal justice system. This kind of approach can easily lead to a breeding ground for corruption. The Deputy Registrar of this court is directed to forward a copy of this judgment to the Chief Magistrate. E

It is for the above reasons that the order was granted.

Cheda & Partners, applicants' legal practitioners

Criminal Division, Attorney General's Office, respondent's legal practitioners F

© 2015 Juta and Company (Pty) Ltd.

Document 40 of 75

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2012/Volume 1/MUKOKO v ATTORNEY-GENERAL 2012 (1) ZLR 321 (S)

MUKOKO v ATTORNEY-GENERAL 2012 (1) ZLR 321 (S)

Citation	2012 (1) ZLR 321 (S)
Case No	Judgment No. S-11-12
Court	Supreme Court, Harare
Judge	Chidyausiku CJ, Malaba DCJ, Sandura JA, Ziyambi JA & Garwe JA
Heard	25 June 2009; *CAV*
Judgment	20 March 2012*
Counsel	*J J Gauntlett SC*, with him Mrs *B Mtetwa*, for the applicant Mrs *F Maxwell*, for the respondent

Case Type Constitutional application

Annotations Link to case annotations

Flynote

Constitutional law – *Constitution of Zimbabwe 1980 – Declaration of Rights – s 13(1) – right to personal liberty – curtailment of right where there is a reasonable suspicion that person has committed an offence – such* D *suspicion based on information obtained from person by use of torture or inhuman treatment – charge and prosecution consequent thereon – such prosecution a breach of s 13(1)*

Constitutional law – *Constitution of Zimbabwe 1980 – Declaration of Rights – s 15(1) – prohibition against torture or inhuman or degrading* E *punishment or treatment – "torture" – "inhuman treatment" – "degrading treatment" – meaning – absolute nature of prohibition – person subjected to torture and inhuman and degrading treatment before being charged and prosecuted – such person not ipso facto entitled to stay of prosecution – prosecution lawful if based on evidence not obtained in violation of s 15(1) – prosecution not lawful if based solely on evidence obtained* F *in violation of s 15(1) – onus – on whom onus of showing breach of s 15(1) lies – remedies for violation of s 15(1)*

Criminal procedure – *charge – validity – charge based on evidence obtained in violation of s 15(1) of Constitution – prosecution not lawful*

Headnote

G The applicant sought a permanent stay of a criminal prosecution because of torture and inhuman and degrading treatment to which she had been subjected by State security agents before being brought to court on a

---

Malaba DCJ

charge of recruiting or attempting to recruit a named person to undergo A military training in Botswana in order to commit any act of insurgency, banditry, sabotage or terrorism in Zimbabwe. She had been subjected, *inter alia*, to repeated beatings on the soles of the applicant's feet with a piece of a hosepipe and a metal object using severe force ("*falanga*"); being forced to kneel for a long time on mounds of gravel whilst being B interrogated; prolonged periods of solitary confinement incommunicado on the occasions she was not being interrogated; being kept blindfolded each time she was out of solitary confinement and not being interrogated; and being blindfolded and driven at night to an undisclosed destination under threat of unspecified action.

It was argued, firstly, that the institution of the criminal prosecution was C rendered invalid by the pre-charge ill-treatment to which the applicant was subjected. The manner in which she was apprehended and treated in detention before being brought to court on the charge constituted a violation of her fundamental rights not to be arbitrarily deprived of personal liberty guaranteed under s 13(1) and not to be subjected to torture or to inhuman or degrading treatment protected by s 15(1) of D the Constitution. The undisputed behaviour by State security agents in kidnapping her from her residence and subjecting her to torture, inhuman and degrading treatment whilst she was in their custody for nearly a month rendered the institution of the criminal prosecution an abuse of legal process. E

Secondly, it was argued that the decisions made by the public prosecutor to charge the applicant with the criminal offence and to bring the prosecution proceedings were based solely on information or evidence of the crime obtained from her by infliction of torture, inhuman and degrading treatment and that the use of inadmissible information or evidence rendered the institution of the criminal prosecution invalid. F The decision to charge the applicant with the criminal offence and the institution of the prosecution of it was not based on a reasonable suspicion of her having committed the criminal offence. The criminal prosecution was therefore not authorised by s 13(2)(e) of the Constitution.

Held, that under s 15(1) of the Constitution, the concepts of "torture"; G "inhuman treatment" and "degrading treatment" make up the three key elements of the protection of a person's dignity and physical integrity from the prohibited treatment at the hands of public officials. The section enshrines one of the most fundamental values in a democratic society. It is an absolute

prohibition which cannot be derogated from by the State even in a state of public emergency. The only derogations allowed are H

2012 (1) ZLR p323

Malaba DCJ

A when Parliament, when properly constituted, exercises the power under s 52 of the Constitution to amend, add to or repeal any provision of the Constitution upon strict compliance with the procedure prescribed for the purpose. Using these powers, Parliament has provided six specific instances of treatment of individuals by the State which shall not be held to be in contravention of s 15(1). The fact that torture, inhuman and B degrading treatment are prohibited by a peremptory provision serves to render null and void any act authorising such conduct. The prohibition protects the dignity and physical integrity of every person regardless of his or her conduct. No exceptional circumstance, such as the seriousness of the crime the person is suspected of having committed, or the danger C he or she is believed to pose to national security, can justify the infliction of torture, or inhuman or degrading treatment.

Held, further, that s 15(1) distinguishes between torture on the one hand and inhuman or degrading treatment on the other. The distinction between the notion of torture and the other two concepts lies principally in the intensity of physical or mental pain and suffering inflicted, in respect of D torture, on the victim intentionally and for a specific purpose. Torture is an aggravated and deliberate form of inhuman or degrading treatment. What constitutes torture, or inhuman or degrading treatment, depends on the circumstances of each case. The definition of torture often adopted by courts as a minimum standard is that provided under article 1(1) E of the United Nations Convention Against Torture and Other Cruel or Inhuman or Degrading Treatment or Punishment 1987. In terms of this definition, the torture must be inflicted for the purpose of obtaining information or a confession.

Held, further, that inhuman treatment is treatment which, when applied to or inflicted on a person intentionally or with premeditation, causes, if not F actual bodily injury, at least intense physical or mental suffering to the person subjected thereto and also leads to acute psychiatric disturbance during interrogation. Degrading treatment is treatment which, when applied to or inflicted on a person, humiliates or debases him by showing a lack of respect for or diminishing his human dignity or arouses feelings of fear, anguish or inferiority capable of breaking the person's moral and physical resistance. The relevant notions in the definition of degrading treatment are those of humiliation and debasement. The suffering and humiliation involved must go beyond the inevitable element of suffering or humiliation connected with a given form of legitimate or fair treatment.

Held, further, that not every treatment which causes some discomfort to the H person in detention violates s 15(1) of the Constitution, otherwise no

---

2012 (1) ZLR p324

Malaba DCJ

one could be arrested, detained and interrogated in the investigation of A crime. The treatment must reach the minimum level of severity before it constitutes a breach of the absolute prohibition under the section. The assessment of the minimum level of severity is relative and depends on such factors as the nature and context of the treatment, the manner and method of its execution, as well as the duration of the treatment, B its physical and mental effects and in some cases the age, sex and state of health of the victim.

Held, further, that what the applicant had undergone at the hands of State agents constituted a violation of her fundamental right not to be subjected to torture, or to inhuman or degrading treatment.

Held, further, however, that ill-treatment *per se* has no effect on the validity C of the decisions to charge the victim with a criminal offence and institute prosecution proceedings against him. It is the use of the fruits of ill-treatment which may affect the validity of the decisions, depending on compliance or non-compliance by the public prosecutor with the requirements of permissible deprivation of personal liberty under s 13(2)(e) of the Constitution. If a prosecution is based on a decision D to charge the accused person with the criminal offence which complies with the requirements of permissible deprivation of personal liberty, it is a lawful measure. It cannot be a subject of an order of permanent stay on the ground that the accused person was kidnapped and

subjected to torture, or inhuman or degrading treatment before the charge was E brought against him.

Held, further, that failure to comply with the requirements for a valid decision to charge and prosecute an accused person is a violation of the principle of legality or rule of law enshrined by s 18(1) of the Constitution. The principle of legality requires that every decision or act of a public official which affects the rights or interests of an individual must be in F accordance with an existing law otherwise it violates the rights of the individual concerned.

Held, further, that ss 13(1) and 15(1) of the Constitution protect two separate but related fundamental rights. These rights may be violated independently of each other. The infliction of torture or inhuman or degrading treatment G on an accused person does not in itself affect his criminal liability. The accused may be a victim of ill-treatment by law enforcement agents whilst at the same time being a villain who has committed a criminal offence. The applicability of a particular constitutional provision should turn on the reasons it was included in the Constitution and the evils it was designed to eliminate. H

Malaba DCJ

A *Held*, further, that the existence of reasonable suspicion of the accused person having committed the criminal offence with which he is charged and prosecuted is critical to the determination of the validity of the decisions to charge and prosecute him. A charge is an official act by which notification is given by the competent authority of an allegation that the accused person has committed a criminal offence. It is the existence or B absence of reasonable suspicion of the accused person having committed the criminal offence he is charged with which provides an answer to the question whether pre-charge ill-treatment of an accused person had anything to do with the institution of the criminal prosecution. Where the criminal prosecution meets all the requirements of permissible C deprivation of the accused person of liberty, it cannot be impugned, even if the accused was kidnapped and subjected to torture or inhuman or degrading treatment before the charge was brought. A fair balance must be struck between the interests of the individual in the protection of his or her fundamental rights and freedoms and the interests of the public in having those reasonably suspected of having committed criminal D offences tried and, if convicted, punished according to law. An order of permanent stay of the criminal proceedings cannot be justified by the pre-charge ill-treatment of the accused person; it can only be justified on the ground that there was no reasonable suspicion of the accused person having committed the offence with which he was charged.

E *Held*, further, that this does not mean that the accused person has no remedy for the pre-charge contravention of fundamental rights. Kidnapping a person is a criminal offence. Compensation under s 13(5) of the Constitution is payable to a person who is unlawfully arrested or detained. It is also an appropriate remedy for the redress of a contravention of a fundamental right, available to the court in the exercise of the wide discretionary F power under s 24(4) of the Constitution.

Held, further, that decisions of the courts to decline jurisdiction in situations where the accused had been unlawfully abducted by State agents from another country are not relevant to the present situation and do not justify the court in impugning the validity of decisions by a public prosecutor G to charge a person who is resident in the area of jurisdiction of the court with a criminal offence which the court has jurisdiction to hear.

Held, further, that s 15(1) of the Constitution imposes on the State, through its agents, the obligation not to admit or use, in any legal proceedings, information or evidence obtained from an accused person or defendant or any third party by torture, or inhuman or degrading treatment. That H obligation is inherent in the general terms of the section and, like the

---

Malaba DCJ

general prohibition, is absolute and non-derogable. It is an exception to A the general rule of evidence set out in s 48(1) of the Civil Evidence Act [*Chapter 8:01*], which states that evidence of violation of a fundamental right or freedom is admissible in legal proceedings unless its admission would bring the administration of justice into disrepute.

Held, further, that at various stages in the whole process, the Constitution B imposes duties for the protection of the fundamental rights of the suspect who is the custody of State agents: firstly, law enforcement agents are obliged not to abuse executive authority by torturing or treating suspects in an inhuman or degrading manner to extract information or confessions to be used against them in legal proceedings anticipated to follow the ill-treatment; secondly, public prosecutors have a duty not to C admit or use information or evidence obtained from an accused person suspected of having committed a criminal offence or any third party by torture, inhuman or degrading treatment when making prosecutorial decisions; thirdly, a similar duty is placed on judicial officers; and finally, it lies with the Supreme Court to intervene through the exercise of its D original jurisdiction to enforce or secure the enforcement of fundamental rights. The rationale for the exclusionary rule is the protection of any person suspected of a crime, who is in the custody of a public officer, from torturous, or inhumane or debasing invasions of his dignity and physical integrity. It has nothing to do with the fair determination of the guilt or innocence of the accused person based on lawfully obtained E information. The admission of evidence obtained through the use of torture would compromise the integrity of the judicial process and bring the administration of justice into disrepute.

Held, further, that the onus is on an applicant to establish, on a balance of probabilities, that the information or evidence of the crime used by the F public prosecutor to charge him with the criminal offence and prosecute him for it was obtained by the infliction of torture, inhuman and degrading treatment at the hands of the State security agents prior to the charge being brought against him. The reason for this is that it is the accused person or defendant who has to raise the question of contravention of G fundamental rights by the State. It is he who would have knowledge of what was done to him and what information was extracted as a result of the ill-treatment. It was then for the State to prove beyond reasonable doubt that the decision to charge the applicant with and prosecute the criminal offence was taken upon consideration of independent information or evidence of the crime lawfully obtained and on which reasonable H

Malaba DCJ

A suspicion of his having committed the criminal offence was based. *In casu*, the applicant discharged the onus on her.

Held, further, that the effect of the finding that the public prosecutor relied on information or evidence of the commission of the alleged criminal acts obtained from the applicant by torture, inhuman and degrading treatment in deciding to charge her with and prosecute her for the B criminal offence is that there was a breach of ss 15(1) and 13(1) of the Constitution. The criminal prosecution was a direct consequence of the violation of s 15(1) of the Constitution.

Cases referred to

C *A & Ors v Secretary of State for Home Affairs* [2005] UKHL 71; [2005] 3 WLR 1249, [2006] 2 AC 221

A-G v Blumears & Anor 1991 (1) ZLR 118 (S)

Blanchard & Ors v Minister of Justice 1999 (2) ZLR 24 (S)

Bull v A-G 1987 (1) ZLR 36 (S)

Chahal v United Kingdom (1996) 23 EHRR 413

D *Frisbie v Collins* 342 US 519 (1952)

Ireland v United Kingdom (1979-80) 2 EHRR 25

Ker v Illinois 119 YS 436 (1886)

Key v A-G & Anor 1996 (4) SA 187 (CC)

Korematsu v United States 323 US 214 (1944)

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

In re *Mlambo* 1991 (2) ZLR 339 (S)

Mohammed v President of Republic of SA & Ors 2001 (3) SA 893 (CC)

Osborne v Canada (1991) 82 DLR (4th) 321

Paradza v Chirwa & Ors NNO 2005 (2) ZLR 94 (S)

People (A-G) v O'Brien [1965] IR 142

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

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

S v Harington 1988 (2) ZLR 344 (S)

R v Horseferry Road Magistrates [1994] AC 42

R v Loosely [2001] UKHL 53; [2001] 4 All ER 897 (HL)

G *S v Masitere* 1990 (2) ZLR 289 (S)

S v Mthembu 2008 (2) SCAR 407; [2008] 4 All SA 517 (SCA); 2008 SCA 51

R v Mullen [2000] QB 520

S v Nkomo 1989 (3) ZLR 117 (S)

Soering v United Kingdom (1989) 11 EHRR 439

H *United States v Alvaren-Machain* 119 L ed 2nd 441 (1992)

Malaba DCJ

United States v Crews 445 US 463 (1980) A

United States v Toscanino 500 F 2d 267 (1974)

Woods v Comr of Prisons & Anor 2003 (2) ZLR 421 (S)

Legislation considered

Civil Evidence Act [*Chapter 8:01*], s 48(1)

Constitution of Zimbabwe 1980, ss 13(1), 13(2)(e), 13(4), 13(5), 15(1), B 15(2), 15(3)(a), 15(3)(b), 15(4), 15(6), 18(1), 18(1a), 24(2) & 52

Foreign legislation

South Africa

Constitution of South Africa 1994, s 35(5) C

International instruments considered

African Charter on Human and People's Rights 1981, art 5

African Commission Guidelines on the Rights to a Fair Trial, art 15

European Convention for the Protection of Human Rights and Fundamental Freedoms 1953, art 3 D

Guidelines on the Role of Prosecutors 1990, art 16

UN Convention against Torture, arts 1(1), 3 & 15

Universal Declaration of Human Rights 1948, art 5

Case information

J J Gauntlett SC, with him Mrs *B Mtetwa*, for the applicant E

Mrs *F Maxwell*, for the respondent

Judgment

Malaba DCJ:

Introduction This case is about a permanent stay of a criminal prosecution because of F torture and inhuman and degrading treatment to which the applicant was subjected by State security agents prior to being brought to court on a criminal charge. Jestina Mukoko (hereinafter referred to as "the applicant" appeared before a magistrate at Rotten Row magistrates court in Harare on 14 January 2009 in the case of *Manuel Chinanzvavana & Eight Ors No. 8801-5/08.* She was charged with the offence of contravening s 24(a) of the Criminal G Law (Codification and Reform) Act [*Chapter 9:23*] (hereinafter referred to as "the Code"). It was alleged that in the months of June and July 2008, the applicant and the co-accused persons "recruited or attempted to recruit or assisted in the recruitment of Ricardo Hwasheni to undergo military training in Botswana in order to commit any act of insurgency, banditry, sabotage or terrorism in Zimbabwe". H

Malaba DCJ

A The applicant alleged in the magistrates court that she had been abducted from home and subjected to torture and inhuman and degrading treatment by State security agents. She requested the magistrate to refer the question of contravention of her fundamental rights to the Supreme Court ("this court").

Two grounds were used to justify the request. The first was that the institution B of the criminal prosecution was rendered invalid by the pre-charge ill-treatment to which the applicant was subjected. It was argued that the manner in which she was apprehended by State security agents and treated in detention prior to being brought to court on the charge constituted a violation of the fundamental rights not to be arbitrarily deprived of personal liberty guaranteed under s 13(1) and not to be subjected to torture or to inhuman or C degrading treatment protected by s 15(1) of the Constitution. The argument was that the uncontested behaviour by State security agents in kidnapping the applicant from her residence and subjecting her to torture, inhuman and degrading treatment whilst she was in their custody rendered the institution of the criminal prosecution an abuse of legal process. It was also argued D that the conduct of the State security agents offended the sense of what the judiciary expects as decent behaviour from law enforcement agents in the treatment of persons in their custody. The contention was that the court was obliged to refuse to countenance the bringing of the criminal prosecution in the circumstances.

The second ground was that the decisions made by the public prosecutor to E charge the applicant with the criminal offence and to bring the prosecution proceedings were based solely on information or evidence of the crime obtained from her by infliction of torture, inhuman and degrading treatment. It was argued that the institution of the criminal prosecution was rendered invalid by the use of inadmissible information or evidence. The assumption was F that s 15(1) of the Constitution contains a rule that prohibits the admission or use, in legal proceedings by public officials responsible for the initiation and conduct of criminal prosecution and judicial officers, of information or evidence of the crime obtained from an accused person or any third party by infliction of torture, or inhuman or degrading treatment.

G The contention was that reliance on information or evidence of the crime obtained from the applicant or a third party by torture, inhuman and degrading treatment was a breach of the exclusionary rule and unlawful. It also engaged the responsibility of the State in the violation of s 13(1) of the Constitution. The effect of the argument was that the decision to charge the applicant with the criminal offence and the institution of the prosecution of it was H not based on a reasonable suspicion of her having committed the criminal

---

Malaba DCJ

offence. The criminal prosecution was therefore not authorised by s 13(2) A (e) of the Constitution.

The magistrate was of the view that the raising of the question as to the contravention of the applicant's fundamental rights was not frivolous or vexatious. He referred the question to this court for determination. The relief sought by the applicant was an order of permanent stay of the criminal B prosecution.

The order of the court

On 28 September 2009, after reading documents filed of record and hearing argument by counsel for the applicant and for the respondent, this court made the following order: C

> "The court unanimously concludes that the State through its agents violated the applicant's constitutional rights protected under ss 13(1), 15(1) and 18(1) of the Constitution of Zimbabwe to the extent entitling the applicant to a permanent stay of criminal prosecution associated with the above violations.
>
> Accordingly it is ordered that the criminal prosecution against the applicant arising from the facts set out in proceedings in the magistrates court Harare in D the case of the *S v Manuel Chinanzvavana & Eight Ors* case number 8801-5/08 is stayed permanently.
>
> The reasons for this order will be furnished in due course. The question of the costs of the application will be dealt with in the judgment."

The facts

The reasons for the order are now given. The facts on which the determination E of the question as to the contravention of the fundamental rights referred to in the order was based, were conveyed by oral testimony given by the applicant in the magistrates court. They were also conveyed through the affidavit deposed to by her on 12 January 2009, as well as by the arguments addressed to this court by counsel on behalf of the applicant. The truthfulness F of the evidence conveyed by the means and methods referred to was not contested by the respondent.

The evidence is to the following effect. On 3 December 2008 at 5 a.m., the applicant was in bed at the family home in Norton. In the house were her son, nephew and an employee. The son came to the bedroom and said there G were people at the gate to the premises who wanted to talk to her. She woke up in a night dress only. The son came back saying he understood that the people were members of the police. Wearing a night dress only, she walked to the kitchen where she met seven men and one woman in plain clothes. They said they were members of the police but did not produce identity cards to show that they were police officers. Two of the men took positions H

A on each side of the applicant. They each held her by the hand and led her to a Mazda Familia motor vehicle that was parked at the gate. In the car was another man.

The applicant asked her captors for permission to go back into the house and dress properly. She was instead pushed into the rear seat of the car. She was B ordered to lie on the back seat between two men with her face on the lap of one of them. The man on whose lap she was forced to put her face had a gun across his thighs. Across the floor of the car in front of the rear seat there was another firearm. A jersey was used to blindfold her. She could hardly breathe as the jersey was pressing against her nose. When she complained of suffocation the tightness of the jersey was loosened a little bit. She said C she was terrified by what was happening to her.

The car was driven for about 40 minutes before it was stopped at a secret place. During the journey the car radio had been switched on to produce a very loud sound. She was led out of the car into a room where she was told to sit on a chair. A woman gave her a dress which she said she reluctantly D put on in place of the night dress.

After 30 minutes of their arrival at the secret place, the applicant was taken to another room and told to sit on the floor with legs stretched forward. When the blindfold was removed, six men and one woman started interrogating her. She was told to agree to become a State witness in the case under investigation or be killed. She was asked to give the name of an ex-police officer who E visited her work place seeking financial assistance to go outside the country. The questions sought to solicit from her information to the effect that she had used her organisation's funds to enable the ex-police officer to go outside the country and undergo military training in insurgency and terrorism.

The applicant said when she told the interrogators that she could not remember F the name of the ex-police officer who had visited her office in 2008, one of the men took a piece of a hosepipe about one metre long. Another man took a coiled piece of iron. The two men took turns to beat her with these objects several times on the soles of her feet using severe force. She said her assailants were quite zealous in what they were doing. She yelled in pain. When the first stretch of beatings ended, a woman brought her pants G to wear. The interrogation and beatings stopped in the afternoon of the first day at the secret place.

She was blindfolded and taken to a room in which she was kept in solitary confinement. The blindfold was removed each time she was in solitary confinement. In the evening of the first day of her arrival at the secret place H she was blindfolded and taken to a room. She was made to sit on a chair. When

---

Malaba DCJ

the blindfold was removed she saw the same people who had interrogated A her earlier that day. When the interrogation commenced she was ordered to lift both legs and place the feet on the edge of a table. She did as ordered. Two men struck the soles of her feet repeatedly with severe force using the same objects used to beat her in the morning. She said her feet felt very sore. She could hardly walk the following day. B

On 4 December 2008, the applicant was interrogated in the morning and afternoon without being beaten. In the evening she was told that, as she was not co-operative, a decision had been made that she be surrendered to a merciless group of men and women. A blindfold was put around her head. She said she was gripped by fear. She thought she was going to be killed as she was pushed into a car and told to lie face down on the rear seat. C

The motor vehicle was driven for a considerable time before being stopped at a secluded place. There was a sound of shuffling movement of people outside the car. She thought her captors were preparing to execute her. The car suddenly reversed and then drove on. The captors asked about her workplace. They alleged that she worked for Voice of America Studio. She D said she told them she worked for Voice of the People. The car got back to the secret place at 1.00 a.m.

In the morning of 5 December 2008, the applicant was taken to an interrogation room. When the blindfold was removed she saw Rodrick Takawira, who was her workmate, in the same room. One of the interrogators said to her: E

> "You have been lying all along, Rodrick has told us everything".

Rodrick was taken out of the room. One of the men brought gravel and put it on the floor to form mounds. She was told to pull up her dress above knee-level and kneel on the gravel. The interrogation began and continued with her in that position. She said she was injured on the knees and felt severe pain. Each time she tried to move the knees to relieve the pain the F interrogators ordered her to move back into position. She remained in that position for one hour.

The applicant said the interrogators wanted her to say that she had assisted Ricardo Hwasheni to go to Botswana for military training so as to carry out insurgent and terrorist activities in the country. She said she told the G interrogators that she had a brief interaction with Ricardo when he visited their offices asking for assistance to leave the country. She said she told the interrogators that she referred Ricardo to Fidelis Mudimu who worked in the counselling services unit of the organisation.

On the fourth day she was blindfolded and taken to a room where she was made to sit on a chair. When the blindfold was removed she saw nine men H

Malaba DCJ

A and one woman sitting at a conference table. One of the men had interrogated her before. They said they wanted to know more about Zimbabwe Peace Project and documents it had in its possession on human rights violations in the country. They asked about her interaction with Ricardo Hwasheni. She said she told the interrogators that she had told Ricardo that her organisation did not give money to people who wanted to go out of the country. They B asked her why she did not ask him which country he wanted to go to. When she said that was not her business, the interrogation became very aggressive.

The applicant said the men became visibly angry. One of them threatened to make her suffer. He said they were going to make her defecate. Shaking with fear and not sure whether she would come out of the room unhurt, she C was given a paper and told to write a statement. The interrogators told her to write about the trip she had made to Botswana. She did as told. The next day she was told that there were some things the interrogators wanted deleted from the statement. She removed from the statement what the interrogators did not want and added what they said was to be added to the statement.

D She said she wrote the statement in the manner her interrogators wanted before signing it. According to her, it was not true that she had referred Ricardo Hwasheni to Fidelis Mudimu of the counselling unit. She said she did not make the statement freely and voluntarily. The statement contained what she was told to write by her captors because she believed that would make them release her.

E On 14 December 2008 the applicant was taken to a conference room where there was a cameraman. The men and women who had interrogated her were present. The cameraman was introduced to her. She was told that she was to be video recorded whilst making a statement about how she met Ricardo Hwasheni. It was said a decision was to be made on the basis of the statement F whether to prosecute her or turn her into a State witness. After saying what the interrogators wanted her to say, she was blindfolded and taken to the room where she was kept in solitary confinement. She was held in solitary confinement incommunicado until 22 December 2008.

On 22 December 2008 the applicant was blindfolded and taken by car in the G company of Rodrick Takawira to a place where they were turned over to a police officer called Magwenzi. The police officer told them not to remove the blindfolds before those who brought them left. She said that when the blindfold was removed she recognised the place where they were left by their captors as Braeside police station. She was detained there. The police later obtained from a magistrate a warrant authorising a search to be carried H out at her house in Norton. She was taken to the house. For the first time she

---

saw members of her family. Whilst in the custody of her captors she had not A been allowed to communicate with members of her family or her lawyer.

The search of the house did not yield anything relevant to the allegation that she recruited Ricardo Hwasheni to undergo military training for purposes of carrying out insurgency and terrorism in the country. On 23 December 2008 she was charged with the offence of contravening s 24(a) of the Code. B

The facts on which the charge was based were extracted from the applicant by interrogation at different times during the period of detention extending from 3 to 14 December 2008. On the basis of the information on which the charge was brought against the applicant, the public prosecutor instituted the criminal proceedings. The applicant was then brought before the magistrate C for remand pending trial. The public prosecutor did not adduce evidence challenging what the applicant said happened to her from the time she was kidnapped to the time she appeared before the magistrate.

Meaning of s 15(1) of the Constitution

The first point taken on behalf of the applicant was that the treatment to which D she was subjected by State security agents prior to the charge being laid on her constituted a contravention of s 15(1) of the Constitution. Section 15(1) of the Constitution provides that:

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

In this case the only relevant concepts are "torture"; "inhuman treatment" and "degrading treatment". They make up the three key elements of the protection of a person's dignity and physical integrity from the prohibited treatment at the hands of public officials.

Section 15(1) of the Constitution enshrines one of the most fundamental values F in a democratic society: *Chahal v United Kingdom* [1996] 23 EHRR 413 para 79. It is an absolute prohibition. It is because of the importance of the values it protects that the rules by which the prohibition imposes the obligations on the State are peremptory in effect. The most conspicuous consequence of this quality is that the principle at issue cannot be derogated from by the State even in a State of public emergency. See s 25 of the Constitution. G

The provision is subject only to the exercise by Parliament, when properly constituted, of the power under s 52 of the Constitution to amend, add to or repeal any provision of the Constitution upon strict compliance with the procedure prescribed for the purpose: *Mike Campbell (Pvt) Ltd & Anor v*

Minister of National Security Responsible for Land, Land Reform & Resettlement & Anor 2008 (1) ZLR 17 (S). H

Malaba DCJ

A It was in the exercise of the power conferred on it by s 52 of the Constitution that Parliament, by means of Act No. 30 of 1990 (Amendment No. 11) and Act No. 9 of 1993 (Amendment No. 13), provided that six specific instances of treatment of individuals by the State shall not be held to be in contravention of s 15(1) of the Constitution. These are: treatment to prevent the escape from custody of a person who has been lawfully detained (s 15(2)); moderate B corporal punishment inflicted upon a person under the age of 18 years by his parent or guardian or by someone in *loco parentis* (s 15(3)(a)); moderate corporal punishment inflicted on a male person under the age of 18 years in execution of the judgment or order of a court (s 15(3)(b)); execution of a sentence of death in the manner prescribed in s 315(2) of the Criminal C Procedure & Evidence Act [*Chapter 9:07*](s 15(4)); delay in the execution of a sentence of death (s 15(5)), and delay in the execution of any sentence imposed by a competent court (s 15(6)).

The qualities of absoluteness, in the sense of being an unconditional prohibition and non-derogability, articulate the notion that the prohibition is one of the most fundamental standards of a democratic society. They are also designed D to ensure that the prohibition produces a deterrent effect, in that it signals in advance to all public officials and private individuals that it is an absolute value from which nobody must derogate. The fact that torture, inhuman and degrading treatment is prohibited by a peremptory provision serves to render null and void any act authorising such conduct.

E The prohibition protects the dignity and physical integrity of every person regardless of his or her conduct. No exceptional circumstance, such as the seriousness of the crime the person is suspected of having committed, or the danger he or she is believed to pose to national security, can justify infliction of torture, or inhuman or degrading treatment. There cannot be a value in our society over which there is so clear a consensus as the F prohibition of torture, inhuman or degrading treatment of a person in the custody of a public official. That such a treatment should never form part of the techniques of investigation of crimes employed by law enforcement agents is a restatement of the principle that the law, which it is their duty to enforce, requires that only fair and humane treatment ought to be applied to a person under criminal investigation.

G There is a distinction intended to be made under s 15(1) of the Constitution between torture on the one hand and inhuman or degrading treatment on the other. The distinction between the notion of torture and the other two concepts lies principally in the intensity of physical or mental pain and suffering inflicted, in respect of torture, on the victim intentionally and for H a specific purpose. Torture is an aggravated and deliberate form of inhuman

Malaba DCJ

or degrading treatment. What constitutes torture, or inhuman or degrading A treatment depends on the circumstances of each case.

The definition of torture, often adopted by courts as a minimum standard by which a determination of the question whether torture has been committed or not, is that provided under Article 1(1) of the United Nations Convention Against Torture and Other Cruel or Inhuman or Degrading Treatment or B Punishment 1987 (hereinafter referred to as "the UN Convention on Torture"). Article 1(1) of the UN Convention on Torture provides that:

> "... torture means any act by which severe pain or suffering whether physical or mental is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, C or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not indicate pain or suffering arising only from, inherent in or incidental to lawful sanction."

The definition of torture provided in Article (1)(1) is consistent with the D interpretation by this court in its case law of the concept as used in s 15(1) of the Constitution. It is important to note that, in

terms of the definition, the torture must be inflicted for the purpose of obtaining information or a confession. This is the mischief at which the UN Convention on Torture is aimed.

Inhuman treatment is treatment which, when applied or inflicted on a person E intentionally or with premeditation, causes, if not actual bodily injury, at least intense physical or mental suffering to the person subjected thereto and also leads to acute psychiatric disturbance during interrogation: *Ireland v United Kingdom* (1979-80) 2 EHRR 25 para 167.

Degrading treatment is treatment which, when applied to or inflicted on a F person humiliates or debases him or her, showing a lack of respect for or diminishing his or her human dignity, or arouses feelings G of fear, anguish or inferiority capable of breaking the person's moral and physical resistance. The relevant notions in the definition of degrading treatment are those of humiliation and debasement. The suffering and humiliation involved must G go beyond the inevitable element of suffering or humiliation connected with a given form of legitimate or fair treatment: *Woods v Commissioner of Prisons & Anor* 2003 (2) ZLR 421 (S) at 432C-B.

It follows from the definition of the relevant concepts that not every treatment which causes some discomfort to the person in detention violates s 15(1) of the Constitution. Otherwise no one could be arrested, detained and interrogated H

Malaba DCJ

A in the investigation of crime. The treatment must reach the minimum level of severity before it constitutes a breach of the absolute prohibition under the section. The assessment of the minimum level of severity is relative. The question whether or not the requisite threshold of breach of the fundamental right has been reached in a particular case is determined by the consideration of such factors as the nature and context of the treatment;the manner and B method of its execution, as well as the duration of the treatment; its physical and mental effects and, in some cases, the age, sex and state of health of the victim: *Ireland v United Kingdom supra* para 162; *S v Ncube & Ors* 1987 (2) ZLR 246 (S) at 271A-G; *Soering v United Kingdom* (1989) 11 EHRR 439 para 100; *Woods v Commissioner of Prisons & Anor supra* at 431G.

C **Application of s 15(1)**

Applying the principles of the law on what constitutes a contravention of s 15(1) of the Constitution to the facts, the court finds a violation by the State, through its agents, of the applicant's fundamental right not to be subjected to torture, or to inhuman or degrading treatment. The reasons for D the decision are these.

The repeated beatings on the soles of the applicant's feet with a piece of a hosepipe and a metal object using severe force on each of the two occasions she was under interrogation, constitute torture. Repeated beating of the soles of feet with a blunt instrument is a serious form of torture called "falanga". E See K Amris "*Long Term Consequences of Falanga Torture*", *Torture* Vol 19 No. 1 IRCT (2009).

Forcing the applicant to kneel for a long time on mounds of gravel whilst being interrogated falls within the meaning of torture. The treatment to which she was subjected was premeditated. The severe pain and suffering she was forced to endure was intentionally inflicted. It was in aid of the F interrogation the purpose of which was the extraction from her of information on the assistance her organisation was suspected of having given to Ricardo Hwasheni to enable him to undergo military training outside the country.

The prolonged periods of solitary confinement incommunicado on the occasions she was not being interrogated constitutes inhuman and degrading G treatment: *S v Masitere* 1990 (2) ZLR 289 (S) at 290F. It is important to note, however, that solitary confinement is not to be deemed to be contrary to the prohibition under s 15(1) of the Constitution. It must be in conjunction with other conditions, for example, prolongation and imposition on a person who has not yet been convicted of an offence. The severity of the specific measure, its duration, the objectives pursued by it, the cumulative effect of H any further conditions imposed, as well as the effects on the individual's

---

Malaba DCJ

physical and mental well-being, are all factors which have to be taken into A account in the assessment of the question whether a specific instance of solitary confinement is in violation of s 15(1) of the Constitution.

It was inhuman treatment to keep the applicant blindfolded each time she was out of solitary confinement and not being interrogated. The treatment was intentionally applied and caused the applicant mental suffering. She was B also subjected to inhuman and degrading treatment when she was blindfolded and driven at night to an undisclosed destination under threat of unspecified action. The treatment was intended to induce in her fear and anguish. She said she feared for her life when the motor vehicle was stopped in the middle of the night at the place she could not see. She heard the sound of people shuffling about as if preparing to execute her. The feelings of fear and anguish C generated in her by the treatment had the intended effect of debasing her.

The purpose of the prohibition of acts violative of s 15(1) of the Constitution is to protect human dignity and physical integrity. Any recourse to physical force against a person in the custody of a public official which is not rendered strictly necessary by his or her conduct diminishes his or her dignity and D implicates a violation of the prohibition.

First ground

Effect of pre-charge abduction and violation of section 15(1) on criminal prosecution

The grounds on which the relief sought were premised on the court making E a finding that the applicant was kidnapped from home and subjected to ill-treatment in the form of torture, inhuman and degrading treatment by State security agents prior to being charged with the criminal offence by the public prosecutor.

The general effect of the contention advanced on the first ground was that F this court should not countenance a prosecution of an accused person for a criminal offence in circumstances in which he or she was kidnapped and subjected to torture, or inhuman or degrading treatment by public officials exercising executive authority prior to the charge being brought against him or her. The argument was that the institution of criminal proceedings in the G circumstances would be an abuse of court process.

The question for determination is whether ill-treatment in breach of s 15(1) of the Constitution prior to the charge being brought against the victim taints the subsequent decisions to lay the charge and institute criminal prosecution against him or her, regardless of the question whether the requirements of s 13(2)(e) of the Constitution have been complied with or not. H

Malaba DCJ

A The decision of this court on this point is that ill-treatment *per se* has no effect on the validity of the decisions to charge the victim with a criminal offence and institute prosecution proceedings against him or her. It is the use of the fruits of ill-treatment which may affect the validity of the decisions depending on compliance or non-compliance by the public prosecutor with B the requirements of permissible deprivation of personal liberty under s 13(2)(e) of the Constitution. The reasons for the decision are these.

The requirements which a public prosecutor has to bear in mind and comply with to make a valid decision to charge an accused person with a criminal offence and institute a criminal prosecution on the charge are prescribed by s 13(1) of the Constitution. The section recognises that every person C has a fundamental right to personal liberty. It then makes provision for the protection of the right against interference by the State by declaring that no person shall be deprived of personal liberty. Recognising the principle that the right to personal liberty is not an absolute right, the section goes on to specify cases listed as exceptions to the prohibition, in which deprivation D of personal liberty is permissible upon strict compliance with the prescribed requirements.

The requirements of permissible deprivation of personal liberty in the case of a person suspected of crime are in s 13(2) (e) of the Constitution. They constitute the standard by which the validity of the decision by the public E prosecutor to charge the accused person with the criminal offence and institute criminal proceedings is to be measured. The effect of prohibition of arbitrary deprivation of personal liberty is the promotion of lawful arrest or detention and prosecution of persons suspected

of having committed crimes. It is the deprivation of personal liberty in connection with the criminal justice process F that is relevant to the determination of the issues raised.

Once a measure such as a criminal prosecution is based on a decision to charge the accused person with the criminal offence which complies with the requirements of permissible deprivation of personal liberty, it is a lawful measure. It cannot be a subject of an order of permanent stay on the ground that the accused person was kidnapped and subjected to torture, or inhuman G or degrading treatment before the charge was brought against him or her. The ill-treatment to which the accused person would have been subjected would have taken place when he or she was in a state of lawful deprivation of personal liberty. It is usually inflicted after the person has been deprived of personal liberty by arrest and detention.

H Section 13(1) of the Constitution provides that:

2012 (1) ZLR p340

Malaba DCJ

"(1) No person shall be deprived of his personal liberty save as may be authorized A by law in any of the cases specified in subsection (2).

(2) The cases referred to in subsection (1) are where a person is deprived of his personal liberty as may be authorized by law –

(a) ...

(b) ... B

(c) ...

(d) ...

(e) upon reasonable suspicion of his having committed, or being about to commit, a criminal offence."

Section 13(4)(b) provides that: C

"(4) Any person who is arrested or detained –

(a) ...

(b) upon reasonable suspicion of having committed or being about to commit a criminal offence;

and who is not released shall be brought without undue delay before a court; and if any person arrested or detained upon reasonable suspicion of his having D committed or being about to commit a criminal offence is not tried within a reasonable time, then, without prejudice to any further proceedings that may be brought against him, he shall be released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to the trial." E

Failure to comply with the requirements for a valid decision to charge the accused person with a criminal offence and the institution of criminal prosecution proceedings against him or her implicates a violation of the principle of legality or rule of law enshrined by s 18(1) of the Constitution. The principle of legality requires that every decision or act of a public official which affects the rights or interests of an individual must be in accordance with F an existing law otherwise it violates the rights of the individual concerned. The requirements for permissible deprivation of personal liberty are part of the protection of that right. Compliance with the requirements is consistent with the principle of the rule of law. In that way the public prosecutor and the court are prevented from acting arbitrarily. G

Section 18(1) provides that:

"(1) Subject to the provisions of this Constitution every person is entitled to the protection of the law.

(1a) Every public officer has a duty towards every person in Zimbabwe to exercise his or her functions as a public officer in accordance with the law and to observe and uphold the rule of law." H

2012 (1) ZLR p341

Malaba DCJ

A The provisions of ss 13(1) and 15(1) of the Constitution protect two separate but related fundamental human rights. One right is not constitutive of the other. They are autonomous and under protective requirements peculiar to their nature and ambit. That means that the rights may be violated independently of each other. The infliction of torture or inhuman or degrading treatment B on an accused person affects his dignity and physical integrity. It does not in itself affect his or her criminal liability. The other right protects the individual from arbitrary arrest, detention and

prosecution by agents of the State. The same person may be a victim of ill-treatment by law enforcement agents, whilst at the same time he or she is a villain having committed a criminal offence against another person. The applicability of a particular constitutional C provision should turn on the reasons it was included in the Constitution and the evils it was designed to eliminate.

The existence of reasonable suspicion of the accused person having committed the criminal offence with which he or she is charged and prosecuted is critical to the determination of the validity of the decisions to charge him or her with the criminal offence and institute criminal prosecution on the charge. D A charge is an official act by which notification is given by the competent authority of an allegation that the accused person has committed a criminal offence. In *Attorney-General v Blumears & Anor* 1991 (1) ZLR 118 (S) at 122A-B Gubbay CJ said:

> "The standard for the deprivation of personal liberty under s 13(2)(e) of the E Constitution are facts and circumstances sufficient to warrant a prudent man in suspecting that the accused person had committed, or was about to commit, a criminal offence. This standard represents a necessary accommodation between the individual's fundamental right to the protection of his personal liberty and the State's duty to control crime."

It is the existence or absence of reasonable suspicion of the accused person F having committed the criminal offence he or she is charged with which provides an answer to the question whether pre-charge ill-treatment of an accused person had anything to do with the institution of the criminal prosecution. The purpose of instituting criminal proceedings against an accused person on reasonable suspicion of having committed the criminal G offence with which he or she is charged is to prove the circumstance of his or her guilt. It is also to give effect to the law which proscribes the conduct he or she is charged with as a crime. The decision to charge the accused person with the criminal offence and prosecute the crime would be based on the evidence of acts he or she would be suspected of having committed before he or she was subjected to ill-treatment by law enforcement agents. H The prosecution would be directly connected with the crime.

Malaba DCJ

If each time an accused person was subjected to torture, or inhuman or A degrading treatment prior to being charged with a criminal offence, the court was obliged to order a permanent stay of the criminal prosecution, the requirements of permissible deprivation of personal liberty which form the standard for the validity of the decision by the public prosecutor to institute the criminal proceedings against the accused person would be reduced to B mere words. It would implicate the principle of legality which requires the court to uphold conduct which is in accordance with law.

The availability of the procedure under s 13(2)(e) of the Constitution means that where the criminal prosecution meets all the requirements of permissible deprivation of the accused person of liberty, it cannot be impugned, notwithstanding the fact that the accused person was kidnapped C and subjected to torture or inhuman or degrading treatment before the charge was brought against him or her. Section 24(4) of the Constitution provides a remedy to the individual whose fundamental right has been violated. No right to personal liberty would have been violated in relation to the accused person by the institution of criminal proceedings in the circumstances. An D illegal arrest or detention, without more, has never been viewed as a bar to subsequent prosecution for an offence the accused person is reasonably suspected on untainted evidence of having committed.

That does not mean that the accused person has no remedy for the pre-charge contravention of fundamental rights. Kidnapping a person is a criminal offence. Compensation under s 13(5) of the Constitution is payable to a person who E is unlawfully arrested or detained. It is also an appropriate remedy for the redress of a contravention of a fundamental right available to the court in the exercise of the wide discretionary power under s 24(4) of the Constitution.

A finding that the decision by a public prosecutor to charge an accused person with a criminal offence was based on reasonable suspicion of his F or her having committed the offence effectively means that the criminal prosecution is lawful. It means that there is evidence on which proof of the commission of the acts defined as the crime with which the accused person is charged would be based at the trial. It also means that the wrongful conduct of ill-treating the accused person prior to being charged with the criminal offence had nothing to do with the decisions to institute and conduct the G criminal prosecution: *S v Harington* 1988 (2) ZLR 344 (S); *Blanchard & Ors v Minister of Justice* 1999 (2) ZLR 24 (S); *S v Mthembu* 2008 (2) SACR 407 (SCA); [2008] 4 All SA 517 (SCA); 2008 SCA 51 para 35.

As a matter of law and fact it is clear that where reasonable suspicion of the accused person having committed a criminal offence existed at the time H

2012 (1) ZLR p343

Malaba DCJ

A the public prosecutor charged him or her with the offence in question and commenced criminal prosecution proceedings, the prosecution must be taken to have been properly instituted, regardless of the fact that the accused person was subjected to torture, or inhuman or degrading treatment prior to the charge being brought against him or her. The charge and prosecution would be a product of the consideration by the public prosecutor of evidence B on the conduct of alleged wrong doing by the accused person.

There is nothing in the Constitution which requires the court to permit an accused person, reasonably suspected of a criminal offence and properly charged, to escape prosecution because he or she was subjected to torture or inhuman or degrading treatment prior to the charge being brought against him C or her. The Constitution does not guarantee protection against prosecution to an accused person reasonably suspected of having committed a criminal offence on account of having been subjected to torture, or inhuman or degrading treatment before the charge was laid on him or her. Giving effect to the proposition advanced on behalf of the applicant would violate the D constitutional principle of proportionality. The principle requires that a fair balance be struck between the interests of the individual in the protection of his or her fundamental rights and freedoms and the interests of the public in having those reasonably suspected of having committed criminal offences tried and, if convicted, punished according to law.

Acting in the manner suggested by the applicant would mean that the purpose E of criminal law is to protect the interests of a person suspected of crime at the expense of the victim and society. That would be tantamount to providing a guarantee of immunity from prosecution to a person reasonably suspected of having committed a criminal offence in every case in which proof is produced that he or she was kidnapped and subjected to torture or inhuman F or degrading treatment by agents of the State prior to being charged with a criminal offence. The victims of crime would be denied the right to the protection of the law. Justice demands, however, that each man and woman be given what is due by his or her conduct.

It would also mean that one person who fell into the hands of law enforcement G agents who decided to break the law and maltreat him or her would escape prosecution whilst another person who fell into the hands of law abiding law enforcement agents would not. That would be despite the fact that they were both reasonably suspected of having committed the criminal offences with which they were charged. Each would have known that his or her act was criminal. He or she would have committed the act before being placed H in the custody of law enforcement agents.

2012 (1) ZLR p344

Malaba DCJ

Where there is no direct connection between the fruits of the torture or inhuman A or degrading treatment to which the accused was subjected and the institution of the criminal prosecution, justification for an order of permanent stay of the criminal proceedings cannot be found in the pre-charge ill-treatment of the accused person. If the order were made it would be on the ground that there was no reasonable suspicion of the accused person having committed B the offence with which he or she was charged.

In urging the first ground on this court, Mr *Gauntlett* relied on the decision of the South African Appellate Division in *S v Ebrahim* 1991 (2) SA 553 (A). It is necessary to briefly look at the circumstances in which the decision was made to see whether the principles relied upon in that case are applicable to the facts of this case. C

The appellant, a South African citizen by birth, fled to Swaziland whilst under a restriction order which confined him to Pinetown in Natal. In December 1986 he was forcibly abducted from his home in Mbabane by persons acting as agents of the South African State. He was taken to South Africa and handed over to the police. The police detained him in terms of security legislation. He was subsequently charged with treason, convicted and sentenced to 20 D years' imprisonment with labour.

Prior to pleading to the charge, the appellant launched an application seeking an order that the court lacked jurisdiction to try him. The contention was that his abduction was in breach of international law and thus unlawful. The application was dismissed. An appeal against the ruling succeeded. E

Steyn JA carried out a review of Roman and Roman-Dutch authorities on the question whether the court lacked jurisdiction. The learned Judge of Appeal came to the conclusion that under both systems the removal of a person from an area of jurisdiction in which he had been illegally arrested to another area was considered to be tantamount to abduction. The court held that there was F a rule at common law which limited a court's jurisdiction in criminal cases. That rule was to the effect that even if an offence was committed within the area of jurisdiction of the court it does not have jurisdiction to try the offender if he was abducted from another area of jurisdiction by agents of the State.

The head note to the judgment shows that the court continued at 582C-E as follows: G

> "Several fundamental legal principles are implicit in these rules (of the Roman-Dutch Law) namely, the preservation and promotion of human rights, good international relations and sound administration of justice. The individual must be protected against unlawful detention and against abduction, the boundaries of jurisdiction must not be violated, State sovereignty must be respected, the legal process must be fair towards those who are affected by it and the misuse of the H

Malaba DCJ

> A legal process must be avoided in order to protect and promote the dignity and integrity of the administration of justice. The State is also bound thereby. When the State itself is a party to a case, as for example in criminal cases, it must as it were come to court with 'clean hands'. When the State is itself involved in an abduction over territorial boundaries, as in the present case, its hands are not clean. Rules such as those mentioned are evidence of sound legal development B of high quality."

The court in *Ebrahim's* case approved of the decision of the Federal Court of Appeal for the Second Circuit in *United States v Toscanino* 500 F 2d 267 (1974). The appellant, an Italian national, protested that agents of the United States Government had abducted him from Uruguay and taken him to Brazil where he was held in custody and tortured. From there he was conveyed C by aeroplane to the United States. He was arrested and brought to trial on a charge of conspiring to import narcotics into the country.

The trial court had followed the prevailing judicial authorities on the interpretation of the principle of due process and its application to such cases. Judicial policy at the time was represented by the decisions of the D United States Supreme Court in *Ker v Illinois* 119 US 436 (1886) and *Frisbie v Collins* 342 US 519 (1952). These decisions held that where an accused person was brought to court on a proper charge he or she was in the lawful custody of the court and as such the court had no right to inquire into the means or method used to secure his or her presence before the court.

E In holding that the concept of due process under the Fourth Amendment of the United States Constitution had been broadly interpreted and as such justified an inquiry by a court into the circumstances in which an accused person had been brought before the court, the Federal Court of Appeal departed from the line of binding decisions of the Supreme Court of the United States. In F *United States v Alvaren-Machain* 119 L ed 2nd 441 (1992) that court re-affirmed its previous decisions by a majority, thereby effectively overruling the decision in *Toscanino's* case.

The reasoning in *Ebrahim's* case was endorsed by this court in *S v Beahan* 1991 (2) ZLR 98 (S) as having "the quality of being in accord with justice, fairness and good sense". The principles have been applied in subsequent G similar type situations in South Africa; for example, in *Mohammed v President of the Republic of South Africa & Ors* 2001 (3) SA 893 (CC).

The same principles have been adopted and applied by the United Kingdom courts in similar cases of accused persons who had been forcibly abducted from territories of sovereign states by security agents of the receiving state, H in some cases with the connivance of the prosecution agency: see *R v*

Malaba DCJ

Horseferry Road Magistrates [1994] 1 AC 42; *R v Mullen* [2000] QB 520; A and *R v Loosely* [2001] UKHL 53; [2001] 4 All ER 897 (HL).

There is no doubt that the contention urged on this court was animated by the principles enunciated in *Ebrahim's* case. What is clear from the cases is that the principles in question provided a basis for an answer to a defence to the charge placed on the accused person to the effect that the court lacked B jurisdiction to try him. The reason given in each of the cases was that the appearance of the accused person before the court was brought about by his forcible removal by agents of the receiving state from the territory of another sovereign state in breach of international law and the sovereignty of that state. The accused person would at the time of the abduction have been under the protection of the laws of the state in which he lived. He would C have been outside the boundaries of the territorial jurisdiction of the court.

The cases merely recognised a long standing principle of international law, that abduction by one state of persons located within the territory of another violates the territorial sovereignty of the second state. The breach of international law in the circumstances is usually redressed by the return D of the person abducted.

The principles enunciated in *Ebrahim's* case, and those that followed it, were applied in the determination of the question of lack of jurisdiction, because the courts accepted that the principles formed part of the meaning of the applicable international norms. They do not provide a basis for challenging the validity of decisions by a public prosecutor to charge a person who is E resident in the area of jurisdiction of the court with a criminal offence which it has jurisdiction to hear.

The principles are not an answer to the question whether a court, whose duty is to protect fundamental human rights, can decline jurisdiction in a case in which the accused person complains that his or her fundamental rights have F been contravened by the institution of criminal prosecution proceedings after he had been kidnapped and subjected to torture, or inhuman or degrading treatment by agents of the state within the area of jurisdiction of the court. They are not applicable to facts of a case, the consideration of which has to take into account the existence or absence of reasonable suspicion by the public prosecutor of the accused person having committed the criminal G offence with which he or she has been charged.

The principles enunciated in *Ebrahim's* case cannot be transposed and applied to facts of cases which do not raise for determination questions of breach of boundaries of criminal law jurisdiction. Different principles apply in the determination of the issues raised by the facts of this case. H

Malaba DCJ

A The cocktail of the principles of the relevant international law would have to have been violated by the receiving state before a criminal prosecution which followed could be said to be an abuse of legal process and a breach of the principles of protection and promotion of the dignity and integrity of the administration of justice. The cocktail comprises the principles of the preservation and promotion of the human right to personal liberty; the B protection of individuals from unlawful detention and abduction; the protection of boundaries of territorial jurisdiction and the protection of foreign state sovereignty. Needless to say, the last two principles would not form part of the law applicable to the facts of this case.

The analogy was inappropriate. The forcible abduction of an accused person C from a foreign territory by agents of the receiving State has the effect of barring jurisdiction by the courts because it involves breach of an affront to the sovereignty of the state of refuge. The act of arresting a person is an act of sovereignty. In such a case, that power would have been exercised by one state in the territory of another state. Deriving from the cases of foreign abduction the proposition that in every case in which the accused person D was subjected to torture, or inhuman, or degrading treatment before being charged with the crime this court is obliged to order a permanent stay of the criminal prosecution was an ingenious argument which was unhelpful in the determination of the issues. To discharge the constitutional mandate of enforcing or securing the enforcement of fundamental human rights and E freedoms enshrined in the constitution, this court must exercise the power expressly conferred on it. Its duty is to determine the question whether the conduct of the State forming the subject of complaint contravenes the fundamental right or freedom sought to be enforced. It must come up with an affirmative or negative answer to that question after consideration of all the circumstances of the case.

F It is unthinkable, in the circumstances, that this court can restrict the exercise of the power and not inquire into the method by which the presence of an accused person before it was secured. It has to inquire if the allegation is that the conduct of the public officers involved in bringing the

accused person violated his or her fundamental rights. The only occasion in which this court G can decline to exercise its powers under s 24(4) of the Constitution is if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person under other provisions of the Constitution or under any other law. What it cannot do is to decline to exercise the power to determine the question whether or not the fundamental right has been or is being or is likely to be contravened by the conduct of the State forming H the subject of complaint properly brought before it.

2012 (1) ZLR p348

Malaba DCJ

The argument that a criminal prosecution following a pre-charge illegal A arrest, detention and infliction of torture or inhuman or degrading treatment constituted abuse of process requiring a stay of proceedings would have to contend with the requirements of s 13(2)(e) of the Constitution and show that the fundamental right or freedom guaranteed by the Constitution has been violated by the institution of the criminal prosecution in those circumstances. B It is not necessary to consider the argument in this case.

The second ground

Effect of pre-charge abduction and violation of s 15(1) on criminal prosecution

The second ground on which the validity of the decision to institute the C criminal prosecution was challenged was that the prosecution was unlawful because it was based on information or evidence obtained from the applicant by infliction of torture, inhuman and degrading treatment.

In the raising of the issue of the wrongful conduct of public officers antecedent to the charge being brought against the accused person and its connection with the prosecution proceedings instituted was the suggestion D that the responsibility of the State was engaged in occasioning a violation of the accused person's fundamental right to personal liberty. In such a case, there had to be produced clear evidence of a direct connection between the antecedent breach of the fundamental right of the accused not to be subjected to torture, or inhuman or degrading treatment and the decision to charge and E prosecute him or her. The institution of the criminal prosecution had to be shown to have been a direct consequence of the precedent wrongful conduct of the State. In other words, it had to be a product of the outrageous conduct of pre-charge ill-treatment of the accused person by law enforcement agents.

According to the applicant, the use by the public prosecutor of information obtained from her by infliction of the treatment prohibited by s 15(1) of the F Constitution is evidence of the existence of the requisite direct connection between antecedent violation of the fundamental right and the criminal prosecution. The criminal prosecution was an outgrowth or fruit of the torture, inhuman and degrading treatment to which she was subjected.

The contention advanced on behalf of the applicant on the second ground was G premised upon an interpretation of the provisions of s 15(1) of the Constitution, which recognises that the prohibition contains a rule, by which it imposes an obligation on public officers charged with the responsibilities of initiating and conducting criminal prosecutions and judicial officers who preside over them, not to admit or use information or evidence obtained from an accused person or any third party by torture, or inhuman or degrading treatment. H

2012 (1) ZLR p349

Malaba DCJ

A Three issues arise in this context for determination. They are: (i) whether or not s 15(1) of the Constitution contains a rule prohibiting the admission or use, in any legal proceedings, of information or evidence obtained from an accused person or defendant or any third party by infliction of torture or inhuman or degrading treatment; (ii) on whom does the burden of proving the B essential elements of the rule lie and what is the standard for the discharge of the onus? (iii) what effect does a finding that the onus has been discharged have on the question of the contravention of the fundamental rights of the accused person protected under ss 13(1), 15(1) and 18(1) of the Constitution?

Section 15(1) of the Constitution and evidence obtained by torture

C This court takes the first point for determination. Its decision on the point is that s 15(1) of the Constitution contains the rule by which it imposes on the State, through its agents, the obligation not to admit or use in any legal proceedings, information or evidence obtained from an accused person or defendant or any third party by torture, or inhuman or degrading treatment. The reasons for the decision are these.

D Article 15 of the UN Convention on Torture requires State parties to ensure "that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings except against a person accused of torture as evidence that the statement was made". Article 15 of the African Commission Guidelines on the Rights to a Fair E Trial and Legal Assistance in Africa and Article 16 of the Guidelines on the Role of Prosecutors adopted by the Eighth United Nations Congress on the Prevention of Crime and Treatment of Offenders in Havana, Cuba on 27 August to 7 September 1990 are important. They recognise the existence of an obligation on the public prosecutors not to use or rely on information F or evidence obtained from an accused person or any third party by torture, or inhuman or degrading treatment to make decisions in the exercise of prosecutorial powers.

The relevance of the reference to the provisions of Article 15 of the UN Convention on Torture is not in the substance of the obligation imposed on State parties. It is on the principle of interpretation involved. Of importance G to the determination of the question before the court is the recognition and acceptance of the principle that the rules in Article 15 of the UN Convention on Torture and the UN Guidelines on the Role of Prosecutors are based on the interpretation of Article 5 of the Universal Declaration of Human Rights (1948). Article 5 prohibits, in absolute and non-derogable terms, the infliction H of torture, inhuman or degrading treatment or punishment on any person.

Malaba DCJ

The African Commission Guidelines on Legal Assistance are based on the A interpretation of the relevant provisions of the African Charter on Human and People's Rights (1981). Article 5 of the African Charter prohibits torture, inhuman and degrading treatment or punishment of any person. The principle of interpretation which emerges is that the fact that a stand-alone rule has been used to denote the meaning of a primary provision does not prevent a B court interpreting the meaning of a primary provision in similar language as covering the matters explicitly dealt with in the rule if the meaning of the primary provision has not been explained by a similar rule.

The principle under consideration was applied by the European Court of Human Rights in *Soering v United Kingdom* (1989) 11 EHRR 439. That court held, on the interpretation of Article 3 of the European Convention C for the Protection of Human Rights and Fundamental Freedoms (1953) ("the ECHR"), that the prohibition by the Article was the basis for the rule against admission or use of information or evidence established to have been obtained or in respect to which there were substantial grounds for believing that it was obtained from the defendant or a third party by infliction of torture, D inhuman or degrading treatment.

Considering the fact that Article 3 of the ECHR did not spell out in specific terms, as did Article 3 of the UN Convention on Torture, that no State "shall extradite a person where there are substantial grounds for believing that he would be in danger of being subjected to torture", the European Court E of Human Rights at para 88 of the judgment in *Soering's* case *supra* said:

> "The fact that a specialised treaty should spell out in detail a specific obligation attaching to the prohibition of torture does not mean that an essentially similar obligation is not already inherent in the general terms of Article 3 of the European Convention."

The obligation on the State, through its agents, not to admit or use in criminal F proceedings, information or evidence obtained from an accused person or any third party by infliction of torture, inhuman or degrading treatment is not explicitly set out by a separate provision in the Constitution. It would be contrary to the object and purpose of the prohibition under s 15(1) of the Constitution to allow admission or use of such information or evidence in G any legal proceedings.

A proper interpretation of s 15(1) of the Constitution, which takes into account the purpose and broadness of the language underlying the importance of the fundamental value protected, compels the court to conclude that the obligation on the State not to admit or use information or evidence obtained from an accused person or any third party by infliction of torture, or inhuman H

Malaba DCJ

A or degrading treatment in any legal proceedings attaches to the prohibition of such treatment by s 15(1) of the Constitution.

The obligation is inherent in the general terms of the section. It enjoys with the general prohibition the same qualities of being absolute and non-derogable. The condemnation is more aptly categorised as a constitutional principle B than as a rule of evidence. The obligation is an exception to the general rule of evidence enacted by s 48(1) of the Civil Evidence Act [*Chapter 8:01*]. That rule is to the effect that evidence of violation of a fundamental right or freedom is admissible in legal proceedings unless its admission would bring the administration of justice into disrepute: *Paradza v Chirwa & Ors NNO* 2005 (2) ZLR 94 (S) at 111G-112D; *A & Ors v Secretary for State for Home* C *Affairs* [2005] UKHL 71 para 12; [2006] 2 AC 221; [2005] 3 WLR 1249.

At various stages of the whole process of proceedings by which the State deals with persons suspected of crime who are in the custody of public officers, the Constitution imposes duties for the protection of the fundamental rights of the suspect. The primary duty is on the law enforcement agents not to D abuse executive authority in the investigation of crime by torturing suspects or treating them in an inhuman or degrading manner to extract information or confessions to be used against them in legal proceedings expected to follow the ill-treatment. If the duty fails to achieve its intended purpose at this stage, the law imposes the duty on public prosecutors when making prosecutorial decisions not to admit or use information or evidence obtained from an E accused person suspected of having committed a criminal offence or from any third party by torture, inhuman or degrading treatment. If the duty fails at this stage, the law imposes the duty on judicial officers. Eventually this lies with this court to intervene through the exercise of its original jurisdiction to enforce or secure the enforcement of fundamental rights.

F The rationale for the exclusionary rule is the protection of any person suspected of a crime who is in the custody of a public officer from torturous, or inhumane or debasing invasions of his or her dignity and physical integrity. Its object is to ensure that criminal prosecutions which are a direct consequence of the pre-trial illegality violative of fundamental rights of an accused person to freedom from torture, inhuman and degrading treatment are not used to G give legitimacy to such conduct.

The rule has nothing to do with the fair determination of the guilt or innocence of the accused person. Where there is independent evidence which has been obtained lawfully and on which reasonable suspicion of the accused person having committed the criminal offence with which he or she is charged is H founded, an order of permanent stay of a criminal prosecution is not justified.

Malaba DCJ

The rule represents a device designed to deter disregard for constitutional A prohibitions and give substance to constitutionally protected fundamental rights. The exclusionary rule as a remedy for the enforcement of the protection of fundamental rights under the Constitution is not intended to immunise an accused person from criminal prosecution for any action he or she is reasonably suspected of having committed which is provable at the trial by B independent evidence lawfully obtained.

Information or evidence obtained from an accused person or any third party by torture, or inhuman or degrading treatment, if admitted or used in legal proceedings, would reduce s 15(1) of the Constitution to a mere form of words. As Jackson J put it in the dissenting opinion in *Korematsu v United States* 323 US 214 (1944) at 246, "once judicial approval is given C to such conduct it lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need". In *People (Attorney-General) v O'Brien* [1965] IR 142 Kingsmill Moore J of the Supreme Court of Ireland said that:

> "to countenance the use of evidence extracted or discovered by gross personal D violence would ... involve the State in moral defilement."

In *A & Ors supra* at para 35 Lord Bingham of Cornhill quotes from a report by Mr Alvaro Gil-Robles, the Council of Europe Commissioner for Human Rights on his visit to the United Kingdom in November 2004 (8 June 2005 Comm D H 2005) where he said: E

> "Torture is torture whoever does it, judicial proceedings are judicial proceedings, whatever their purpose – the former can never be admissible in the latter."

Giving as a reason for holding in *S v Nkomo* 1989 (3) ZLR 117 (S) that a court was under an obligation not to admit or use in any proceedings evidence of objects pointed out as part of confessions extracted from an accused person F by torture McNally JA at p 131F said:

> "It does not seem to me that one can condemn torture while making use of the mute confession resulting from that torture, because the effect is to encourage torture."

In *A & Ors supra* at para 39 Lord Bingham quotes from Burgers and Daneliust *The United Nations Convention Against Torture* (1988), at p 148, G where it is suggested that:

> "... it should be recalled that torture is often aimed at ensuring evidence in judicial proceedings. Consequently, if a statement made under torture cannot be invoked as evidence, an important reason for using torture is removed and the prohibition against the use of such statements as evidence before a court can therefore have the indirect effect of preventing torture." H

Malaba DCJ

A Lastly, in *Mthembu's* case *supra* the South African Supreme Court of Appeal ruled that the admission of evidence obtained through the use of torture would compromise the integrity of the judicial process and bring the administration of justice into disrepute. The reason given is that torture is barbaric, illegal and inhuman and is one of the most serious of human rights violations. That court applied the exclusionary rule against the admission B or use of information or evidence obtained by torture in legal proceedings as an exception to the general rule contained in s 35(5) of the Constitution of South Africa. The section provides that:

> "evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render that trial unfair or otherwise be detrimental to the administration of justice."

C It is clear that the rationale for the exclusionary rule against the admission or use of information or evidence obtained from an accused person or any third party by infliction of torture, or inhuman or degrading treatment as contained in s 15(1) of the Constitution, is founded on the absolute obligation imposed on the State. It is also founded on the revulsion which attaches to D the source of such information or evidence, coupled with its offensiveness to civilized values and its degrading effect on the administration of justice. The rule applies even when the evidence is reliable and necessary to secure the conviction of an accused person facing serious charges. The reliability or probative value of the information or evidence is irrelevant, because its admissibility is prohibited in absolute and peremptory terms. It is vital in E a society governed by the rule of law that persons in the custody of public officials should not be subjected to ill-treatment of the level of severity prohibited by s 15(1) of the Constitution.

Onus

The court takes the second point for determination. Its decision is that the F onus is on the applicant to establish, on a balance of probabilities, that the information or evidence of the crime used by the public prosecutor to charge her with the criminal offence and prosecute her for it was obtained by the infliction of torture, inhuman and degrading treatment at the hands of the State security agents prior to the charge being brought against her. The G reason for the decision is that it is the accused person or defendant who has to raise the question of contravention of fundamental rights by the State. It is he or she who would have knowledge of what was done to him or her and what information was extracted as a result of the ill-treatment. It was then for the State to prove beyond reasonable doubt that the decision to charge the applicant with and prosecute the criminal offence was taken upon H consideration of independent information or evidence of the crime lawfully

---

Malaba DCJ

obtained and on which reasonable suspicion of her having committed the A criminal offence was based.

The applicant discharged the onus on her. She established by oral and affidavit evidence that, in bringing the charge of contravening s 24(a) of the Code against her and initiating the prosecution

proceedings, the public prosecutor relied solely on information on the commission of the alleged criminal acts B obtained from her and a third party by torture and inhuman and degrading treatment. There was an inextricable link between the ill-treatment and the criminal prosecution. No evidence was placed before this court by the respondent to show that the decisions by the public prosecutor were based on independent evidence of the crime which was lawfully obtained. It is important to emphasise the fact that the ordering of the exclusion of evidence C obtained by torture or inhuman or degrading treatment assumes implicitly that the remedy does not extend to barring the prosecution based on evidence wholly untainted by the misconduct of the law enforcement agents. It is also important to point out that where the allegations by the accused are contested by the State, it is the court before which the allegations are first made or the D trial court which must hear the parties and decide question of facts.

Effect on violation of exclusionary rule

Finally, the court takes the third point for determination. Its decision on this point is that the effect of the finding that the public prosecutor relied on information or evidence of the commission of the alleged criminal acts E obtained from the applicant by torture, inhuman and degrading treatment in deciding to charge her with and prosecute her for the criminal offence, is that there was a breach of ss 15(1) and 13(1) of the Constitution. The breach of s 13(1) of the Constitution lies not in the use of torture, inhuman and degrading treatment to obtain the information or evidence of the crime from the applicant. That is a breach of s 15(1) of the Constitution. F

The violation of s 13(1) of the Constitution lies in the use of, or reliance by the public prosecutor on, the information or evidence obtained by torture, inhuman and degrading treatment for the purposes of making the prosecutorial decisions. Had the public prosecutor rejected the information or evidence of the crime obtained from the applicant by torture and inhuman and degrading G treatment, there would have been a violation of s 15(1) of the Constitution, but no breach of s 13(1) provided the criminal prosecution was supported by a reasonable suspicion of her having committed the criminal offence with which she was charged. The reason is that the criminal prosecution would be a proceeding for the proof beyond reasonable doubt of the guilt of the accused person of the crime with which he or she is charged, based on no H

A more or less evidence of the criminal acts than was available at the time of their commission.

The criminal prosecution was a direct consequence of the violation of s 15(1) of the Constitution. The absolute and non-derogable fundamental right of the applicant not to have information or evidence of the crime obtained B from her or any third party by torture or inhuman or degrading treatment used or relied upon by the public prosecutor in making the prosecutorial decisions to charge her with the criminal offence and institute the criminal prosecution was contravened. There was also a violation of the applicant's fundamental right to the protection of the law guaranteed by s 18(1) of the C Constitution. By acting in the manner he did, the public prosecutor failed to act in accordance with the requirements of the protection of the fundamental rights prescribed by ss 15(1) and 13(1) of the Constitution. He acted in breach of the principle of the rule of law.

It is clear from the facts that at the time the State security agents kidnapped D the applicant from home and later detained her at the secret place, they did not have reasonable suspicion of her having committed the criminal offence she was later charged with. They then used torture, inhuman and degrading treatment during interrogation to extract from her information or evidence on which they expected that the public prosecutor would act as a basis of a E reasonable suspicion of her having committed the criminal offence with which she was then charged. The effect of the operation of the exclusionary rule is that the whole conduct of the State security agents in kidnapping and detaining the applicant and subjecting her to torture, inhuman and degrading treatment was a violation of the fundamental rights guaranteed to her by ss 13(1), 15(1) F and 18(1) of the Constitution. It also shows that the criminal prosecution was a direct consequence of the violation of s 15(1) of the Constitution, thereby engaging the responsibility of the State in the contravention of ss 13(1) and 18(1) of the Constitution. In so far as the applicant suggested that she should not be prosecuted because her presence in court followed her unlawful arrest or kidnapping and ill-treatment by State security agents, she could not claim G immunity from prosecution on those grounds alone because her body is not a suppressible fruit and the illegality of her detention and

treatment could not deprive the Government of the opportunity to prosecute her and prove her guilt on independent evidence wholly untainted by the misconduct of law enforcement agents: *United States v Crews* 445 US 463 (1980) at 474; *Key* H *v Attorney General & Anor* 1996 (4) SA 187 (CC) at 195G-196B.

2012 (1) ZLR p356

Malaba DCJ

Costs

The court takes the question of costs for determination. Its decision on this A point is that there be no order as to costs. The reasons for the decision are these.

Section 24(4) of the Constitution gives the court a wide discretion as to the choice of a practical and effective remedy which can appropriately redress a violation of a fundamental human right or freedom. An order of permanent stay B of the criminal prosecution was considered by the court to be the appropriate remedy for the redress of the violation of the applicant's fundamental rights. The violation would otherwise have continued: In re *Mlambo* 1991 (2) ZLR 339 (S) at 355B-E. In selecting an appropriate remedy under the Constitution the primary concern of this court must be to apply the measures that will C best vindicate the values expressed in the Constitution and to provide the form of remedy to those whose rights have been violated that best achieves that objective. This flows from this court's role as guardian of the rights and freedoms which are entrenched as part of the supreme law of the country: *Osborne v Canada* (1991) 82 DLR (4th) 321 at 346e-f.

Costs are in the discretion of the court. It is permissible in cases of this nature D to order that costs incurred should follow the event: *Bull v Attorney-General* 1987 (1) ZLR 36 (S). Nonetheless a constitutional question was raised with regard to which the answer was not self-evident. The question whether s 15(1) of the Constitution imposes an absolute and non-derogable obligation on the State, through its agents, not to admit or use information or evidence E of the crime obtained from an accused person or defendant by infliction on him or her or any third party of torture, or inhuman or degrading treatment had not been raised and exhaustively determined by this court previously.

The opportunity arose for the court to clarify the law on the fundamental right of a person accused of a crime not to have information or evidence F obtained from him or her by infliction of torture, or inhuman or degrading treatment admitted or used against him or her in any legal proceedings. The legal question had to be clarified not only for the benefit of accused persons in similar circumstances; it has been clarified for the benefit of public prosecutors and judicial officers. The victor is therefore not the applicant but the administration of justice. The respondent did not challenge the correctness G of the factual basis of the constitutional question. He properly took the view that the resolution of the legal question was in the public interest. The court considers that the respondent should not be penalised by an order of costs. There will be no order as to costs. H

2012 (1) ZLR p357

Malaba DCJ

A CHIDYAUSIKU CJ, SANDURA JA, ZIYAMBI JA, GARWE JA concurred.

Mtetwa and Nyambirai, applicant's legal practitioners

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

* *Editor's note*: this was the date on which the court's reasons for its decision was made available. As indicated in the judgment, the court had, on 28 September 2009, issued the order granting the applicant a permanent stay of prosecution.

© 2015 Juta and Company (Pty) Ltd.

Document 41 of 75

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2012/Volume 1/JG CONSTRUCTION v CHADWICK & ANOR 2012 (1) ZLR 358 (H)

JG CONSTRUCTION v CHADWICK & ANOR 2012 (1) ZLR 358 (H)

Citation	2012 (1) ZLR 358 (H)
Case No	Judgment No. HH-141-12
Court	High Court, Harare
Judge	Bere J
Heard	21 March 2012; *CAV*
Judgment	26 March 2012
Counsel	*J Samukange*, for the applicant *A Rutanhira*, for the first respondent
Case Type	Urgent chamber application
Annotations	No case annotations to date

Flynote

Appeal – *notice of – defective – notice not complying with requirement to serve notice on respondent – whether High Court can declare notice of appeal a nullity – power of Supreme Court to grant an extension of the time to file a proper notice of appeal – province of Supreme Court* D *to declare a notice of appeal defective and to grant an indulgence relating thereto – not proper for the High Court to speculate on what the Supreme Court might do*

Headnote

The first respondent obtained summary judgment in the High Court against the applicant, who noted an appeal to the Supreme Court. The notice E of appeal was subsequently served on the Registrar of the High Court. Despite the noting of the appeal, the first respondent proceeded with execution, prompting the applicant to lodge an application to interdict the first respondent from continuing with execution pending the finalization of the case. The first respondent argued, inter alia, that by failing to serve F the notice of appeal on the him, the applicant had not complied with the peremptory requirements of r 29(2) of the Supreme Court Rules 1964, which requires that, once filed or noted, the notice of appeal must be served inter alia on the respondent. On that basis, he contended that the notice of appeal was fatally defective and consequently the appeal itself G must be rendered a nullity. The applicant argued that, once it noted its appeal, the first respondent was automatically barred from proceeding with execution in the absence of a successful application to execute pending the outcome of the appeal. It argued that it was not the function of the High Court to deal with the alleged shortcomings or defects in the appeal, but that of the Supreme Court itself. H

Bere J

A *Held*, that in terms of r 29 of the Supreme Court Rules, 1964, a notice of appeal which does not comply with the requirements set out therein is fatally defective. It is, however, the Supreme Court and not the High Court which should state whether an appeal is null and void for want of compliance with those rules. Unless the Supreme Court is prepared to grant an indulgence and

allow an extension of the time within which B to allow a proper notice of appeal to be filed, the appeal must be struck off. The process of granting such an indulgence falls within the province of the Supreme Court and the High Court cannot speculate on what the Supreme Court might do.

Held, further, that once an appeal is noted or filed it suspends execution. C The High Court Rules provide a remedy in the event of the other party desiring to proceed with execution, despite the noting of an appeal. In the interim, the relief sought would be granted.

Cases referred to

de Kock & Anor v Madiro & Anor HH-30-04

D *Hubert Davies Employees Trust (Pvt) Ltd & Ors v Croco Hldgs (Pvt) Ltd* 2009 (2) ZLR 53 (S)

Mydale International Marketing (Pvt) Ltd v Kelly & Anor HH-04-10

Nazir and Nazdek Housing Group v A-G, Republic of Guyana Civil Appeal No. 30 of 2002

Legislation considered E

Supreme Court Rules 1964 (RGN 380 of 1964), rr 4 & 29

Case information

J Samukange, for the applicant

F *A Rutanhira,* for the first respondent

Judgment

Bere J: In this urgent chamber application the applicant seeks an interim relief to interdict the first respondent from continuing with execution pending the finalization of the instant case.

G The brief background to this matter can be summarised as follows: After hearing arguments in case number HH 102-12 my brother Mathonsi, in a thoroughly reasoned judgment, granted summary judgment in favour of the now first respondent in this matter on 14 March 2012. Following upon the pronouncement of the judgment in question and dissatisfied with the judgment in issue, the applicant filed its notice of appeal in the Supreme G Court of Zimbabwe on 6 February 2012. The filing of the appeal was done

---

within the time stipulated by the rules governing the appeal process. The A notice of appeal was subsequently served on the Registrar of the High Court.

Despite the noting of the appeal in the Supreme Court the first respondent proceeded with execution, prompting the applicant to lodge the instant application.

In proceeding with execution, the first respondent has raised a number of B issues whose cumulative effect, the first respondent argues, renders the filed notice of appeal fatally defective to the extent that the appeal itself must be rendered a nullity.

The first argument raised by the first respondent as a preliminary point was that, by failing to serve the notice of appeal on the first respondent, the C applicant had not complied with the peremptory requirements of r 29(2) of the Supreme Court Rules 1964 (RGN 380 of 1964),which requires that once filed or noted the notice must be served *inter alia* on the respondent. The applicant has not taken a definite position with regards to the service or non-service of the notice of appeal. For purposes of this judgment, and aided by the submissions made by both counsel, I have no hesitation in D accepting it as a fact that the notice of appeal filed in the Supreme Court on 6 February 2012 was indeed not served on the first respondent. I also accept it as properly established by the first respondent that the failure to serve the notice of appeal amounted to non-compliance with the peremptory requirements of r 29 (2) of the Supreme Court Rules, 1964.

Apart from the alleged non-compliance with the Supreme Court Rules, the E first respondent has attacked what he perceives to be the inadequacies of the certificate of urgency and the founding affidavit by the applicant which the respondent argued should be regarded as not having been properly placed before the court.

Counsel for the respondent has also gone further to deal with what he perceives F to be zero prospects of success in the appeal itself. The first respondent is of the firm view that the appeal itself is frivolous and vexatious as it has been noted with *mala fide* intentions.

The applicant argued that once it noted its appeal the first respondent was automatically barred from proceeding with execution in the absence of a G successful application to execute pending the outcome of the appeal. It was also argued that it was not the function of the High Court to deal with the alleged shortcomings or defects in the appeal itself but that that was the province of the Supreme Court itself.

In advancing its position on the alleged non-compliance with the mandatory provisions of the Supreme Court rules, the first respondent referred me to H

2012 (1) ZLR p361

Bere J

A *Nazir and Nazdek Housing Group v Attorney-General, Republic of Guyana* Civil Appeal No. 30 of 2002 ,where the court dealt with a similar provision like our r 29(2) of the Supreme Court rules. In that case the court dealt with the interpretation of their Order 2 r 4(1) and (2) which is worded in virtually the same way as r 29(2) of our Supreme Court Rules. The Chancellor in B that case stated:

> "There is no doubt in my mind that the word 'shall' in Order 2 r 4(1) and (2) is mandatory in relation to the service of a notice of appeal. The appellant therefore was obliged to serve this notice of appeal upon all parties affected by the appeal within seven days after filing the original notice. Not having done so the appellant is accordingly in breach of r 4 (2). There is no specific rule for C applying to extend this period of time unlike a breach of Order 2 r 3 (3) which empowers a court in exceptional circumstances and for good and substantial reasons to extend the time for filing a notice of appeal."

Further reference by the first respondent's counsel was also made to *de Kock & Anor v Madiro & Anor* HH-30-04, *per* Bhunu J, where the learned judge was of the firm view that the appeal, whose validity he had to deal with, was D an irregular and invalid one and could not suspend execution until such time the defect in that appeal had been remedied. It is significant that in that case the appeal had been filed out of time and no condonation had been sought to regularise that defect.

In casu the appeal was filed in time and served on the Registrar of the High E Court. The only notable omission was failure to serve that notice on the respondent.

It is doubtful in my mind if it should be the function of this court to try and deal with the merits or demerits of an appeal which for all intents and purposes is not before it but intended for the Supreme Court.

F I say so because, in terms of our Supreme Court Rules as currently framed, the Supreme Court has a wide discretion in dealing with the matter placed before it. For good and sufficient cause shown, the Supreme Court may decide to condone non-compliance with its own Rules. See r 4 of Supreme Court Rules. In this regard, I find support in the headnote in *Hubert Davies* G *Employees Trust (Pvt) Ltd & Ors v Croco Holdings (Pvt) Ltd* 2009 (2) ZLR 53 (S) where it is stated:

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

2012 (1) ZLR p362

Bere J

It occurs to me that the process of granting indulgence falls within the A province of the Supreme Court and not the High Court which at this stage is *functus officio*. The High Court cannot sit as a court and start speculating on what the Supreme Court may or may not do without taking the risk of abusing that court in the appeal process itself.

In this regard, I am more inclined to follow the reasoning by Gowora J (as B she then was) when she stated, in *Mydale International Marketing (Pvt) Ltd v Kelly & Anor* HH-04-10 at p 4 of the judgment, as follows:

> "It is also pertinent to note that the appeal is before the Supreme Court and it is my view that the Supreme Court which should state whether or not the appeal is null and void for want of compliance with the rules. In the absence of such a declaration it is not open to this court to find that the appeal is null and void." C

In conclusion, I prefer the school of thought that in appeal matters we follow the basics, that is, once an appeal is noted or filed it suspends execution. Our rules, as they stand, provide a remedy in the event of the other party desiring to proceed with execution despite the noting of an appeal.

Consequently, the interim relief sought is granted as prayed for. D

Venturas & Samukange, applicant's legal practitioners

Scanlen & Holderness, first respondent's legal practitioners E

© 2015 Juta and Company (Pty) Ltd.

Document 42 of 75

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2012/Volume 1/CT BOLTS (PVT) LTD v WORKERS COMMITTEE 2012 (1) ZLR 363 (S)

CT BOLTS (PVT) LTD v WORKERS COMMITTEE 2012 (1) ZLR 363 (S)

Citation	2012 (1) ZLR 363 (S)
Case No	Judgment No. S-16-12
Court	Supreme Court, Harare
Judge	Garwe JA, Omerjee AJA & Gowora AJA
Heard	12 March 2012; *CAV*
Judgment	27 March 2012
Counsel	Mrs *R Matsika*, for the appellant *B Makururu*, for the respondent
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Employment – *workers committee – legal status of – not a legal persona – workers committee not entitled to litigate in its own name*

Practice and procedure – *parties – locus standi – workers committee – not* D *a legal persona – not entitled to represent workers in litigation*

Headnote

A workers committee may, in terms of s 23(1) of the Labour Act [*Chapter 28:01*], be appointed or elected by the employees employed by any one employer to represent their interests. It is the function of the workers committee to represent the employees in any matter affecting their rights E and interests and to negotiate with the employer a collective bargaining relating to the terms and conditions of the employees concerned. The Act has not, however, made provision for the workers committee to operate as a legal persona. Had this been the intention, the Act would have said so.

F Under the common law, an unincorporated association, not being a legal persona, cannot, as a general rule, sue or be sued in its name apart from the individual members, whose names have to be cited in the summons. A universitas, on the other hand has the capacity, apart from the rights of the individuals forming it, to acquire rights and incur obligations. A body that has no constitution is not a universitas, for it is the constitution G that determines whether an association is or is not a universitas.

On a proper interpretation of s 24 of the Act, it is clear that a workers committee exists to safeguard and champion the interests and welfare of the workers at the work place. It has no other function. There is no provision in the Act requiring a workers committee to adopt a constitution, nor is there a requirement for a workers committee to acquire rights H apart from the rights of the individuals forming it and the employees

---

Garwe JA

they represent. There is also no provision for a workers committee to A acquire assets in its own name. In contrast, s 29 of the Act provides that, upon registration, every trade union, employers' organisation or federation shall become a body corporate and in its corporate name shall be capable of suing and being sued. Such bodies are required by s 28 to adopt a written constitution. No such requirement is imposed upon a B workers committee, which suggests that the intention of the legislature was not to give the committee any other additional rights.

Cases referred to

Cold Storage Co National Workers Cttee v Cold Storage Co Ltd 2002 (1) ZLR 141 (H) C

Olivine Industries (Pvt) Ltd v Olivine Workers Cttee 2002 (2) ZLR 200 (S)

Thomas Meikle Centre (Pvt) Ltd v TM National Workers Cttee & Ors 2002 (2) ZLR 502 (S)

Legislation considered D

Labour Act [*Chapter 28:01*] ss 23(1),24(1), 28 & 29

Case information

Mrs *R Matsika,* for the appellant

B Makururu, for the respondent

Judgment

Garwe JA: This is an appeal against the decision of the Labour Court E remitting the matter to an arbitrator for the determination of the salary increment to be awarded to employees of the applicant.

At the hearing of this matter, it appeared to this court that the respondent, simply cited as "Workers Committee", was not a legal *persona*, capable of F being sued. Accordingly both counsel were asked to address the court on the matter. Both counsel accepted that the respondent, which is a workers committee appointed by workers of the appellant company, is not a legal *persona* and cannot therefore be sued.

Section 23(1) of the Labour Act [*Chapter 28:01*] ("the Act") provides that employees employed by any one employer may appoint or elect a workers G committee to represent their interests. On the functions of the workers committee, s 24 of the Act provides in subs (1) as follows:

"(1) A workers committee shall –

(a) subject to this Act, represent the employees concerned in any matter affecting their rights and interests; and H

Garwe JA

(b) subject A to subsection (3), be entitled to negotiate with the employer concerned a collective bargaining agreement relating to the terms and conditions of employment of the employees concerned; and

(c) subject to Part XIII, be entitled to recommend collective job action to the employees concerned; and

(d) where a works council is or is to be constituted at any workplace, elect B some of its members to represent employees on the works council."

It is clear from the above provision that it is the function of the workers committee to represent the employees in any matter affecting their rights and interests and to negotiate with the employer a collective bargaining agreement relating to the terms and conditions of the employees concerned. The Act has C not made provision for the workers committee to operate as a legal *persona*. Had this been the intention, the Act would no doubt have said so.

The issue of the legal status of the respondent assumes greater significance in a case such as this one where there could be issues of costs involved.

Under the common law, an unincorporated association, not being a legal D *persona*, cannot as a general rule, sue or be sued in its name apart from the individual members, whose names have to be cited in the summons. A *universitas,* on the other hand, has the capacity, apart from the rights of the individuals forming it, to acquire rights and incur obligations. The position is also established that a body that has no constitution is not a *universitas,* E for it is the constitution that determines whether an association is or is not a *universitas*.

On a proper interpretation of s 24 of the Act, it is clear that a workers committee exists to safeguard and champion the interests and welfare of the workers at the work place. It has no other function. There is no provision in F the Act requiring a workers committee to adopt a constitution. There is also no requirement for a workers committee to acquire rights apart from the rights of the individuals forming it and the employees they represent. There is also no provision for a workers committee to acquire assets in its own name.

In contrast, s 29 of the Act has provided that upon registration, every trade union, employers organisation or federation shall become a body corporate G and in its corporate name shall be capable of suing and being sued. Such bodies are required by s 28 to adopt a written constitution.

Had the intention of Parliament been to clothe a workers committee with some legal status, the Act would no doubt have said so. The fact that it did not do so suggests that the intention was not to give the committee any other H additional rights.

2012 (1) ZLR p366

Garwe JA

I am aware that in cases such as *Thomas Meikles Centre (Pvt) Ltd v TM* A *National Workers Committee & Ors* 2002 (2) ZLR 502 (S) and *Olivine Industries (Pvt) Ltd v Olivine Workers Committee* 2000 (2) ZLR 200 (S) this court proceeded on the basis that the workers committee cited in the appeal proceedings was properly before it. The issue of the legal status of the workers committee had not, however, been raised and consequently a determination of the legal status of the workers committee never became B necessary.

However, in *Cold Storage Co National Workers Committee v Cold Storage Co Ltd* 2002 (1) ZLR 141 (H), the legal capacity of the workers committee to institute the proceedings in that matter was raised. In dismissing the application, the court remarked at 142H: C

> "The legislature did not give the workers committee the right to sue and to be sued like it did to the employment council. In s 60 of the Act, employment councils were made bodies corporate, capable of suing and being sued. It seems to me that if the intention of the legislature was to make workers committee legal *personae* it would have said so.
>
> The applicant, however, argued that it derived its authority from the provisions D of the Act quoted *supra*. It seems to me that the argument ignores the fact that in the event of the case going in favour of the other party with costs such party would have no one to recover its costs from, as the applicant is not capable of suing and being sued. There would also be no one to execute the order against."

I would agree with the above remarks.

The respondent, not being a legal *persona*, is not properly before this court. E The proceedings before the Labour Court and prior to that, the arbitrator, were similarly void.

On the issue of costs, it seems to me that, regard being had to the fact that there is no respondent before this court, an order that there be no order as to costs would meet the justice of the case. F

The proceedings are accordingly struck off the roll with no order as to costs.

OMERJEE AJA and GOWORA AJA concurred.

Wintertons, appellant's legal practitioners G

Guni & Guni, respondent's legal practitioner H

© 2015 Juta and Company (Pty) Ltd.

Document 43 of 75

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2012/Volume 1/S v NOORMOHAMED 2012 (1) ZLR 367 (H)

S v NOORMOHAMED 2012 (1) ZLR 367 (H)

Citation	2012 (1) ZLR 367 (H)
Case No	Judgment No. HH-162-12
Court	High Court, Harare
Judge	Mavingira J & Hungwe J
Heard	27 March 2012
Judgment	27 March 2012
Counsel	*J Samukange*, for the appellant *E Nyazamba*, for the respondent
Case Type	Criminal appeal
Annotations	No case annotations to date

Flynote

C **Criminal procedure** – *discharge at close of State case – when may be granted – court's duty to order discharge if there is no evidence that accused committed offence charged – court not entitled to put accused on defence to bolster up an inadequate prosecution case – accused being wrongly put in his defence – refusal to grant discharge not in itself a ground to* D *set aside conviction – appeal court entitled to look at all the evidence led*

Headnote

There is no longer any controversy in our law as to whether a court may properly refrain from exercising its discretion in favour of the accused, if at the close of the case for the prosecution it has reason to suppose that E the inadequate evidence adduced by the State might be supplemented by defence evidence. Section 198(3) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] provides that if, at the close of the case for the prosecution, the court considers that there is no evidence that the accused committed the offence charged or any other offence of which he might be convicted thereon, it shall return a verdict of not guilty. There F is a sound basis for ordering the discharge of the accused at the close of the case for the prosecution, where (a) there is no evidence to prove an essential element of the offence; or (b) there is no evidence on which a reasonable court, acting carefully, might properly convict; or (c) the evidence adduced on behalf of the State is so manifestly unreliable that G no reasonable court

could safely act on it. However, once an accused person is put on his defence, albeit wrongly, and is ultimately convicted, the refusal to discharge the accused is not in itself a sustainable ground for appeal against the ultimate conviction. When the appeal is heard, the court cannot close its eyes to the evidence lead on behalf of the accused or a co-accused which, taken in conjunction with the State evidence, H proves the accused's guilt conclusively. The question which the appeal

Hungwe J

court must consider is whether, on the evidence and the findings of A credibility (if any), unaffected by the irregularity, there is proof of guilt beyond a reasonable doubt. If the court does so consider – and the onus is on the State to satisfy it – there is no resultant miscarriage of justice and the irregularity will be ignored. B

Cases referred to

A-G v Bvuma & Anor 1987 (2) ZLR 96 (S)

A-G v Mzizi 1991 (2) ZLR 321 (S)

A-G v Tarwirei 1997 (1) ZLR 575 (S)

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

Legislation considered

Criminal Procedure and Evidence Act [*Chapter 9:07*], s 198(3)

Case information

J Samukange, for the appellant

E Nyazamba, for the respondent D

Judgment

Hungwe J: After hearing both counsel in argument we allowed this appeal and indicated that our reasons for that decision will follow. These are the reasons. The appellant was charged with unlawful entry in aggravated circumstances as defined in s 131(2) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. After a contested trial, the appellant was found E guilty as charged. He was thereupon sentenced to 36 months' imprisonment of which 12 months were suspended on appropriate conditions. He appeals against both conviction and sentence.

The substantive grounds of appeal advanced by the appellant are the following: that the court erred in convicting the appellant when there was no evidence F led to prove unlawful entry in aggravated circumstances; that the court erred in placing the appellant on his defence after the State conceded that it had failed to establish a *prima facie* case; that the court had erred in convicting the appellant when the State had conceded that it had not proved the case against the appellant beyond a reasonable doubt.

At the appeal hearing, the State maintained the same position that it had taken G at the trial. In our view, that position is quite justified in all the circumstances of this case.

The State outline gave the following averments as the basis upon which the appellant was to be tried. The complainant is married to the appellant's sister. During 2002 the complainant left for South Africa and left the appellant in H

Hungwe J

A charge of his shop at 64C Charter Road, Harare, which at the time, he leased from the appellant.

The State outline continued:

> "Some goods continued missing from the shop but the complainant could not tell how the goods were missing.

B At a later date he got an anonymous letter informing that someone had been stealing from his shop and suggested that the complainant changes his keys. The complainant changed his keys and all of a sudden no shortfalls were ever noticed.

The accused took advantage the time he was left in charge of the shop and obtained duplicate keys which he then used to gain entry into the shop and stole various items. Total value stolen is $100 000 and nothing has been recovered."

C The evidence led during trial did not prove –

(a) an unlawful entry;

(b) the quantity or the description of goods stolen; or

(c) the value of such goods; or

(d) when they were allegedly stolen; or even D

(e) such general deficiency as alleged in the outline.

More importantly, however, we noted that whilst the charge related to unlawful entry, the judgement dealt at length with theft. Yet such theft, if any, only served to aggravate the alleged unlawful entry which the State charged the appellant with. Regarding the allegation of unlawful entry, the State was E hard put to prove this element because the premises in question belonged to the appellant. It is not clear from the evidence which part of the premises the complainant leased from the appellant.

The allegation in the State outline that the appellant was at some point left in charge of the shop was denied by the complainant. It was not in dispute, however, that the complainant's wife also sells shoes from the same shop F which the complainant leased from the appellant. In the absence of the exact period during which his entry into the shop premises would have been unlawful it was difficult, if not impossible, to prove unlawful entry. Further, the risk of false incrimination in this case was not safely excluded. We make this observation on the following basis. The appellant and complainant were G engaged in fierce civil litigation wherein the appellant sought to evict the complainant from the same premises in issue in the present case. He succeeded in the magistrates court. The complainant, soon after receiving the notice of eviction, made a police report concerning the present allegations regarding issues dating back over four years previously. When asked why he took such a long time to report the theft to the police, his explanation was that H he attempted to resolve the matter at the family level. This may be so, but

---

the inference that the report was actuated more by malice after he lost the A battle for eviction, than the alleged theft, is highly irresistible. The court *a quo* should have approached the evidence tendered by the complainant with more caution than it did.

As for the ground of appeal that the court *a quo* erred in placing the appellant on his defence after the State had conceded that it had failed to establish a B *prima facie* case, the submission is not wholly correct. It is doubtful, on the case law, whether such an error can be a sound ground of appeal standing alone. The authorities do not agree that this is so.

Section 198(3) of the Criminal Procedure and Evidence Act [*Chapter 9:07*]provides that if, at the close of the case for the prosecution, the court considers that there is no evidence that the accused committed the offence charged or C any other offence of which he (or she) might be convicted thereon, it shall return a verdict of not guilty.

There is sound basis for ordering the discharge of the accused at the close of the case for the prosecution, where –

(i) there is no evidence to prove an essential element of the offence: D *Attorney-General v Bvuma & Anor* 1987 (2) ZLR 96 (S) at 102F-G;

(ii) there is no evidence on which a reasonable court, acting carefully, might properly convict: *Attorney-General v Mzizi* 1991 (2) ZLR 321 (S) at 323B;

(iii) the evidence adduced on behalf of the State is so manifestly unreliable E that no reasonable court could safely act on it: *Attorney-General v Tarwirei* 1997 (1) ZLR 575 (S) at 576G.

It is significant that s 198(3), unlike its precursor s 188(3) of [*Chapter 59*], uses the word "shall'' and not "may" – "it shall return a verdict of not guilty". The amendment was probably occasioned by the dictum in *Attorney-General* F *v Bvuma & Anor supra* at 102F that it is –

"not a judicious exercise of the court's discretion to put an accused on his defence in order to bolster the State case in a case which, standing alone, cannot be proved."

Hence, so far as the law in Zimbabwe is concerned, there is no longer any controversy as to whether a court may properly refrain from exercising G its discretion in favour of the accused, if at the close of the case for the prosecution it has reason to suppose that the inadequate evidence adduced by the State might be supplemented by defence evidence. H

In *S v Kachipare* 1998 (2) ZLR 271 (S) the court held, however, that once an accused person is put on his defence, albeit wrongly, and is ultimately

---

2012 (1) ZLR p371

Hungwe J

A convicted, the refusal to discharge the accused is not in itself a sustainable ground for appeal against the ultimate conviction. At the stage the appeal is heard, the court cannot close its eyes to the evidence lead on behalf of the accused or a co-accused which, taken in conjunction with the State evidence, proves the accused's guilt conclusively. The question which the B appeal court must consider is whether, on the evidence and the findings of credibility (if any), unaffected by the irregularity, there is proof of guilt beyond a reasonable doubt. If the court does so consider – and the onus is on the State to satisfy it – there is no resultant miscarriage of justice and the irregularity will be ignored.

C In my view, where the appeal court finds evidence supporting the conviction in the defence case, the fact that standing on its own the State case had not established evidence upon which a reasonable court could convict does not entitle the appeal court to interfere with conviction. Therefore, an appellant cannot succeed in persuading the court that he was entitled to an acquittal at the close of the case for the prosecution simply because, at that stage, D there was insufficient evidence upon which he could have been convicted. If there was admissible evidence indicating guilt on the part of an appellant on the record, an appeal court cannot rely on the erroneous decision of the court *a quo* placing the accused on his defence, unless there is some other irregularity which renders the conviction insupportable or not in the interests E of justice. In the present case, the dearth of evidence was not cured either by the appellant exercising his right to remain silent or the evidence showing that he gave his co-accused the tyres which led to his co-accused's arrest.

The duty to prove beyond a reasonable doubt that the appellant committed the offence charged remained squarely on the State. As I said at the outset F of this judgment, there were too many gaps to put the matter beyond a reasonable doubt. The complainant stated that he was the sole importer of certain bicycle tyres. The court *a quo* appears to have believed him without any evidence to prove that indeed he was. It escapes me how such a claim could go unchallenged. There was no proof of any sort as to what exactly was allegedly stolen, besides a blanket claim that an assortment of merchandise G was stolen. What led the court to hold that the appellant, who allegedly gave his co-accused bicycle tyres to sell, also stole double sockets, single sockets, spiral wires, hammers, axes, saws and bicycles? There is just no evidence to suggest he did.

The concession by the prosecution that there was no *prima facie* case against H the appellant, in my view, was well made.

2012 (1) ZLR p372

Hungwe J

It was for these reasons that after hearing counsel's submissions we allowed A the appeal. In the result therefore the conviction in the court *a quo* is set aside and the following is substituted:

"The accused is found not guilty and is acquitted." B

MAVANGIRA J concurred.

Venturas & Samukange, appellant's legal practitioners

Attorney-General's Office, respondent's legal practitioners C

© 2015 Juta and Company (Pty) Ltd.

Document 44 of 75

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2012/Volume 1/MAUCHAZA v NOTA 2012 (1) ZLR 373 (H)

MAUCHAZA v NOTA 2012 (1) ZLR 373 (H)

Citation	2012 (1) ZLR 373 (H)
Case No	Judgment No. HH-120-12
Court	High Court, Harare
Judge	Gowora J & Patel J
Heard	24 July 2011; *CAV*
Judgment	28 March 2012
Counsel	*J Tsivama*, for the appellant The respondent in person
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Court – *magistrates court – jurisdiction – divorce – court having no jurisdiction to deal with divorce other than in respect of a registered customary law marriage – claim under general law – must be within court's monetary jurisdictional limit*

Headnote

D The respondent (plaintiff in the court *a quo)* issued summons in the magistrates court against the appellant (defendant) claiming "sharing of property." The summons was in the form used for instituting divorce proceedings in the magistrates court for the dissolution of a marriage solemnised E in terms of custom, although a decree of divorce was not sought. The particulars of claim made reference to a customary union which resulted in the establishment of a universal partnership. The plaintiff sought an order that a house shared by the parties during the partnership be sold and the proceeds jointly shared between the parties.

F The evidence showed that the parties had an unregistered customary union which resulted in the birth of one child. They stayed together for four years before the plaintiff left the matrimonial home. During the relevant period, despite the absence of a formal relationship, the parties conducted themselves and treated each other as husband and wife. A customary marriage ceremony took place where the defendant paid part of the bride G price (*lobola*). The defendant had not finished paying all of it when they separated. It was argued on behalf of the defendant that, if the plaintiff's claim was premised on a tacit universal partnership, then the trial court lacked the jurisdiction to entertain the matter as the value of the property in dispute was in excess of the magistrate's civil jurisdiction.

The magistrate awarded the plaintiff a 50 per cent share of the immovable H property.

Gowora J

Held, that in terms of s 11(1)(b)(iv) of the Magistrates Court Act [*Chapter* A *7:10*], the magistrates court would not have the jurisdiction to deal with this matter as a divorce in the absence of solemnisation of the union under the Customary Marriages Act [*Chapter 5:07*]. The only circumstance under which the court would have jurisdiction would be if the matter were an ordinary civil dispute which was within the monetary jurisdictional B limit of the court. Assuming that a choice of law had been properly made and that choice was general law, a valid cause of action had been pleaded, either universal partnership or unjust enrichment. Although the plaintiff appeared to have chosen to have the dispute settled as a claim for distribution of assets under a tacit universal partnership, the matter was actually disposed of as if the court was considering a divorce under C customary law. In the absence of a marriage under customary rites the court had no jurisdiction to determine the plaintiff's claims unless premised under general law. With regard to the court's monetary jurisdiction, the likelihood was that the claim exceeded the court's jurisdiction, but this was not conclusively established. D

Cases referred to

Feremba v Matika 2007 (1) ZLR 337 (H)

Mandava v Chasekwa 2008 (1) ZLR 300 (H)

Legislation considered E

Magistrates Court Act [*Chapter 7:10*], s 11

Case information

J Tsivama, for the appellant

The respondent in person

Judgment

Gowora J: On 10 July 2006, the respondent, who~~m~~ I shall refer to as F "the plaintiff", issued summons in the Harare magistrates court against the appellant (who was the defendant), claiming "sharing of property." Particulars of claim attached to the summons made reference to a customary union which resulted in the establishment of a universal partnership. It was accordingly prayed that it would be just and equitable for the court to order that a house shared by the parties during the partnership be sold and the proceeds jointly G shared between the parties.

The defendant pleaded to the claim in a manner which both denied and accepted the existence of the customary union, the existence of the universal partnership and the acquisition of the immovable property over which the plaintiff was claiming a right to a share. I find that the defendant's legal practitioners filed H

Gowora J

A a plea which was not only vague and embarrassing but which did not clearly set out the facts upon which the defence was based. The errors I have referred to above notwithstanding, the matter went before a magistrate for trial and, on 19 April 2007, the magistrate rendered a judgment in terms of which the plaintiff was awarded a fifty percent share in the immovable property. The defendant then noted an appeal against the judgment.

B The evidence adduced at the trial in the court below established that the parties had an unregistered customary union which resulted in the birth of one child. The parties stayed together from 1982 to 1986, when the plaintiff left the matrimonial home. During the period in question, despite the absence of a formal relationship, the parties conducted themselves and treated each C other as husband and wife. Evidence was led to the effect that a customary marriage ceremony took place where the defendant paid part of the bride price (*lobola*). According to the plaintiff, the defendant had not finished paying all of it when they separated. The defendant accepts that the parties had such a union.

There are a number of issues on which the parties differ in so far as the D evidence adduced at the trial is concerned. The case for the plaintiff is that she had failed to return home after an excursion with the defendant. As a result she and the defendant decided to get married. The defendant's case

is that he and the plaintiff had not returned home. The next day the plaintiff was told by her relatives that she was not acceptable at home. She moved in E with him. He was then forced to live with her, and decided to pay damages for having made her pregnant. What is not in dispute is that the parties lived together from 1982 to some time in 1986. During that period an immovable property, known as 82 Caledon Avenue, Hatfield, was purchased through a mortgage bond secured in the name of the defendant. The defendant was responsible for settlement of the mortgage payments, whilst the plaintiff took F care of the other household expenses.The deposit for the house was paid by the defendant even though the plaintiff indicated in her evidence that she had contributed towards half of the deposit paid by the defendant. From the evidence adduced before him, it is my view that the magistrate correctly concluded that the defendant had paid *lobola* for the plaintiff and the parties G were married in terms of custom. The union was however never solemnised.

Although the defendant did not plead lack of jurisdiction in his plea, when closing submissions were filed on his behalf at the close of the trial, it was argued on his behalf that, if the plaintiff's claim was premised on a tacit universal partnership, then the trial court lacked the jurisdiction to entertain the matter as the value of the property in dispute was in excess of Z$5 million. H It was conceded by the defendant's legal practitioner that no evidence had

---

been adduced as to the value of the property but the court was urged to A take judicial notice of the fact that a half share in an immovable property in Hatfield could not possibly at the time be valued at less that Z$5 million. It was accordingly argued that the claim should be dismissed on that basis.

The trial court was addressed on the question of the lack of jurisdiction of the court, given the monetary value of the items in dispute, but it does not appear B as if the magistrate addressed his mind to this. It had not been pleaded but a defendant can consent to a claim where the value of the claim exceeds that set by statute. Although there is no evidence on the value of the property, the defendant has urged this court to assume that it is in excess of Z$5 million.

In the exercise of its appellate jurisdiction the High Court, being a superior C court with inherent jurisdiction, is empowered to exercise review powers. There are certain aspects to this matter that point to procedural irregularities. First and foremost, the summons in terms of which proceedings were instituted is the form used for instituting divorce proceedings in the magistrates court for the dissolution of a marriage solemnised in terms of custom. The summons to which the particulars of claim were attached appears to be divorced from D the cause that the plaintiff had brought to court. The summons speaks of an action for sharing of property which is not a cause of action recognisable under general law. The summons calls upon the defendant to appear at court to answer the plaintiff's claim and to file his defence before the date of hearing. This is in fact in terms of r 8(8) of the Customary Law Court rules.

To this the plaintiff had attached particulars of claim, in which she sought a E half share of the proceeds of the Hatfield property after a judicial sale of the same. There is no claim therein for a decree for divorce, despite the summons having been issued under rules utilised for divorce in a customary union. On the other hand, a summons under general law in terms of the rules of the magistrates court allows a defendant seven days in which to enter appearance F after service of summons. A defendant who enters an appearance to defend the claim is obliged to file a plea in which the basis of the defence to the claim is set out. In terms of Order 19 r (1) of the Magistrates Court (Civil) Rules, the party wishing to have the action brought to trial must request the other party to attend a pre-trial conference at a mutually convenient time and place. This is normally done before a magistrate in chambers. At the G pre-trial conference all issues ancillary to the trial are dealt with, including the issues for trial and the duration of such trial.

In casu, all these stages were skipped, which leads one to conclude that, despite the cause of action having been premised on general law, the parties conducted their dispute as if it were premised on customary law principles. H

A There was therefore a mixture of procedures starting from the institution of the summons themselves. I have no hesitation in concluding that the summons was defective.

I turn then to the issue of jurisdiction or lack thereof. In terms of the Magistrates Court Act [*Chapter 7*:*10*] the jurisdiction of the court is provided B for as follows:

"**11. Jurisdiction in civil cases**

(1) Every court shall have in all civil cases, whether determinable by the general law of Zimbabwe or by customary law, the following jurisdiction –

(a) excepting any other jurisdiction assigned to any court by this Act or any other enactment, the persons in respect of whom the court shall have jurisdiction C shall be –

(i) any person who resides or carries on business or is employed within the province;

(ii) any partnership whose business premises are situated, or any member whereof resides, within the province;

(iii) any person whatever, in respect of any proceedings incidental to any D action or proceedings instituted in the court by such person himself;

(iv) any person, whether or not he resides, carries on business or is employed within the province, if the cause of action arose wholly within the province;

(b) with regard to the causes of action –

(i) … E

(ii) …

(iii) …

(iv) in actions in which it is claimed a decree of divorce, judicial separation or nullity of a marriage solemnized in terms of the Customary Marriages Act [*Chapter 5*:*07*], including actions relating to the division, apportionment or distribution of the assets, whether movable F or immovable, of spouses or former spouses of such marriages and the payment of maintenance in terms of the Matrimonial Causes Act [*Chapter 5*:*13*]."

A magistrates court would therefore not have the jurisdiction to deal with this matter as a divorce in the absence of solemnisation of the union under G the Customary Marriages Act. The only circumstance under which the magistrates court would have jurisdiction is if the matter were an ordinary civil dispute which was within the monetary jurisdictional limit of the court. From the description of the house which is the subject matter of the dispute, it is pretty obvious that its monetary value exceeded by far the jurisdiction of the magistrates court. The magistrates court is a creature of statute and H can only function within the confines and parameters set by the statute that

---

creates it. It cannot grant to itself any powers not afforded it by the statute, A and one of those powers is the limitation on its monetary jurisdiction. In *Mandava v Chasekwa* 2008 (1) ZLR 300 (H) Makarau JP (as she then was) and Hlatshwayo J stated as follows in relation to the jurisdiction of the magistrates court:

"The magistrates court is a creature of statute with set jurisdictional limits in civil B matters. Assuming that a choice of law had been properly done and that choice was general law that a valid cause of action had been pleaded ... the value of the estate that the trial court set to distribute far exceeded its monetary jurisdiction ..."

In my view those remarks are pertinent and apposite *in casu*. There was a choice of law exercised, in that the plaintiff based her claim on universal C partnership and or unjust enrichment. This choice was, however, only exercised in terms of the particulars of claim filed by the plaintiff. The court had the capacity to determine the dispute as formulated by the plaintiff even if, in the particulars of claim, the cause of action appeared to be drifting between a universal partnership and unjust enrichment.

Although the plaintiff appears to have chosen to have the dispute settled D as a claim for distribution of assets under a tacit universal partnership, the record reveals that the matter was actually disposed of as if the court was considering a divorce under customary law. Clearly, in the absence of a marriage under customary rites, the court had no jurisdiction to determine the plaintiff's claims unless premised under general law. To add to the E confusion, the summons under which the dispute was presented to court removed it from claims under general law. In *Feremba v Matika* 2007 (1) ZLR 337 (H) Makarau JP raised awareness to the problem of jurisdiction arsing from these unions with the following remarks:

"... The distribution of the assets of parties in an unregistered customary union by the magistrates court presents three main legal issues that all trial magistrates F must be wary of. Firstly, an unregistered

customary union is not a marriage in terms of the Matrimonial Causes Act and thus the provisions of s 7 of the Act have no direct application in distributing the assets of such parties. Further, the provisions of s 11 of the Magistrate's Court Act [*Chapter 7:10*] which grants magistrates courts jurisdiction in divorce actions of persons married in terms of the Customary Marriages Act [*Chapter 5:07*] do not apply to unions that are not registered under the Act. The court has jurisdiction to apply customary G law and can apply such law to the distribution of the assets of the parties who were in such union. If, however, the court, for some legitimate reason, is not applying customary law then two 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 magistrates court jurisdiction will apply. Secondly, for a claim based on common law, a recognised cause of action must be pleaded." H

2012 (1) ZLR p379

Gowora J

A In this instance, the face of the summons bore the legend "sharing of property". Even if it were to be assumed in the plaintiff's favour that the claim had been brought under general law, the monetary jurisdiction of the court in this case has been challenged by the defendant, as no evidence was placed before the court as to the value of the immovable property that the plaintiff sought a share in. The fact that such property was located in the low density suburbs cannot, B in my view, lead to an inevitable conclusion that the value thereof exceeded the monetary jurisdiction of the magistrates court. Generally, properties in the low density suburbs do tend to be of higher value than those in the high density suburbs, but it is however not given that, in every instance, the value of such property has to be high or exceed the jurisdiction of the magistrates C court. In this case, and in fact in every case where a magistrates court has to adjudicate over a matter involving an immovable property, it is important that the value of such property be established at the outset to inform the court whether or not the property is within its jurisdictional limits. In this case it was not done and, other than to remark that the property may well have been outside the jurisdiction of the court, I cannot make a definitive D statement because its value was never established.

In *Mandava v Chasekwa supra* at 303D the appeal court had to contend with all these problems emanating from the trial court. The court stated:

> "It is still part of our law that unregistered customary unions are not marriages for the purposes of the Matrimonial Causes Act [*Chapter 5*:*13*]. Consequently, parties to such unions cannot be divorced by the courts and their joint estate E cannot be distributed in terms of the divorce of this country. Trial magistrates who deal with the estates of the parties to an unregistered customary union tend to fall into three errors. Firstly, they tend to proceed to deal with unregistered unions as if they are registered. Secondly, they fail to avert to the choice of law provisions of our law. Finally, they tend to forget their monetary jurisdictional limit when distributing joint estates at general law."

F In this case, the court fell into the error of treating the claim as if it had been brought under customary law when the particulars clearly identified the claim as one falling under general law. The court then applied the factors set out in the Matrimonial Causes Act in its disposal, in that it took into account the contributions that the plaintiff had made as a housewife. Given the totality of the irregularities attaching to these proceedings it is my view that the G proceedings are a complete nullity. The extent of the irregularities is such that this court cannot make an order in favour of either of the parties. The justice of the case demands that the proceedings be set aside in their entirety. I therefore make an order as follows.

The proceedings in the court a *quo* under case number 9146/06 be and are H hereby set aside with no order as to costs.

2012 (1) ZLR p380

Gowora J

PATEL J concurred. A

Sawyer & Mkushi, appellant's legal practitioners

Legal Aid Advice Scheme, respondent's legal practitioners B

© 2015 Juta and Company (Pty) Ltd.

Document 45 of 75

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2012/Volume 1/ASHANTI GOLDFIELDS ZIMBABWE LTD v NGUWO 2012 (1) ZLR 381 (H)

ASHANTI GOLDFIELDS ZIMBABWE LTD v NGUWO 2012 (1) ZLR 381 (H)

Citation	2012 (1) ZLR 381 (H)
Case No	Judgment No. HH-58-12
Court	High Court, Harare
Judge	Mutema J
Heard	29 March 2011
Judgment	29 March 2011
Counsel	*T Magwaliba*, for the applicant *G C Manyurureni*, for the respondent
Case Type	Civil application
Annotations	No case annotations to date

Flynote

C **Appeal** – *right of – from High Court – application for summary judgment – order giving unconditional leave to defend an action – no appeal lies from such an order – grant of conditional leave to defend by High Court – appeal will lie only against conditions imposed*

Headnote

D In providing in s 43(2)(b) of the High Court Act [*Chapter 7:06*] that no appeal shall lie from an order of a judge of the High Court giving "unconditional leave to defend an action", the legislature intended to refer only to the granting of unconditional leave to defend in summary judgment proceedings in terms of rr 69 and 79 of the High Court Rules E 1971 (RGN 1047 of 1971). Implicitly, from the provisions of s 43(2)(b) of the Act, where conditional leave to defend is granted in summary judgment proceedings, the right of either party to appeal is restricted to the right of appeal only against the conditions imposed.

Cases referred to

G D Haulage (Pvt) Ltd v Mumurgwi Bus Services (Pvt) Ltd 1979 RLR 447 (A); 1980 (1) SA 729 (ZRA) F

Howff, The, (Pvt) Ltd v Tromp's Engineering (Pvt) Ltd 1977 (1) RLR 72 (G); 1977 (2) SA 267 (R)

Rheeder v Spence 1977 (2) RLR 262 (G); 1978 (1) SA 1041 (R)

Legislation considered G

High Court Act [*Chapter 7:06*], ss 43(2)(b) & (d)

High Court Rules 1971 (RGN 1047 of 1971), rr 69 & 70

Case information

T Magwaliba, for the applicant

G C Manyurureni, for the respondent H

2012 (1) ZLR p382

Mutema J

Judgment

Mutema J: On 29 March, 2011, I dismissed unconditionally an application A for summary judgment by the applicant.

On 4 May 2011, I dismissed a chamber application for leave to appeal to the Supreme Court against the order dismissing the application for summary judgment. The application for the leave to appeal had been made pursuant to s 43(2)(d) of the High Court Act [*Chapter 7*:*06*]. That provision states that: B

"(2) No appeal shall lie –

(a) …

(b) …

(c) …

(d) from an interlocutory order or interlocutory judgment made or given by a C judge of the High Court, without the leave of that judge or, if that has been refused, without the leave of a judge of the Supreme Court …"

I dismissed the application for leave on the basis of the provision of s 43(2)(b) of the same Act which provides:

"(2) No appeal shall lie –

(a) … D

(b) from an order of a judge of the High Court in which he refuses an application for summary judgment and gives unconditional leave to defend an action ..."

In view of the clear and unambiguous provisions of s 43 (2)(b) of the High Court Act, and the fact that my order was one dismissing an application for E summary judgment, wherein I gave unconditional leave to the respondent to defend the action, that order is not subject to any appeal and s 43(2)(d) does not apply. Even the Supreme Court cannot grant leave to appeal against such an order.

The provisions in s 43(2)(b) of the High Court Act [*Chapter 7*:*06*] have been literally interpreted in a number of precedents. In *GD Haulage (Pvt*) F *Ltd v Mumurgwi Bus Service (Pvt) Ltd* 1979 RLR 447 (A); 1980 (1) SA 729 (ZRA) the court, in interpreting s 31(1)(b) of the predecessor High Court Act [*Chapter 14* of 1974], whose provisions fell on all fours with those in our current s 43(2)(b) of the High Court Act [*Chapter 7*:*06*], held that, in providing in s 31(1)(b) of the High Court Act [*Chapter 14*] that no G appeal shall lie from an order of a judge of the General Division giving "unconditional leave to defend an action", the legislature intended to refer only to the granting of unconditional leave to defend in summary judgment proceedings in terms of what are now rr 69 and 70 of the High Court Rules 1971. Implicity, from the provisions of s 31(1)(b) of [*Chapter 14*], where conditional leave to defend is granted in summary judgment proceedings, H

2012 (1) ZLR p383

Mutema J

A the right of either party to appeal is restricted to a right of appeal (with leave of the court under s 31(1)(b)) only against the conditions imposed. Pertinent to note here is that the provisions of s 31(1)(b) of the then [*Chapter14*] are similar to those of s 43(2)(b) of the present High Court Act and rr 69 and 70 of Order 10 of the High Court Rules 1971 are also still the same. See also *Howff (Pvt) Ltd v Tromp*'s *Engineering (Pvt) Ltd* 1977 (1) RLR 72 (G); B 1977 (2) SA 267 (R); *Rheeder v Spence* 1977 (2) RLR 262 (G); 1978 (1) SA 1041 (R).

In spite of the plain language of the relevant legislation and case law cited above, to the effect that refusal of an application for summary judgment coupled with unconditional leave to defend an action is not appealable, C the applicant's legal practitioner, following my refusal of leave to appeal, has since noted an appeal to the Supreme Court against my order refusing summary judgment. Whence he got the leave to lodge such appeal is alien to the applicable law. He has now requested for written reasons for my order of 29 March, 2011 to enable him to prosecute his appeal. It is not for

me to withhold them in spite of the law saying no such appeal shall lie from such D an order. Those reasons are herewith provided.

[The remainder of the judgment are not relevant to this report.]

Magwaliba & Kwirira, applicant's legal practitioners

E *Manyurureni & Company*, respondent's legal practitioners

© 2015 Juta and Company (Pty) Ltd.

Document 46 of 75

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2012/Volume 1/S v MPOFU 2012 (1) ZLR 384 (H)

S v MPOFU 2012 (1) ZLR 384 (H)

Citation	2012 (1) ZLR 384 (H)
Case No	Judgment No. HB-81-12
Court	High Court, Bulawayo
Judge	Cheda J
Heard	3 March 2012; 4 March 2012; 25 March 2012; 26 March 2012; *CAV*
Judgment	5 April 2012
Counsel	*W Mabhande*, for the State *T Khumalo*, for the accused
Case Type	Criminal trial: application for discharge
Annotations	No case annotations to date

Flynote

Criminal procedure – *discharge at close of State case – when should be ordered – what State must have established before an answer is called for from the accused – matter within peculiar knowledge of the accused – need for accused to explain his conduct* D

Headnote

A trial court has no discretion but to acquit at the end of the State case if there is no evidence upon which a reasonable court would convict the accused. The court is not entitled to place him on his defence in the face of inadequate evidence in the hope that the accused would incriminate himself during his defence. It is the duty of the State to place evidence E of probative value before the court in order for the court to hold that the State has established a prima facie case against the accused, meaning proof of the commission of the offence which implicates the accused to such a degree as to call for an answer. Less evidence will suffice to establish a prima facie case where the matter is peculiarly within the knowledge of the opposite party than would under other circumstances be required. F The State need not, however, prove the commission of a crime at this stage, but must have adduced evidence which will justify the transfer of the onus

to the accused on the basis of his special knowledge of the incident. Where this knowledge is shown, it then becomes the accused's duty to explain his conduct and he can only do so in his evidence-in-chief G which should be tested by cross-examination by the State.

Cases referred to

A-G v Mzizi 1991 (2) ZLR 321 (S)

R v Chaikin 1940 NPD 133

R v du Plessis 1942 EDL 9 H

Cheda J

A *R v Ebrahim & Heskiah* 1921 TPD 305

S v Hartlebury & Anor 1985 (1) ZLR 1 (H)

R v Herholdt & Ors 1956 (2) SA 722 (W)

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

S v Ruzani 1984 (1) ZLR 334 (B)

S v Tsvangirai & Ors 2003 (2) ZLR 88 (H)

B *R v van der Linde & Anor* 1933 OPD 5

Union Government (Minister of Railways) v Sykes 1913 AD 156

Legislation considered

Criminal Procedure and Evidence Act [Chapter9:07], s 198(3)

Case information

C *W Mabhande*, for the State

T Khumalo, for the accused

Judgment

Cheda J: The The accused is facing three charges, namely murder, armed robbery and attempted murder.

D **Murder**

It is alleged that on 31 January 2003, at Pumula East Service Station in Bulawayo, he unlawfully, wrongfully and intentionally murdered one Trust Mbiva (hereinafter referred to as "the deceased"]. Also that he subsequently committed the crimes of robbery and attempted murder. He pleaded not E guilty to all the charges.

The summary of the state case is that on 31 January 2003 the accused, together with his accomplice, who is at large, armed themselves with pistols and they arrived at Pumula Service Station. They approached the deceased who was on duty with his colleagues. The deceased was part of the employees F of the Fort Group Cash-in-Transit Team tasked with collecting cash from various business cash points. While they were waiting for cash to be loaded into their vehicle, the accused and his accomplice approached the deceased. The accused produced a pistol and shot the deceased, resulting in his death.

The accused then took the deceased's pistol while his accomplices confronted the driver pointing a pistol at him, and ordered him to get out of the car. They G loaded cash boxes with cash and drove away in the Fort Group vehicle. The vehicle was later found abandoned near Magwegwe North sewage pond.

They went further and forcibly took a Datsun Pulsar from one Mr Zivuka Harurosi, which they loaded with tin trunks full of money stolen from Magwegwe Service Station. The Datsun Pulsar vehicle was later recovered at H Magwegwe West. On 17 March 2003 during the night, Mr Qinisani Sibanda

Cheda J

met the accused and his accomplices at Cowdray Park. They were behaving A in a strange way. When he confronted them, the accused drew a pistol and fired at him twice, but missed. He then ran away.

On 12 April 2003 the accused was arrested at Lupane while in possession of a pistol. The pistol in question was taken for ballistic examination.

Count 1 and 2 B

The State opened its case by leading evidence from Elliot Jombe. He told the court that on 31 January 2003 he was on duty at Pumula Service Station as the driver of a vehicle which was carrying cash. While he was still in front of the steering wheel he heard a gunshot. When he looked to check what was going on he saw one Trust Mbiva, who was a gunner on the date C in question, falling to the ground and the accused was holding him in the stomach region. When he attempted to drive away, the accused pointed a firearm at him and ordered him to come out of the vehicle, which he did as he feared for his life. He did not take a good look at his assailant as a firearm was being pointed at his cheek.

The next witness was Charles Mushongavhudzi. His evidence was that D on the day in question he went into one of the offices at Pumula Service Station, where he signed for money which he carried in boxes towards their waiting car. Before he got to the car, he heard a gunshot. He took a vantage position and saw a man, whom he now identified as the accused, standing at the driver's side. He described the man he saw as light in complexion and E wearing a boiler suit. It is further his evidence that he was positive about the identity of the person he saw as he was face-to-face with him.

Emmanuel Buru was the next witness to give evidence. His evidence was that on 31 January 2003 he was on duty at Pumula Service Station when Charles Mushongavhudzi came in to collect money. Immediately after he had gone out he heard a gunshot and observed a man getting into a vehicle F which was then driven away towards Magwegwe Township. He, together with others who were in the vicinity, gave chase in a motor vehicle but they did not catch up with it.

The next witness was Artwell Mpofu whose evidence was materially similar to that of other witnesses, in that on the day in question he and his colleagues G were collecting money from Pumula Service Station. He heard a gunshot and observed the now deceased falling down, After falling down, he observed the man whom he now identified as the accused removing the deceased's weapon from its belt (holster). He further observed the accused's colleague producing a firearm and pointing it at Elliot Jombe. At this juncture, people who were at the filling station started running away. It is further his evidence H

Cheda J

A that the person who was disarming the deceased was the same person who had shot the deceased.

Never Sibanda Chiweshe was next to give evidence. He was a member of Pumula/Magwegwe Neighbourhood Watch Committee together with the deceased. On the day in question he was sitting on the bench when the B deceased, who was driving his employer's pick up vehicle, arrived driving at a high speed and almost crushed him. He stood up and confronted him and they however resolved the matter. He then heard a sound, which he initially mistook for a tyre burst, but it turned out that it was in fact a gunshot. He together with others ran away and took refuge in the kiosk. He did not see the person who shot the deceased but saw a person producing a firearm C although he could not identify him.

Zivaku Harurovi was the last to give evidence with regards to counts 1 and 2. He told the court that he is a teacher by profession. On the morning of 31 January 2003 he was in the company of a three-year-old child and was driving towards Magwegwe North when he met a Mazda B2200 vehicle, D yellow in colour, with two suspects including the accused. The vehicle in question blocked his way and the two occupants came out armed with two pistols, which they pointed at him. They forced him to load the trunks from the Mazda B2200 into his vehicle. He further stated that one of the persons who robbed him of his car was short, stout and light in complexion. It is also his evidence that

during the robbery his assailants ordered him not to look E at them, at the same time threatening to shoot him if he did. He recovered his motor vehicle after the accused had been arrested. He also attended an identification parade but failed to identify his assailants.

During cross-examination, the defence counsel sought to highlight some discrepancy in his statement with regards to the sequence of events. His F explanation was that the statement was typed by the police and he did not check it before he signed it. The discrepancy was about the structure of the assailant who was talking to him, that is, whether he was slim or stout. The thrust of his evidence, however, is that he was robbed of his motor vehicle which was recovered and both murder and robbery were directly linked to the accused and his accomplice.

G **Count 3**

The next witness was Qinisani Sibanda. His evidence was that on 17 March 2003 he was coming from a wedding in Cowdray Park, in the company of a friend Shakes Moyo, at around 0130 hours. When they got to the Cowdray Park fly-over bridge they met two men who were wearing woollen hats H which covered their faces. These men told them that they were members

of the neighbourhood watch committee and started searching them. After A searching them they ordered them to run away and that they should not look back. While this was happening there was a white Peugeot 404 which was parked on the side of the road. This witness entered a ditch along the road and it is at that moment that two shots were fired at him, but they missed him. He then went to Luveve police station to make a report. He accompanied the B members of the police in search of the accused. While the search was going on he spotted the same vehicle he had seen earlier on, but it drove away. He later recovered two 9 mm spent cartridges at the place where he was fired at. He however could not identify his assailants as it was at night and their faces were covered with woollen hats.

The matter was postponed to 26 June 2009. When it resumed, the State C counsel submitted a letter dated the same day advising of the indisposition of one of the assessors, Mr Mtshena Sidile. He then applied that the trial proceeds without him and the application was granted and the trial proceeded in terms of s 58(1) of the High Court Act [*Chapter 7:06*].

Detective Inspector Philip Tada also gave evidence. It is his evidence D that, at the relevant period, he was the acting Officer-in-Charge Homicide Section, Bulawayo, when he received a report about the accused's arrest at Lupane, where he had been found with a pistol. The accused was charged with these crimes after the spent cartridges were recovered at Bellevue Spar, Bulawayo, where he was involved, and he confessed to his involvement in this crime. He was thus convicted and sentenced at the Bulawayo regional E court. On examination, the spent cartridges were found to match those that were recovered at Pumula Service Station where Trust Mbiva was shot dead. He further told the court that the accused was charged with these crimes after the ballistic expert had conducted his investigations and concluded that the cartridges matched those found at another scene where the accused F was involved.

The last witness was Mr Francis Cole, a retired firearms identification officer and as such he is qualified to give evidence on all aspects of holding firearms. At the relevant time he was based at the Police General Headquarters in Harare. He received exhibits from Luveve police station comprising of spent cartridges and a pistol. After carrying out his investigations, which included G the examination of cartridges under a comparison microscope, he found that the pistol that was fired at Pumula Service Station and at Bellevue Spar is the same weapon.

The State produced by consent a post-mortem report No. 85/74/2003, five forensic ballistic reports: reference nos, FB 39/03, FB 40/03, FB 89/2003, H

A FB 123/2003 and 147/2003, a Star pistol and other affidavits from the police in terms of the procedure of recovering of the weapon and post-mortem procedure carried out on the deceased.

The State then closed its case.

At the end of the State case, Mr *T Khumalo* for the accused applied for a B discharge. In support of this application he filed written submissions. It is his argument that with regards to the first count of murder, the witnesses contradicted themselves in that one told the court that the accused was standing at the driver's side, while the other stated that the accused was standing at the back of the truck. He also attacked the evidence of Zivuku Haruvori in that he failed to identify the accused as he stated that everything C happened very fast.

The evidence of Inspector Cole was also attacked as, according to him, the ballistic scientific examinations carried out were not conclusive.

According to him, *Mr Makoni* for the State failed to establish a *prima facie* case against the accused and hence the accused was entitled to an acquittal.

D On the other hand, the State has argued that Elliot Jombe, Emmanuel Buru, Artwell Mpofu, Never Sibanda, Zivaku Haruvori and Qinisani Sibanda were unable to identify the accused for various reasons, including limited time, the accused having given them his back, hidden faces and the speed with which the crimes were committed, coupled with the fact that the accused and his E accomplices were armed with firearms. It is only Charles Mushongavhudzi who gave a proper description of the accused's facial make-up.

The law

The court is legally entitled to discharge an the accused at the close of the State case if: F

(1) there is no evidence to prove an essential element of the offence: see *S v Ruzani* 1984(1) ZLR 334B'

(2) there is no evidence on which a reasonable court acting carefully might properly convict: see *R v Herholdt & Ors (3)* 1956 (2) SA 722 (W) and *A-G v Mzizi* 1991 (2) ZLR 32 1(S); G

(3) that the evidence adduced by the State is so manifestly unreliable that no reasonable court could safely act on it: see *S v Hartlebury & Anor* 1985 (1) ZLR 1 (H) at 3.

In fact, s 198(3) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] gives clear guidelines of this principle. The above legal position was followed in *S v Tsvangirai & Ors* 2003 (2) ZLR 88 (H), the decision of which was G in line with the decision in *S v Kachipare* 1998 (2) ZLR 271 (S). In fact in

---

this case the court went further and decreed that the trial court would have A no discretion but to acquit if there was no evidence upon which a reasonable court would convict the accused. It is my understanding, therefore, that it is to the credit of the accused that the court is not entitled to place the accused on his evidence on the face of inadequate evidence in the vain hope that the accused would entangle himself in his defence. It is the duty of the State to B place evidence of probative value before the court in order for the court to hold that the State has established a *prima facie* case against the accused.

Mr *Mabhande* for the State has submitted that it has failed to place evidence before the court which warrants placing the accused on his defence. His reason for this is that the five witnesses did not identify the accused. In addition, it is his further argument that the ballistic forensic witness, Mr C Cole, failed to incriminate the accused.

It is settled law that, at the conclusion of the State case, the court must discharge the accused if the State has failed to prove a *prima facie* case against the accused. This principle applies where the evidence of a fact is offered at that stage, even though its quality does not qualify to be the best evidence D in the circumstances. In other words, it is such evidence which ordinarily would not be adequate to convey proof of probative value.

The State need not prove the commission of a crime at this stage, but must establish evidence which will justify the transfer of onus to the accused of some wrongdoing on the ground of special knowledge of the incident: see E *Union Government (Minister of Railways) v Sykes* 1913 AD 156 at 173 where Innes J (as he then was) stated:

> "The important point is that less evidence will suffice to establish a *prima facie* case where the matter is peculiarly within the knowledge of the opposite party than would under other circumstances be required. Thus in *Huggins v Ward* LR 8 QB 321 the appellant had been charged with contravening a statutory order F which compelled every person having in his possession an animal affected with a contagious disease to

notify it with all practicable speed to a police constable. All that was proved by the prosecution was that the appellant to his own knowledge have five sheep so affected in his possession. Upon a special case stated by the justices the court held that the *prima facie* evidence thus given threw upon the appellant the onus of proving that he had duly notified the police." G

It is in the same case that the court laid down the principle that where the truth of a party's allegations lie within the knowledge of his opponent the burdening of disproving it lies upon the latter. The correct legal position, therefore, as laid down by the authorities, is that, at the conclusion of the State case, the State should have placed before the court *prima facie* proof of the commission of the offence which implicates the accused to such a H

2012 (1) ZLR p391

Cheda J

A degree as to call for an answer. This principle was clearly laid down in *R v van Der Linde & Anor* 1933 OPD 5 at 8. In that case de Villers JP (as he then was) stated:

"As was pointed out in *R v van der Vyver* 1932 (2) PH H109, the law is well-established that the Crown is absolved from the necessity of bringing evidence B to prove guilt 'beyond a reasonable doubt' in cases where the facts are in the peculiar knowledge of the accused, who could readily offer an explanation if he were innocent. In such cases the Crown need merely, in the first instance, bring *prima facie* proof implicating the accused to such a degree as to 'call for an answer' If he then makes no answer, or his answer is not believed, the Crown's *prima facie* proof becomes 'proof beyond a reasonably doubt'. This rule is well known, and the only difficulty is to define in general terms the degree of C implication which in law 'calls for an answer'."

See also *R v du Plessis* 1942 ED 9 at 11. What comes out clearly from these authorities is that the State needs to place evidence before the court which evidence requires reasonable explanation from the accused excusing or justifying his conduct. Such conduct would only be within the accused's D knowledge and, therefore, it then becomes the accused's duty to explain his conduct. He can only do so in his evidence-in-chief, which should be tested by cross-examination by the State.

In casu the State led evidence about the commission of these crimes. The accused was identified by one of the witnesses. Exhibits 5, 6, 8, and 9 E contain evidence that the pistol used to fire at Bellevue Spar is linked to the pistol used at Pumula Service Station. The accused did not challenge this evidence as these exhibits were admitted by consent. The defence did not cross-examine on them as it is required to have done: see *R v Ebrahim and Heskiah* 1921 TPD 305 and *R v Chaitkin* 1940 NPD 133.

F In my opinion, on the basis of the authorities cited above, it is clear that in circumstances where the accused fails to offer an explanation, or offers a false explanation, any reasonable court should place him on his defence.

The accused is therefore expected to give a reasonable explanation of his conduct in relation to the evidence placed before the court at this juncture G if he is innocent.

I do not believe that it was proper for the State to argue that there is no *prima facie* evidence which it had laid before the court when there are gaps which need to be explained by the accused himself as the knowledge of the commission of the offences where he is implicated are stuck in him and H him alone.

2012 (1) ZLR p392

Cheda J

In light of the above reason, I am of the opinion that the State has placed A sufficient evidence before the court and therefore, it has established a *prima facie* case against the accused and an explanation is expected from him.

The application for a discharge is accordingly dismissed.

Criminal Division, Attorney General's Office, applicant's legal practitioners B

Khumalo and company, respondent's legal practitioners C

© 2015 Juta and Company (Pty) Ltd.

Document 47 of 75

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2012/Volume 1/S v NDLOVU 2012 (1) ZLR 393 (H)

S v NDLOVU 2012 (1) ZLR 393 (H)

Citation	2012 (1) ZLR 393 (H)
Case No	Judgment No. HB-104-12
Court	High Court, Bulawayo
Judge	Kamocha J
Heard	12 April 2012
Judgment	12 April 2012
Counsel	Detail not supplied
Case Type	Criminal review
Annotations	No case annotations to date

Flynote

C **Criminal procedure** *(sentence) – offences under Criminal Law Code – rape – appropriate sentence – ordinarily should not exceed sentence for murder or culpable homicide – when maximum sentence might be appropriate*

Headnote

D The maximum sentence for rape is life imprisonment, but that is reserved for the worst examples of the crime. Where the court considers that the offence does not warrant a sentence of imprisonment for life, the sentence it does imposed must not be out of step with sentences which are expected to be imposed for that type of offence. In cases of murder with actual intent, where the court is of the opinion that there are extenuating circumstances, the convicted person is usually sentenced to imprisonment E for a period ranging from 21 years' imprisonment upwards. For murder with constructive intent, where there are extenuating circumstances, the sentence is usually between 14 years and 20 years. In the bulk of cases of culpable homicide handled by the regional courts, where there has been violence causing death, the sentences, depending on the circumstances F of the case, range from 18 months to ten years for the bad cases. Rape is a terrible crime. It is traumatizing, dehumanizing, humiliating and abominable; but so are murder and culpable homicide involving causing death violently. A single count of rape is should attract a sentence from five years up to ten years. Only the rare, very bad, cases of rape should attract sentences beyond ten years and the worst ones should attract G imprisonment for life.

Legislation considered

Criminal Law (Codification and Reform) Act [*Chapter 9:23*], ss 47, H 49 & 65

Kamocha J

Judgment

Kamocha J: The 43-year-old accused was charged with five counts of A raping his biological daughters aged seven, four and four years respectively. The two four-year-olds are presumably twins. On arraignment the accused pleaded not guilty and claimed that his wife could have caused the children to fabricate the allegations in order to fix him. He was, however, convicted in respect of all the five counts at the end of the trial. B

The accused was then sentenced to 20 years' imprisonment in respect of each of the five counts. That made a total of 100 years' imprisonment. The sentence in count one was made to run concurrently with the sentence on count four, presumably because they involved the raping of the same complainant. Similarly, the sentence on count two was ordered to run concurrently with the one of count five. A further 20 years' imprisonment was suspended on C the customary conditions of future good behaviour. That then left the accused with a total effective sentence of 40 years' imprisonment.

In reply to the query raised by this court in respect of the two counts where he was alleged to have called one complainant at a time into the kitchen hut and raped her during the absence of the mother who had gone to the fields, D the trial magistrate conceded that no evidence had been led in respect of those counts and the convictions on those counts are improper. The concessions were properly made. The convictions on those two counts shall accordingly be set aside.

The convictions on the remaining three counts are proper and nothing turns on them. The sentences are, however, a cause for concern. The accused was E sentenced to 20 years' imprisonment in respect of each count, giving a total of 100 years' imprisonment. The convictions on two counts shall be set aside but that still leaves three convictions in respect of which the accused raped each child once. Each count attracted a sentence of 20 years' imprisonment of which a sentence of 20 years was suspended for a period of five years on F the customary conditions of future good behaviour.

The trial court found the following aggravating factors in this matter: the accused is aged 43 years; he raped his own three children aged seven years and twins aged four years; the seven-year-old defecated in agony during the rape; he struck one of the four-year-olds with an open hand when she cried out in pain as he ravished her; the accused was HIV positive at the time he G raped the children; and above all that, the sexual attack was unprotected, thereby exposing the children to infections with sexually transmitted diseases and HIV.

The rapes were indeed very serious and abominable. But were these the worst types of rape? If they had been the worst type they would have attracted H

Kamocha J

A a sentence of imprisonment for life. Section 65(1) provides that a person guilty of rape shall be liable to imprisonment for life or any shorter period.

Once a court has arrived at the conclusion that the offence does not warrant a sentence of imprisonment for life, the shorter sentence must not be out of step with sentences which are expected to be imposed for that type of offence.

B The worst crime under crimes against the person is the crime of murder. Where a person is found guilty of murder, he or she shall be sentenced to death unless he or she was under the age of 18 years at the time of the commission of the crime or the court holds that there are extenuating circumstances in the case, in which event the convicted person shall be liable to imprisonment for life or any shorter period. See s 7 of the Criminal Law (Codification and C Reform) Act [*Chapter 9:33*].

The trend, where the convicted person intended to kill the other person (murder with actual intent) but the court is of the opinion that there are extenuating circumstances, is that the convicted person is usually sentenced to imprisonment for a period ranging from 21 years' imprisonment upwards. D While a person who causes the death of another person realizing that there is a real risk or possibility that his or her conduct may cause death, and continues to engage in that conduct despite the risk or possibility (murder with constructive intent) shall also be sentenced to death, unless the court finds extenuating circumstances in the case. In such a case the sentence is usually between 14 years and 20 years.

E In terms of s 47(3) of the Act a person convicted of attempted murder or incitement or conspiracy to commit murder shall be liable to be sentenced to death or imprisonment for life or any shorter period. The shorter period rarely exceeds 10 years' imprisonment.

Similarly, in terms of s 49 of the Act a person who is guilty of culpable F homicide shall be liable to imprisonment for life or any shorter period. The shorter periods rarely exceed 10 years' imprisonment. The rare ones would be verging on the crime of murder. The bulk of the cases of culpable homicide are handled by the regional courts. The cases involve the use of violence in causing death. Most of the sentences, depending on the circumstances of the case, range from 18 months to 10 years for the bad cases.

G Why, then, should the shorter period in the crime of rape attract a sentence of 20 years? Rape is indeed a terrible crime. It is traumatizing, dehumanizing, humiliating and abominable, but so are murder and culpable homicide involving causing death violently.

It seems to me that a sentence of 20 years on a single count of rape is H completely out of step with sentences imposed in respect of other crimes

---

Kamocha J

against a person outlined above. It seems to me that rape should also attract A a sentence from 5 years up to 10 years. Only the very bad rare cases of rape should attract sentences beyond 10 years and the worst ones should attract imprisonment for life.

Since the court was initially dealing with five counts of rape it should have borne in mind the cumulative effect of the sentences on the five counts and B imposed a sentence which is not so excessive as to induce a sense of shock.

In the result the sentences imposed by the trial court in respect of each of the three counts are hereby set aside and are substituted with the following:

Count 1: 6 years' imprisonment

Count 2: 6 years' imprisonment C

Count 3: 6 years' imprisonment

Total: 18 years' imprisonment

CHEDA J agrees D

© 2015 Juta and Company (Pty) Ltd.

Document 48 of 75

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2012/Volume 1/ZIMBABWE OPEN UNIVERSITY v MAGARAMOMBE & ANOR 2012 (1) ZLR 397 (S)

ZIMBABWE OPEN UNIVERSITY v MAGARAMOMBE & ANOR 2012 (1) ZLR 397 (S)

Citation	2012 (1) ZLR 397 (S)
Case No	Judgment No. S-20-12
Court	Supreme Court, Harare
Judge	Chidyausiku CJ
Heard	22 February 2012; *CAV*

Judgment 16 April 2012

Counsel *T Mpofu*, for the applicant
T Mberi, for the first respondent
No appearance for the second respondent

Case Type Chamber application

Annotations No case annotations to date

Flynote

Employment – *appeal – against arbitrator's award – grant of stay of execution pending appeal – subsequent registration of award with High Court – effect*

Headnote

D The applicant formerly employed the first respondent, whose contract of employment the applicant terminated. The first respondent disputed the lawfulness of the termination and the matter was referred to arbitration. The arbitrator decided in favour of the first respondent and ordered E reinstatement or damages in lieu thereof. The applicant appealed to the Labour Court in terms of s 98(10) of the Labour Act [*Chapter 28:10*]. It also applied to the Labour Court in terms of s 92E(3), as read with s 89(1)(a), of the Act for an order suspending the arbitral award pending the hearing of the appeal. The first respondent decided to accept damages in lieu of reinstatement and requested the arbitrator to quantify the damages F due. The applicant appealed against the award of damages and also applied for a review of the award. The following day the first respondent applied in the High Court for registration of the arbitral award. The first respondent sought execution of the award. The High Court dismissed an urgent application to stay the execution on the grounds that the matter G was not urgent and that the execution of the arbitral award could not be stayed because the award, by being registered, had become a High Court judgment whose execution could not be suspended by the Labour Court, a court inferior to the High Court.

The applicant noted an appeal against the dismissal. It also brought a chamber application to have the appeal heard as a matter of urgency and for a H stay of the sale in execution of property which had been attached. The

Chidyausiku CJ

first respondent argued that the matter was not urgent and that there A was no valid appeal because the High Court's order was interlocutory.

Held, that while the High Court's ruling as to urgency was interlocutory, the ruling that the Labour Court could not interfere with the decision of the High Court was not. Leave to appeal was not required.

Held, further, that the applicant had a *prima facie* right to stay of execution B pending the determination of the appeal. If the appeal court found in favour of the applicant on the issue of whether the Labour Court's order suspending execution of the judgment was *intra vires*, the applicant would have a clear right or entitlement to a stay of execution of the arbitral award pending the hearing of the appeal by the Labour Court.

Held, further, that in any event, the applicant had very good prospects of C success on appeal. Section 98 of the Act gives the applicant the right of appeal against the determination of the arbitrator on a question of law. Having noted the appeal, the applicant also applied to the Labour Court for a stay of execution of the arbitral award. The Labour Court granted the application, as it was entitled to do. It was questionable whether the subsequent registration of the arbitral award with the High Court had D the effect of erasing or rendering null and void the order of the Labour Court suspending execution of the award.

Case referred to

Dhlodhlo v Deputy Sheriff for Marondera & Ors 2011 (1) ZLR 416 (H) E

Legislation considered

Labour Act [*Chapter 28:01*], ss 89(1)(a), 92E(3) & 98(1)

Case information

T Mpofu, for the applicant F

T Mberi, for the first respondent

No appearance for the second respondent

Judgment

Chidyausiku CJ: This is a chamber application in which the applicant, the Zimbabwe Open University (hereinafter referred to as "the University") seeks the following relief – G

(a) an order that the appeal SC 25-12 be heard on an urgent basis; and

(b) a stay of the sale in execution of the University's property, attached in pursuance of an arbitration award it has appealed against.

The first respondent is Gideon Magaramombe (hereinafter referred to as "Magaramombe"). The second respondent is the Deputy Sheriff of Harare. H

Chidyausiku CJ

A Magaramombe was formerly employed by the University as a lecturer. The University terminated his contract of employment. He now disputes the termination of employment and contends it was unlawful. The disputed termination was referred to an arbitrator for determination. The dispute was determined in favour of Magaramombe and the arbitrator ordered that he be B reinstated or that alternatively he be paid damages in lieu of reinstatement.

The University appealed to the Labour Court against the arbitrator's decision in terms of s 98(10) of the Labour Act [*Chapter 28:01*] (hereinafter referred to as "the Act"). The University also applied to the Labour Court for an order suspending the arbitral award pending the hearing of the appeal. That C application was made in terms of s 92E(3) as read with s 89(1)(a) of the Act.

Magaramombe elected to be paid damages in lieu of reinstatement and requested the arbitrator to quantify the damages due to him. During the quantification proceedings, the University unsuccessfully applied for the stay of proceedings, on the grounds that it had applied to the Labour Court for D the suspension of the arbitral award pending the appeal. The application for the stay of proceedings was turned down by the arbitrator, on the ground that an appeal against an arbitral award and an application for interim relief do not have the effect of suspending an arbitral award. The arbitrator thereafter awarded Magaramombe the sum of $77 302 as damages.

E On 26 September 2011 the University appealed against the award of damages and also applied for a review of the award. On 27 September 2011 Magaramombe applied to the High Court for registration of the arbitral award. The University did not oppose the application for registration, as it was of the view that there was no need to oppose the application for registration since it had already applied for the suspension of the award to the Labour F Court. The University assumed that the execution of the award was dependent on the outcome of the application to the Labour Court. The Labour Court granted the University a stay of execution of the arbitral award pending the hearing of the appeal on 3 November 2011. The High Court registered the arbitral award on or about 14 November 2011.

G After the registration of the arbitral award with the High Court, Magaramombe sought to execute the award despite the suspension of the award by the Labour Court. The University launched an urgent application to stay the execution to the High Court. The basis of the urgent application was that the arbitral award that was executed had been suspended by the Labour Court pending H the hearing of an appeal against that award by the Labour Court. The High

Chidyausiku CJ

Court dismissed the chamber application *. The University noted an appeal A against the dismissal. The University now applies in chambers for the appeal to be set down on an urgent basis and for an order staying execution pending the determination of that appeal.

In dismissing the urgent application the learned judge had this to say at pp 4-5 of the judgment: B

> "The last preliminary point was that the matter was not urgent. … Ms *Mberi* submitted that the applicant sat on its laurels and only acted when the day of reckoning was at hand. She contended that the applicant should have acted on 27 November 2011 when it was served with the notice of registration of the award. C
>
> Mr *Mpofu* made contradictory submissions on the failure to oppose registration. The first was that the noting of (the) appeal in the Labour Court against the arbitral award automatically suspended the award. The second was that it was hopeless to oppose without first obtaining interim relief from the Labour Court stopping the implementation of the arbitral award.
>
> If the applicant believed that it was on (a) firm footing on the first ground, then D all the more reason for it to oppose registration on that point. But as events that transpired after it obtained interim relief shows (*sic*), the applicant believed that implementation could only be stayed by obtaining relief from the Labour Court.
>
> Mr *Mpofu* did not dispute Ms *Mberi*'s submission that the applicant was aware of the judgment of *Dhlodhlo supra*, *that the Labour Court judgment could not stop a High Court order because the latter is a court of superior jurisdiction.* E … I agree with Ms *Mberi* that at the very least, with this foreknowledge, the applicant, knowing that the first respondent was seeking registration of the arbitral award, should have diligently searched for the outcome of the application especially after it received the interim relief it sought in order to forestall it. It was aware that the purpose of seeking registration was to execute. Armed with the interim order, the applicant was duty bound to either oppose the registration, F which was granted on 15 November 2011, or to file an application such as the present one soon thereafter.
>
> I find that it waited until the day of reckoning precipitated by the attachment of 26 January 2011 (2012?) to stay the execution. It did not act with diligence. It sat on its laurels and did not act when the time to act presented itself."

My understanding of the above excerpts of the judgment is that the court G *a quo* made the following two determinations –

(a) the matter was not urgent; and

Chidyausiku CJ

A (b) the execution of the arbitral award could not be stayed because the award had become a High Court judgment whose execution cannot be suspended by the Labour Court.

In this chamber application Mr *Mpofu*, for the University, essentially argued that execution of the award of the arbitrator was suspended by the Labour Court, B which preceded the registration of the award in the High Court. Consequently, Magaramombe could not execute the award, despite its registration with the High Court, as the execution of the award had been suspended by the Labour Court by the time it was registered. In other words, the award that was registered was a suspended award which could not be executed.

Ms *Mberi*, on the other hand, initially raised two preliminary points. She C submitted that the Supreme Court had no jurisdiction to hear the chamber application because there was no valid appeal before the Supreme Court. She argued that the court *a quo* simply ruled that the matter was not urgent and such ruling was interlocutory. She contended that the University had not obtained the leave of the court *a quo* to appeal. Leave to appeal not having D been sought and granted, there can be no valid appeal before the Supreme Court. It was also her submission that, on the authority of *Dhlodhlo v Deputy Sheriff for Marondera & Ors* 2011 (1) ZLR 416 (H), even if the order issued by the Labour Court had stayed execution of the award, such an order was of no force and effect because the award had since been registered with the High Court and thus became a High Court order which cannot be suspended E by an order of an inferior court, namely the Labour Court.

Kudya J in the court *a quo* was probably correct in concluding that the University had authored the urgency of the matter before him by delaying the launching of the urgent application until the last minute. I also accept the submission of Ms *Mberi* that a determination of whether or not a matter F is urgent is interlocutory. An appeal against such a determination would certainly require the leave of the court *a quo*. If such leave were granted, the superior court can only interfere with such a ruling on the basis of a misdirection or gross unreasonableness.

In casu, as I have already stated, the learned judge went beyond ruling on the urgency or otherwise of the matter. The court *a quo* determined that G the execution of the arbitral award could not be stayed on the basis of a suspension order issued by the Labour Court. The learned judge reasoned that the Labour Court was inferior to the High Court. Consequently, the Labour Court could not suspend a judgment of the High Court. He concluded that once a judgment is registered in the High Court it becomes a judgment of H the High Court and cannot be interfered with by the Labour Court.

Chidyausiku CJ

The determination by the court *a quo* is not interlocutory. It is a definitive A and final determination and therefore appealable by the University without the need for leave of the court *a quo*. On this basis I am satisfied that the Supreme Court is properly seized with the matter and that the relief sought in this chamber application relates to a matter with which the Supreme Court is properly seized. B

In this chamber application, as I have already stated, the University seeks the relief that the appeal be set down on an urgent basis and that the execution of the arbitral award be stayed pending the hearing of the appeal. Two issues fall for determination in this chamber application: (1) whether or not this matter should be set down on an urgent basis; and (2) whether or not the University is entitled to the interim relief of a stay of execution of the arbitral C award pending the determination of the appeal.

I will deal with the second issue first, namely the entitlement of the University to the interim relief of a stay of execution. The factors to be taken into account in considering the grant of interim relief are now well settled. These are –

(1) whether or not the party seeking the relief has a *prima facie* right, *in casu*, D whether the University has a *prima facie* right to stay the execution of the sale of the attached property pending the determination of the appeal;

(2) whether or not the applicant, in this case the University, will suffer irreparable harm if execution of the arbitral award is not stayed and the appeal succeeds; and E

(3) the balance of convenience.

Dealing first with the issue of whether or not the University has a *prima facie* right to the stay of execution pending the determination of the appeal, in effect the University is appealing against the court *a quo's* determination that the Labour Court's order suspending execution of the arbitral award is F *ultra vires* because the Labour Court cannot interfere with the process of a superior court. Whether or not the court *a quo* was correct in this conclusion is a matter that the appeal court will have to determine. In the event of the Supreme Court determining that issue in favour of the University, the University will have a clear right or entitlement to a stay of execution of the arbitral award pending the hearing of the appeal by the Labour Court. On G this basis alone, the University has established a *prima facie* case.

In my view, the University has not only established a *prima facie* case but has very good prospects of success on appeal for the following reasons. The University appealed against the arbitral award in terms of s 98(10) of the Act. Section 98(10) of the Act provides as follows: H

Chidyausiku CJ

> A "**98 Effect of reference to compulsory arbitration under Parts XI and XII**
>
> (10) An appeal on a question of law shall lie to the Labour Court from any decision of an arbitrator appointed in terms of this section."

Section 98 confers on the University the right of appeal against the determination of the arbitrator on a question of law. Having noted an appeal B against the arbitral award, the University also applied to the Labour Court, in terms of s 92E(3), as read with s 89(1)(a) of the Act, for the stay of execution of the arbitral award. Section 93E(3), as read with s 89(1)(a), of the Act provides as follows:

> "**92E Appeals to the Labour Court generally** C
>
> (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."

And:

"**89 Functions, powers and jurisdiction of Labour Court**

(1) The Labour Court shall exercise the following functions – D

(a) hearing and determining applications and appeals in terms of this Act or any other enactment. …"

Quite clearly the Act confers on the University the right to apply for the suspension pending appeal of the arbitral award in terms of the above section.

On 3 November 2011 the Labour Court granted the University a stay of execution of the arbitral award. The Labour Court, in doing so, was *intra vires* E the above cited provisions of the Act. On 14 November 2011 the High Court, upon application by Magaramombe, registered the arbitral award. Upon the registration of the arbitral award, the award became a judgment of the High Court. See s 92B (3) and (4) of the Act. I entertain serious doubts as to whether the mere registration of the arbitral award with the High Court F has the effect of erasing or rendering null and void the prior order of the Labour Court suspending execution of the arbitral award. That, however, is an issue that will be determined by the appeal court.

On the papers before me it has been established that, in the event of the University being successful on appeal, Magaramombe will not be able to restore the *status quo ante*. On this basis I am satisfied that the University G will suffer irreparable harm if interim relief is not granted.

Lastly, the balance of convenience is slightly in favour of the University, Magaramombe is presently employed and will not be seriously disadvantaged by the delay of the sale in execution of the University's property.

An order leaving the property under attachment but staying execution would H meet the justice of this case. Accordingly, I order that the property belonging

---

Chidyausiku CJ

to the University remains under attachment pending the determination of the A appeal. The balance of convenience also favours that the University remains in possession of the attached property pending the determination of the appeal.

Finally, the grant of interim relief removes the urgency of set down. There is no indication that the papers in this matter are ready for the hearing of the appeal. Accordingly, I will not grant that relief, except to direct that the B matter be set down as soon as the record is ready.

Costs will be costs in the cause. Accordingly, the application to the extent stated above is granted.

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

Hogwe, Dzimirai & Partners, first respondent's legal practitioners D

* See *Zimbabwe Open University v Magaramombe & Anor* HH-61-12, a judgment of Kudya J, delivered on 1 February 2012. – *Editor.*

© 2015 Juta and Company (Pty) Ltd.

Document 49 of 75

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2012/Volume 1/NYIKADZINO v TSVANGIRAI 2012 (1) ZLR 405 (H)

NYIKADZINO v TSVANGIRAI 2012 (1) ZLR 405 (H)

Citation 2012 (1) ZLR 405 (H)

Case No	Judgment No. HH-166-12
Court	High Court, Harare
Judge	Patel J
Heard	25 April 2012
Judgment	25 April 2012
Counsel	Detail not supplied
Case Type	Civil review
Annotations	No case annotations to date

Flynote

C **Court** – *customary law court – process – where and by whom summons must be served – service must be by messenger of court and at place within court's jurisdiction – any other service fatally defective*

Court – *judicial officer – conduct – presiding officer at customary law court cited as plaintiff in summons – impermissibility of such action – process* D *fundamentally flawed*

Customary law – *court – customary law court – jurisdiction – powers of court limited by Customary and Local Courts Act [Chapter 7:05] – matters over which court has jurisdiction – venue of court – court only entitled to sit at place fixed in terms of Act – review of proceedings by High* E *Court – no interference of magistrate's decision where proceedings are substantially correct*

Customary law – *court – customary law court – process – where and by whom summons must be served – service must be by messenger of court and at place within court's jurisdiction – any other service fatally defective*

F **Maxims** – *nemo judex in sua causa*

Headnote

An action was brought against the defendant, the Prime Minister, arising from a highly publicised customary law marriage that occurred in November 2011. It was claimed that the marriage was taboo because it took place in G November, a "sacred" month under customary law. One Chief Negomo personally served summons on the defendant in Harare, requiring him to attend his court at a named business centre. The chief himself was cited as the plaintiff in the summons. Although the defendant's lawyers questioned the chief's authority and jurisdiction on various grounds, the chief proceeded to hear the matter, in which another person was now H named as plaintiff. This person claimed two bovines and two sheep

2012 (1) ZLR p406

Patel J

from the defendant, on the grounds that the defendant had got married A in November, which was taboo, the spirits needed appeasement and the rains had failed to fall. The chief found against the defendant, who was in default. A local magistrate confirmed the proceedings, but when the defendant's lawyers wrote requesting that the matter be reviewed, the provincial magistrate found several flaws in the proceedings, and initially B directed that the judgment of the local court be set aside. Subsequently, realising that another magistrate had confirmed the proceedings, he referred the matter to the High Court. The defendant's lawyers raised several issues about the chief's authority and jurisdiction: (i) that the summons that he issued cited him as both presiding officer and plaintiff; (ii) that service of the summons was effected unlawfully outside his area C of jurisdiction; (iii) that he was not authorised to convene a local court and the business centre was not a designated court; and (iv) that he did not have jurisdiction over the defendant by dint of residence, consent or cause of action.

Held, that the Provincial Magistrate correctly annulled the proceedings of the court. In particular, it was quite wrong that Chief Negomo, who had D originally been cited as the plaintiff therein, was the very person who had adjudicated in those proceedings. The citation in the summons of the plaintiff and the presiding officer as being one and the same person was an affront to every acceptable notion of justice and procedural fairness. Indeed, it hearkens back to feudal forms of justice that have no place E whatsoever in any modern legal system. It should be blindingly obvious to any judicial officer that he cannot institute a claim or complaint and also adjudicate it himself. It followed that the summons issued by the chief was fundamentally flawed.

Held, further, that it was clear from r 4 of the Local Courts Rules 1991 (SI 115 of 1991) that a summons may only be served by the messenger of F court, and not by the presiding officer; and that the messenger must serve the defendant (or other responsible person) at his residence or place of work only within the area of jurisdiction of the court. Service of the summons was thus irregular and fatally defective, and the defendant could not be held to have been "in wilful default" as was determined G and recorded by the chief's court.

Held, further, that another reason for setting aside the proceedings was the fact that the matter had been heard at a place not designated in terms of the Customary Law and Local Courts (Community Courts) Warrant 2002. The siting of the court was no unimportant technicality, because the public is entitled to know precisely where to attend court sessions and the H

A warrant is also designed to ensure that the *situs curiae* was appropriate and consisted with the dignity and decorum of the judicial office.

Held, further, that the procedure adopted by the provincial magistrate was substantially correct, notwithstanding his omission to direct Chief Negomo to submit a report and to provide the parties with an opportunity of making representation to him in terms of s 25 of the Customary Law B and Local Courts Act [*Chapter 7:05*]. There was no point, however, in directing the provincial magistrate to review the proceedings of the local afresh. No report or representations could possibly alter the eventually outcome of the matter and in the interests of expediency or expedition, his decision should be upheld.

C *Held*, further, that in terms of s 15 of the Act, the criteria for founding the jurisdiction of a local court are (a) normal residence by the defendant within the area of jurisdiction of the court; (b) that the cause of action or any element thereof arose within that area; or (c) the defendant's consent to jurisdiction. These criteria are clearly disjunctive and not conjunctive, so that the establishment of any one of them suffices to D found jurisdiction. Two of these criteria were absent *in casu* but there was nothing in the papers relating to the origin of the cause of action.

Legislation considered

Customary Law and Local Courts Act [*Chapter 7:05*], ss 10, 12(2), 15 & 25

E Customary Law and Local Courts (Community Courts) Warrant 2002 (SI 95 of 2002), ss 2 & 3

Local Courts Rules 1991 (SI 115 of 1991), r 4

Judgment

Patel J: The Provincial Magistrate for Mashonaland Central, sitting at F Bindura magistrates court, has referred this matter to the Registrar for review and directions. The plaintiff is cited as Morris Nyikadzino of Shenjere Shrine, Mazowe. However, his specific role and standing in the matter are not clear. The defendant is the Hon Richard Morgan Tsvangirai, the Prime Minister of Zimbabwe. The background to the case is as follows.

G The claim against the defendant arises from a highly publicised customary law marriage that occurred in November 2011. It was claimed that the marriage was taboo because it took place in *mwedzi we mbudzi*, the sacred month of November. On 7 December 2011, Chief Negomo (Luscious Chitsinde) personally served summons on the defendant in Harare, requiring him to attend his court at Gweshe Business Centre, Mazowe, on 10 of December H 2011. Chief Negomo himself was cited as the plaintiff in the summons. On 9

Patel J

December 2011, the defendant's lawyers (Dube, Manikai & Hwacha) wrote to A Chief Negomo, questioning his authority and jurisdiction on various grounds.

Notwithstanding this challenge, Chief Negomo proceeded to hear and deal with the case in his community court on 10 December 2011. The record of proceedings cites Morris Nyikadzino as the plaintiff, claiming two bovines and two sheep from the defendant. The grounds for this claim were that the B defendant "married Locardia Karimatsenga in the sacred month of November which is taboo, the spirits need appeasement, the rains have failed to fall". Judgment was granted by default and the defendant was ordered to pay "two bovines and two sheep, ten metres white cloth and one ball of snuff (*chambwa*) for spiritual appeasement and land cleansing". C

This default judgment was confirmed, without any detail or elaboration, by a magistrate in Bindura on 30 December 2011. On 22 February 2012 the defendant's lawyers wrote to the provincial magistrate in Bindura, attaching their letter of 9 December 2011 and requesting that the judgment of Chief Negomo's court be reviewed in terms of s 25 of the Customary Law and Local Courts Act [*Chapter 7:05*]. On 2 March 2012 the provincial magistrate D reviewed the matter and found that there were several flaws in the proceedings of the local court. He then directed that its judgment be set aside. He further directed that the correct plaintiff sue in a court of competent jurisdiction and that the matter be heard *de novo* in that court. Subsequently, he realised that the same judgment had previously been confirmed by his brother magistrate. E He now requests that the matter be reviewed by this court.

The grounds advanced by the defendant's lawyers for impugning Chief Negomo's authority and jurisdiction in the matter are: (i) that the summons that he issued cites him as both presiding officer and plaintiff; (ii) that service of the summons was effected unlawfully outside his area of jurisdiction; F (iii) that he is not authorised to convene a local court and Gweshe Business Centre is not a designated court; and (iv) that he does not have jurisdiction over the defendant by virtue of residence, consent or cause of action.

Governing statutory provisions

Section 10 of the Customary and Local Courts Act [*Chapter 7:05*] establishes G local courts as follows:

> "(1) The Minister may, by warrant published in a statutory instrument, constitute –
>
> (a) primary courts; and
>
> (b) community courts;
>
> for such areas as may be specified in the warrants. H

Patel J

> A (2) A local court constituted in terms of subsection (1) shall be a court of law and, within the area specified in the warrant by which it is constituted, shall exercise so much of the jurisdiction conferred by this Act as is specified in the warrant.
>
> (3) The Minister may, by statutory instrument, amend or revoke any warrant referred to in subsection (1)."

B The composition of community courts is prescribed in s 11(2) of the Act:

> "Every community court shall be presided over by a chief or other person who –
>
> (a) shall be appointed to his office by the Minister or by a designated officer authorised thereto by the Minister; and
>
> (b) may be removed from his office by the Minister or by a designated officer authorised thereto by the Minister."

C Section 15 of the Act spells out the jurisdiction of local courts as follows:

> "Subject to this Act and any other enactment and in particular to section *sixteen*, a local court shall have jurisdiction to hear, try and determine any civil case in which customary law is applicable where –
>
> (a) the defendant is normally resident within the area of jurisdiction of the D court; or
>
> (b) the cause of action or any element thereof arose within such area; or
>
> (c) the defendant consents to the jurisdiction of the court."

Section 19(1) provides for the summoning of parties and witnesses:

"Subject to this Act, every local court shall have the power to summon before it E any person who is–

(a) the defendant in a case before that court; or

(b) required to give evidence before that court."

Part VI of the Act deals with appeals from and the review of decisions of local courts. More specifically, s 25 relates to reviews by magistrates. Subsections F (1) and (3) provide as follows:

"(1) Where it comes to the notice of a magistrate that a local court within his province may have given a judgment or order which it was not competent to give, he shall direct the local court to refer the case to him, together with such report thereon as the person presiding over the community court or primary court may wish to give. G

(3) Where a case has been referred to him in terms of subsection (1) or (2), a magistrate may, if he considers that –

(a) the local court concerned had no jurisdiction but another local court does, annul the proceedings and direct the case to be heard, *de novo*, before such other local court; H

(b) the local court concerned had jurisdiction –

Patel J

(i) set aside the judgment or order concerned and return the case for A further hearing with such advice or directions as appear to him to be necessary or desirable; or

(ii) set aside the judgment or order concerned and direct the case to be heard, *de novo*, before the same or another local court with such advice and directions as appear to him to be necessary or desirable; or

(iii) confirm the judgment or order concerned: B

Provided that ……;

(c) no local court has jurisdiction, annul the proceedings:

Provided that a magistrate shall not exercise the powers conferred upon him by this subsection in any case –

(a) unless the parties concerned have been afforded a reasonable opportunity C of making representations as to the proposed exercise of any such powers; or

(b) which was determined more than twelve months prior to the case being referred to him."

Validity of summons

As I have already indicated, the summons *in casu* cites Mambo Negomo D as the plaintiff, while, in the record of proceedings, Morris Nyikadzino is named as the plaintiff. There is nothing in the record to explain this change in identity of the plaintiff. In any event, and more critically, the citation in the summons of the plaintiff and the presiding officer as being one and the same person is an affront to every acceptable notion of justice and procedural E fairness. Indeed, it hearkens back to feudal forms of justice that have no place whatsoever in any modern legal system. It should be blindingly obvious to any judicial officer that he cannot institute a claim or complaint and also adjudicate it himself. It follows that the summons issued by Chief Negomo is fundamentally flawed. For this reason alone, the proceedings pursuant to that summons constitute a nullity and must be treated as being void *ab* F *initio*. Nevertheless, for the sake of completeness and future guidance of incumbents of all local courts, I think it necessary to consider and evaluate all the other aspects of this case.

Service of summons

The defendant's lawyers aver that the summons in this matter was served G on the defendant at Charter House in Harare by Chief Negomo himself accompanied by others. In terms of r 4(1) of the Local Courts Rules 1991 (SI 115 of 1991), a summons must be drawn up by the presiding officer and delivered to the messenger for service upon the defendant. Rule 4(2) requires the messenger to serve the summons on the defendant or any responsible member of his household. By virtue of r 4(3): H

Patel J

A "A messenger shall be competent to serve a summons only upon a defendant who resides or works within the area of jurisdiction of the court."

Two things emerge very clearly from these rules. Firstly, a summons may only be served by the messenger of court, and not by the presiding officer. Secondly, the messenger must serve the defendant (or other responsible B person) at his residence or place of work only within the area of jurisdiction of the court.

In the instant case, the face of the summons shows that service was effected by one Watson Baziwell, not Chief Negomo. However, there is no indication as to the person upon whom the summons was served. Equally significantly, the summons was served in Harare, well outside the remit of the court's C jurisdiction. In the premises, it must be concluded that service of the summons in this case was irregular and fatally defective. Consequently, the defendant cannot be held to have been "in wilful default" as was determined and recorded by the court.

Constitution and site of Community Court

D Section 10(1) of the Act empowers the Minister of Justice, by warrant published in a statutory instrument, to constitute primary courts and community courts for such areas as may be specified in the warrants. In terms of s 10(2), every local court is entitled, within the area specified in the warrant by which it is constituted, to exercise so much of the jurisdiction conferred by the Act as is specified in the warrant.

E In their letter of complaint to Chief Negomo, the defendant's lawyers rely upon the warrant published in SI 107 of 1995 to contend that he is not included in the list of chiefs entrusted with jurisdiction to convene local courts. Their reference to this warrant is patently inapposite and misplaced, as it deals exclusively with the constitution and jurisdiction of local primary F courts, which are presided over by headmen.

The warrant that constitutes local community courts, presided over by chiefs, is to be found in the Customary Law and Local Courts (Community Courts) Warrant 2002 (SI 95 of 2002). Sections 2 and 3 of the Warrant provide as follows: G

"2. The community courts specified in the first column of the Schedule are hereby constituted for the areas specified opposite thereto in the second column and shall sit at the place indicated in the third column.

3. The courts specified the Schedule shall be entitled to exercise all the jurisdiction conferred on community courts by the Act."

In the Schedule to the Warrant, the Mazowe District is covered by seven H community courts. One of the designated courts is Negomo Community

---

Patel J

Court, the area of jurisdiction of which is specified as Chiweshe Communal A Land (Kanhukamwe Area). The place of sitting of this court is indicated as Kanhukamwe School. It follows that Negomo Community Court is a duly constituted community court, endowed with all the jurisdiction conferred by the enabling Act, in respect of the Kanhukamwe Area.

What is contentious, however, is whether it is permissible for the court to sit at B some place other than Kanhukamwe School, as appears to have happened in this case. Gweshe Business Centre is obviously not a place of sitting indicated in the 2002 Warrant. However, it is arguable that the specific location of a local court is irrelevant, particularly as this is not a matter prescribed by the Act itself, so long as it sits within the area specified in the Warrant. On the other hand, it seems to me that every community court, being a creature of C statute, is subject to the strictures not only of the parent Act but also of its subsidiary legislation. Whatever powers chiefs' courts may claim by anointed custom and tradition, such powers must be closely circumscribed and exercised within the confines of the constitutive provisions that presently govern their functions. This must also apply to the places of sitting fixed by statute, for D two very compelling reasons. Firstly, the location fixed and published by warrant enables litigants and other affected members of the public to know precisely where to attend the sessions of the court. Secondly, to permit a chief to choose any place of sitting that he deems fit may well lead to the selection of a *situs curiae* that is entirely inappropriate and inconsistent with the dignity and decorum of judicial office. E

Jurisdiction over defendant

As appears from s 15 of the Customary Law and Local Courts Act, the criteria for founding the jurisdiction of a local court are threefold, *viz.* normal residence by the defendant within the area of jurisdiction of the court, or that the cause of action or any element thereof arose within that area, or the F defendant's consent to jurisdiction. These criteria are clearly disjunctive and not conjunctive, so that the establishment of any one of them suffices to found jurisdiction.

In the present matter, it is indisputable that the defendant does not ordinarily reside within the jurisdiction of Chief Negomo's court. It is equally clear that G the defendant did not consent to the jurisdiction of that court. His lawyers argue that the cause of action is speculative but do not make any further submission on the point. In any event, I am unable to perceive anything in the papers relating to the origin of the cause of action in this matter. It is quite possible that the customary marriage in question, or some material element of that marriage, took place within the jurisdictional bounds of H

Patel J

A Negomo Community Court, *i.e.* in the Kanhukamwe Area. Therefore, in the absence of further clarification on the point, I am unable to make any definite finding in this regard.

Disposition

As I have already stated, there are two magisterial decisions reviewing Chief B Negomo's judgment: the first confirming it and the second setting it aside. The decision of the Bindura Magistrate, recorded on 30 December 2011, simply confirms the judgment without further ado. Given the glaring anomalies that I have adverted to in the proceedings and judgment of the local court, the only inference that can reasonably be drawn is that the learned magistrate completely failed to address his mind to the matter before him. His decision C is clearly unsustainable on the papers and must therefore be set aside.

Turning to the review carried out by the provincial magistrate on 2 March 2012, his conclusion that the proceedings of the local court were flawed, for the reasons set out in his decision, is generally correct. However, while his finding that the defendant did not reside within or consent to Chief Negomo's D jurisdiction is obviously correct, he does not appear to have considered whether the cause of action arose within the area of jurisdiction. In any event, he properly noted the change in citation of the plaintiff on the summons and in the record of proceedings, which unexplained alteration constituted a material irregularity, warranting the setting aside of the proceedings in question.

E Nevertheless, despite the overall correctness of his conclusion, the procedure adopted by the provincial magistrate is defective on two counts. Although he was properly seized with the matter under s 25(1) of the Act, he should have directed Chief Negomo to provide his report as envisaged by that provision. More importantly, he exercised his power under para (a) of s 25(3) to annul the proceedings and direct the case to be heard *de novo*. F However, he appears to have done so without the parties concerned having been afforded a reasonable opportunity of making representations as to the proposed exercise of that power, as is peremptorily required by proviso (a) to s 25(3). There is nothing in the papers submitted by the provincial magistrate to show that he complied with these procedural preconditions to the exercise of his powers of review under s 25.

G In the final analysis, two possible avenues seem to present themselves for redressing all of the irregularities *in casu*. The first is to set aside the decision of the provincial magistrate and direct him to review afresh the proceedings of the local court, after having complied with the procedural requirements of s 25. The second is to uphold his decision and, in particular, the directions H that he gave at the end of his decision. It seems to me that the latter option

---

Patel J

is to be preferred in the interests of expedience and expedition. In view of A my earlier findings as to the invalidity and consequent nullity of the local court's proceedings *ab initio*, I cannot imagine that any report that Chief Negomo might furnish or any representations that the parties might make, will alter the eventual outcome of the matter. Although the decision of the provincial

magistrate is procedurally defective, it is essentially correct in its B conclusion and generally in conformity with substantial justice.

In the result:

1. It is ordered that the proceedings, judgment and order of the Negomo Community Court in Case No. GCD 424/2011 be and are hereby annulled and set aside.
2. The proper plaintiff in this matter is given leave to institute proceedings C in a court of competent jurisdiction for the matter to be heard *de novo* in that court.
3. The provincial magistrate is directed to notify Chief Negomo and the parties to Case No. GCD 424/2011 accordingly. D

KUDYA J concurs. E

© 2015 Juta and Company (Pty) Ltd.

Document 50 of 75

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2012/Volume 1/MUTARA & ANOR v MUTARA & ORS 2012 (1) ZLR 415 (H)

MUTARA & ANOR v MUTARA & ORS 2012 (1) ZLR 415 (H)

Citation	2012 (1) ZLR 415 (H)
Case No	Judgment No. HH-205-12
Court	High Court, Harare
Judge	Guvava J
Heard	16 September 2011; *CAV*
Judgment	3 May 2012
Counsel	Mrs *F Chagadama*, for the applicants Ms *T Mberi*, for the first and third respondents
Case Type	Opposed application
Annotations	No case annotations to date

Flynote

Customary law – *succession – heir – responsibilities – duty to support surviving family dependants – who are dependants – when persons who have attained age of majority may be dependants*

Headnote

D An heir at customary law administers the estate for the benefit of the deceased's dependants. In customary law, succession is intestate, universal and onerous. Upon the death of a family head, his oldest son (if the deceased had more than one wife, it would normally be the oldest son of his first wife) succeeds to the status of the deceased. Emphasis on the term "status" E implies that an heir inherits not only the deceased's property but also his responsibilities, in particular his duty to

support surviving family dependants. These would include children who are majors, including male children, who are as subordinate to the patriarch as females until they are "liberated". The liberation generally comes with the death of F the patriarch and the male taking over, or with a male moving away from the family and founding his own family. In recognition of the onerous nature of the heir's responsibilities, the legislature limited the range of persons who could be regarded as "dependants". Under s 2 of the Deceased Persons Family Maintenance Act [*Chapter 6:03*], a "dependant" is defined as: a surviving spouse; a divorced spouse who G was entitled to maintenance at the time of the deceased's death; a minor child; a major child who suffers a mental or physical disability; a parent who was being maintained by the deceased; or any other person who was being maintained by the deceased. However, where, before the passing of the Act, an heir had responsibility for a dependant in the wider sense, H the heir's responsibility remains as it was under customary law.

Guvava J

Where two children of the deceased, though majors, were living with the A heir in their mother's house, and the heir was responsible for them under customary law, he was obliged to find alternative accommodation for them if he sold the house.

Cases referred to

Magaya v Magaya 1999 (1) ZLR 100 (S) B

Masango v Masango S-66-86

Min of Local Govt v Mudzuri & Anor 2004 (1) ZLR 223 (H)

Muswere v Makanza 2004 (2) ZLR 262 (H)

Vareta v Vareta & Ors 1992 (2) ZLR 1 (H) C

Legislation considered

Deceased Persons Family Maintenance Act [*Chapter 6:03*], s 2

Case information

Mrs *F Chagadama,* for the applicants

Ms *T Mberi,* for the first and third respondents D

Judgment

Guvava J: The applicants in this matter seek an order in the following terms:

1. That the first respondent be and is hereby barred from disposing of and effecting transfer of house No 16036, 6th Street, Sunningdale 2, Harare. E
2. That the fourth respondent be and is hereby ordered not to effect any transfer of House No 16036, 6th Street, Sunningdale 2, Harare.
3. That House No 16036, 6th Street Sunningdale 2 Harare be and is hereby registered in the names of Sydney Mutara, Christine Mutara and Solomon Mutara in equal shares or;
4. Alternatively: That house no 6118 St Mary's Chitungwiza and Stand 33221 Seke "M" Chitungwiza be and are hereby registered in the names F of Sydney Mutara, Christine Mutara and Solomon Mutara in equal shares.
5. The fifth and sixth respondent be and are hereby ordered to comply with the order sought.

The facts giving rise to this application are common cause and may be summarised as follows. The first and second applicants are brother and G sister. The first respondent is the applicants stepbrother and heir to their mother's estate. The late Filda Mutara was the mother of the first and second applicants and the first respondent and she died on 9 October 1990. The second respondent is their uncle who was appointed executor to the estate of the late Filda Mutare. In 1993, following the attainment of the age of majority by the first respondent, the second respondent transferred ownership H

Guvava J

A of stand 16036, 6th Street, Sunningdale 2, Harare (the property) that was left by their mother to him. After taking transfer the first respondent proceeded to sell this property to the third respondent. As payment for this property he received house number 6118 St Mary's Chitungwiza and the sum of US$10 000 which he used to purchase an undeveloped stand which is Number 33221 Seke "M" Chitungwiza. The applicants state that the first respondent should B be interdicted from transferring the property to the third respondent because they will suffer irreparable harm as they will be homeless. They further state that the first respondent, as heir to their mother's estate at customary law, has a duty to provide them with an alternative accommodation since he has sold the only home they had.

C The application was opposed by the first and third respondents. The first respondent argued firstly that the applicants had a pending case before this court which was on the same facts. On the merits he stated that he had sold the property as there was conflict between the applicants and his wife. He therefore decided to purchase two properties in order to avoid further conflict. The first respondent argued further that as the applicants were no D longer minors he did not have a duty to provide them with accommodation. He stated in his opposing affidavit that in the unlikely event that the court finds that he does have a duty to provide the applicants with alternative accommodation, he owns two other properties in which they can have joint ownership without interfering with the rights of the third respondent with E whom he had entered into an agreement of sale.

The second respondent did not file any opposing papers and in my view should not have been cited in these proceedings. He was appointed executor of the late Filda Mutara's estate and discharged his function when he transferred ownership of the property to the first respondent. In any event there is no F claim being made against him.

The third respondent opposed the application on the basis that he was a *bona fide* purchaser who had entered into a valid agreement with the first respondent. He further submitted that the first respondent was the owner of the property and he had fully discharged his obligation in terms of their agreement.

G At the commencement of the proceedings it was conceded by counsel for the respondents that he was not pursuing the point *in limine* as it was now apparent that the application had been withdrawn by the applicants.

The main issue that falls for determination in this application is whether or not an heir at customary law has a duty to support adult dependants. In H this case it is not in dispute that the first respondent was appointed heir to

---

Guvava J

the estate of the late Filda Mutara who died intestate on 9 October 1990 in A terms of customary law. It is also common cause that he inherited the only property which was in the estate, namely, house number 16036, 6th Street, Sunningdale 2, Harare. It is also clear that the law to be applied in this case is the law that was applicable before the amendment to the Administration of Estates Act by Act 6 of 1997.

It is now settled in our law that an heir at customary law administers the B estate for the benefit of the deceased's dependants. In *Magaya v Magaya* 1999 (1) ZLR 100 (S) the court dwelt at length on the legal status of an heir at customary law. At p 104C of the judgment Muchechetere JA quoted Bennett *Human Rights and African Customary Law under the South African Constitution* p 126 and stated as follows: C

> "In customary law, succession is intestate, universal and onerous. Upon the death of a family head his oldest son (if deceased had more than one wife, it would normally be the oldest son of his first wife) succeeds to the status of the deceased. *Emphasis on the term 'status' implies that an heir inherits not only the deceased's property but also his responsibilities, in particular his duty to support surviving family dependants*" (emphasis added). D

It is thus clear from the principles set out in the above cited case that the first respondent, being the eldest son of the deceased, has an obligation to look after his mother's dependants as he steps into the shoes of the deceased. The applicants are majors as they have attained the age of eighteen. The question to consider is whether a person who has attained the age of majority can be E considered a dependant at customary law. Ms *Mberi* for the first respondent submitted that the first

respondent has no duty to support the applicants. She based her argument on s 2 of the Deceased Persons Family Maintenance Act [*Chapter 6:03*] where a dependant is defined as follows:

(i) a surviving spouse, a divorced spouse who was entitled to maintenance F at the time of deceased's death,

(ii) a minor child,

(iii) a major child who suffers a mental or physical disability,

(iv) a parent who was being maintained by the deceased or

(v) any other person who was being maintained by the deceased. G

She thus argued that as the applicants did not fall into any of the above categories the first respondent had no obligation to look after the applicants. However this very point was again dealt with in *Magaya supra* at 108E-F as follows:

"I agree with what Bennett *op cit* says at p 5 about the nature of African society.The learned author states that at the heart of African socio-political order lay the H

Guvava J

A family, a unit that was extended both vertically and horizontally to encompass a wide range of people who could be called 'kin'. The family was therefore the focus of social concern. In the circumstances, individual interests were submerged in the common weal and the system stressed individual duties instead of his/her rights. And the legal relationships of most consequence in customary law were those of a family's dealings with other families, not those flowing from one person's relations with another.

B At the head of a family there was a patriarch, or senior man, who exercised control over property and lives of women and juniors. It is from this that the status of women is derived. The woman's status is therefore basically the same as that of any other junior male in the family. Mr *Ncube* conceded that males in a family are as subordinate to the patriarch as females until they are 'liberated'. The liberation generally comes with the death of the patriarch and the male 'taking C over' or with a male moving away from the family and founding his own family."

Thus the law relating to dependants at customary law is clearly set out in the above quotation. The heir assumes the responsibility of looking after all members of the family who were left by the deceased. Parliament recognised that the responsibility placed upon an heir was indeed onerous D and thus decided to change customary law to what it is today. However the late Filda Mutara died in 1990 prior to the amendment to customary law through legislation. The first respondent therefore inherited in terms of the old law and it is those principles that apply to this case in determining this matter. It is apparent from the facts of this case that the two applicants have not been"liberated" as they were still living with the first respondent in their E mother's house when he sold the property.They had not moved out to start their own families. They are therefore the first respondent's dependants at customary law.

The applicants seek an interdict to stop the first respondent from transferring house number 16036, 6th Street, Sunningdale 2 into the name of the third F respondent. They argue that if he sells the property they will be deprived of shelter which the first respondent is obliged to provide. The principles to be applied in an application for an interdict have been set out in numerous judgments of this court and the Supreme Court. In order to succeed the applicants must establish the following: firstly that they have a clear right, secondly that they have no other remedy, and finally that actual injury must G have been committed or reasonably apprehended. See *Minister of Local Government v Mudzuri & Aor* 2004 (1) ZLR 223 (H).

In my view, the applicants' case falters at the very first hurdle. They must establish a clear right to the immoveable property which would warrant the court exercising its discretion in their favour and granting the interdict. H The applicants in this case are not the owners of the property. The property

---

Guvava J

is registered in the name of the first respondent. An heir at customary law A inherits immoveable property in his personal capacity and thus ownership is vested in him. In *Muswere v Makanza* 2004 (2) ZLR 262 (H) Makarau J (as she then was) stated as follows:

"Under our law of property the right of ownership over property of whatever nature confers the most complete and comprehensive control one can have over B property. The right of an owner of land, for

> instance, to sell that land is almost untrammelled, it being subject only to the conditions in the deed conferring title and any other real rights over the property that the owner may have caused to be registered against his or her title to the land …"

The applicants thus cannot stop the first respondent from selling the property if he so wishes, as all they have is personal rights against him and not real C rights against the world at large. The personal rights of the applicant cannot interfere with the rights of the third respondent who has lawfully purchased the property from the first respondent and paid value for it.

The applicants also have an alternative remedy as the first respondent has stated in his submissions that should the court find that he does have an D obligation to support the applicants then he would be agreeable to having the new properties registered in the applicants' names as well as his own.

Thus, whilst the applicants have not satisfied the requirements for the grant of an interdict they have been able to show that the first respondent has an obligation to provide alternative accommodation. It was argued on behalf of the first respondent that *Vareta v Vareta & Ors* 1992 (2) ZLR 1 (H) is in E support of the view that he is not obliged to provide alternative accommodation to the applicants. However, reading the case, it is my view that it can be clearly distinguished on the facts. In the *Vareta* case there was a home in the communal lands where the defendants could stay. The court thus held that the customary law heir had no obligation to provide them with rented F accommodation in the urban area as well. In the case before me there is no evidence that there is any other home. The first respondent has sold the only home that the applicants have. The duty on a customary law heir to provide alternative accommodation was stated by Beck JA in *Masango v Masango* S-66-86 where he stated at p 3 of the judgment as follows:

> "In the absence of making it possible for the appellant to find such alternative G accommodation for herself and the children as would be reasonable in all the circumstances, I do not consider that the respondent is entitled to insist upon their eviction from what is admittedly now his house. To order their eviction without suitable alternative provision having been made for their shelter would be tantamount to sanctioning avoidance by the respondent of his customary law obligation to care for his father's wife and children." H

2012 (1) ZLR p421

Guvava J

A The first respondent has stated in his opposing affidavit that he would have no objections to being co-owners with the applicants of the two properties that he purchased from the proceeds of their mother's house. It was, however, clear from the evidence that stand 6118 St Mary's Chitungwiza is registered in the name of the first respondent's wife. She was not a party to these proceedings and no evidence was produced to show that the first respondent had the authority B to deprive her of her rights of full ownership to the property. I will therefore only make an award in respect to stand 33221 Seke "M" Chitungwiza as this property is in the name of the first respondent. It is however pertinent to point out that the property in question is an undeveloped stand and thus the first respondent's obligation to provide the applicants with accommodation C remains until this property becomes habitable.

The applicants in this case did not claim costs in the application. I will therefore not make an order for costs.

I therefore make the following order:

1 That Stand 33221 Seke "M" Chitungwiza shall be registered in the D names of Sydney Mutara, Christine Mutara and Solomon Mutara in equal shares.

2 That the first respondent shall provide accommodation to the applicants until stand 33221 Seke "M" Chitungwiza becomes habitable.

3 That each party will bear their own costs.

E *Harare Legal Projects Centre*, applicants' legal practitioners

F *Hogwe, Dzimiri & Partners*, first & third respondents' legal practitioners

---

© 2015 Juta and Company (Pty) Ltd.

Document 51 of 75

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2012/Volume 1/S v NCUBE 2012 (1) ZLR 422 (H)

S v NCUBE 2012 (1) ZLR 422 (H)

Citation	2012 (1) ZLR 422 (H)
Case No	Judgment No. HB-112-12
Court	High Court, Bulawayo
Judge	Ndou J & Makonese J
Heard	26 March 2012; *CAV*
Judgment	10 May 2012
Counsel	*T J Mabhikwa*, for the appellant *L Maunze*, for the respondent
Case Type	Criminal appeal
Annotations	No case annotations to date

Flynote

Appeal – *record – defects in – effect – criminal case – conviction quashed and trial de novo ordered*
Criminal procedure – *trial – record – duties of judicial officer where full recording facilities not available* D

Headnote

In a criminal appeal, the record of proceedings produced by the trial magistrate was not a full and correct record of what transpired at the trial. The record gave the impression that the prosecutor's real participation in the trial started at his cross-examination of the appellant. The questions asked by the prosecutor and answers by the five State witnesses throughout the E State case were not recorded; instead the magistrate merely produced a summary of what he probably believed was important. The appellant argued that this approach was prejudicial to his case as the magistrate left out vital information and that the record made it difficult to see how each witness responded to each and every question asked.

Held, that judicial officers who preside at trials in which the facility of a F mechanical recorder or shorthand writer is not available have a duty to write down completely, clearly and accurately everything that is said and happens before them which can be of any relevance to the merits of the case. A failure to comply with this essential function, where the deficiencies in the transcript are shown to be substantial and material, G will constitute a gross irregularity necessitating the quashing of the conviction. A fresh trial before a different magistrate would be ordered.

Cases referred to

S v Besser 1968 (1) SA 377 (SWA)

S v Davy 1988 (1) ZLR 386 (S) H

Ndou J

A *S v K* 1974 (3) SA 857 (C)

R v Khumalo 1947 (4) SA 156 (N)

S v Ndebele 1988 (2) ZLR 249 (H)

R v Neto 1965 RLR 656 (A)

R v Sikumba 1955 (3) SA 125 (E)

Case information

B *T J Mabhikwa*, for the appellant

L Maunze, for the respondent

Judgment

Ndou J: The appellant, aged 69 years, was convicted and sentenced by a Gwanda provincial magistrate of contravening s 114(2)(a) of the Criminal C Law (Codification and Reform) Act [*Chapter 9:23*]. The background facts are the following. Sometime in February 2009, the complainant's 150 herd of cattle went missing and strayed into the neighbouring farms. It was further alleged that in December 2010, from the missing cattle, a white steer and a white heifer strayed into the appellant's herd. On 27 March 2011, the appellant D sold the white steer to one Tavonga Mpaneshwe. During the skinning of the steer, the police officer who had cleared the beast then noticed complainant's brand mark on the beast and arrested the appellant. As alluded to above, the appellant was convicted and sentenced to the mandatory minimum sentence of nine years' imprisonment.

The appellant raised a preliminary point. The point *in limine* is that the E record of proceedings produced by the trial is not a full and correct record of what transpired at the trial in the court *a quo.* Indeed, the record gives the impression that prosecutor's real participation in the trial starts at his cross-examination of the appellant. The questions asked by the prosecutor and answers by the five State witnesses throughout the state case were not F recorded. Instead the trial magistrate merely produced a summary of what he probably believed was important. It was submitted by the appellant that this approach was prejudicial to his case as the magistrate left out vital information. The record makes it difficult to see how each witness responded to each and every question asked. Further, it is difficult to tell at what stage exactly the summary was produced. The appellant's legal practitioner gave further G details of the prejudices and other challenges posed by such summarization of the record. It should be pointed out at this stage that appellant's legal practitioner of record also represented him during the trial in the court *a quo*. What is being sought in this point *in limine* is essentially that we exercise our review powers and quash the conviction and set aside the sentence and H order a fresh trial before a different magistrate. Although the respondent

---

initially opposed this particular route, eventually a concession was made A that the record was incomplete.

The issue is whether this incomplete record prejudiced the appellant in a material way. In *S v Davy* 1988 (1) ZLR 386 (S) it was stated that judicial officers who preside at trials in which the facility of a mechanical recorder or shorthand writer is not available have a duty to write down completely, B clearly and accurately everything that is said and happens before them which can be of any relevance to the merits of the case.

A failure to comply with this essential function, where the deficiencies in the transcript are shown to be substantial and material, will constitute a gross irregularity necessitating the quashing of the conviction: *R v Sikumba* 1955 (3) SA 125 (E); *S v K* 1974 (3) SA 857 (C); *S v Besser* 1968 (1) SA 377 (SWA); C *R v Khumalo* 1947 (4) SA 156 (N); *R v Neto* 1965 RLR 656 (A) and *S v Ndebele* 1988 (2) ZLR 249 (H). In the circumstances, the trial magistrate's failure constitutes a gross irregularity necessitating the quashing of the conviction.

Accordingly, the conviction is quashed and the sentence imposed is set aside. D It is ordered that a fresh trial be held before a different magistrate.

MAKONESE J concurred.

Mabhikwa, Hikwa & Nyathi, appellant's legal practitioners E

Criminal Division, Attorney General's Office, respondent's legal practitioners F

© 2015 Juta and Company (Pty) Ltd.

Document 52 of 75

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2012/Volume 1/ZARANYIKA v ZVOMA & ANOR 2012 (1) ZLR 425 (H)

ZARANYIKA v ZVOMA & ANOR 2012 (1) ZLR 425 (H)

Citation	2012 (1) ZLR 425 (H)
Case No	Judgment No. HH-222-12
Court	High Court, Harare
Judge	Hungwe J
Heard	12 January 2012; *CAV*
Judgment	23 May 2013
Counsel	*C Nhemwa*, for the applicant *W P Zhangazha*, for the first respondent
Case Type	Opposed application
Annotations	No case annotations to date

Flynote

Practice and procedure – *trial – re-opening of trial for leading of further evidence – when further evidence may be led*

Headnote

After the parties have led their evidence, but before judgment is handed D down the court has a discretion as to whether to allow a party to re-open its case and lead further evidence. The grounds on which the court may take this course are: (a) that the evidence tendered could not have been obtained with reasonable diligence for use at the trial; (b) the evidence must be such as is presumably to be believed or apparently credible; (c) E that the evidence would, as far as can be foreseen, form a determining factor on the result; and (d) conditions since the trial must not have so changed that the fresh evidence will prejudice the opposite party.

Case cited

Farmers' Co-op Ltd v Borden Syndicate (Pvt) Ltd 1961 R & N 28; 1961 (1) SA 441 (FS) F

Case information

C Nhemwa, for the applicant

W P Zhangazha, for the first respondent

Judgment

G **Hungwe J:** The applicant seeks an order directing that the matter between the applicant and the first respondent in HC 1982/05 be re-opened to allow the applicant lead fresh evidence. He also seeks costs against the first respondent. The first respondent opposes this application. The basis of this application is set in the founding affidavit as follows:

"4. That the matter HC 1982/05 involves the issue of the double sales of stained H 794 Bluff Hill Township 16 of Lot 8A Bluff Hill. The second applicant sold

---

2012 (1) ZLR p426

Hungwe J

the property to me on 15 October 2004 and resold it to the first respondent A on 30 November 2004 as pleadings and documents filed in HC 1982/05 and HC 2007/05 illustrate. See Annexures 'A' and 'B' being the two sale agreements.

5. That the first respondent was supposed to finance the purchase of the property through a mortgage facility availed by the Reserve Bank of Zimbabwe to people in the diaspora through a vehicle called Homelink (Private) Limited B as appears from clause six of the agreement of sale dated 30 November 2004. See Annexure 'B', being a copy of the sale agreement.

6. That in case HC 2007/05 my [representative] consented to the first respondent taking vacant possession of the property in dispute on the understanding that the mortgage bond had been approved and that the first respondent was actually repaying the loan. (See Annexure 'C' being a copy of the consent C order.)

7. That during the trial it was again our understanding and based on the claims by the first respondent that the Reserve Bank had approved the mortgage loan application by the first respondent as per their letter dated 27 January 2005. (See annexure 'D' being a letter from the Reserve Bank to Patriot Properties the estate agent who handled the sale).

8. That it has come to my attention that despite the approval of the facility D the first respondent did not take on the offer of the facility by the Reserve Bank but proceeded to fraudulently use it to obtain vacant possession of the property and fight a legal battle for the transfer of the property into his name to prolong his occupation of the property with the enjoyment of the fruits that comes with such occupation under full knowledge that he has misled many a person into believing that he is actually repaying the facility E availed by the Reserve Rank.

9. …

10. That I therefore make this application for the opening of HC 1982/05 to enable me to place before the Honourable HUNGWE J before judgment is issued, the evidence that I offered through my legal practitioners to have them enter [evidence that shows that] ... contrary to the first respondent's F claims he has no facility provided by the Reserve Bank. See Annexure 'E' being the letter to the first respondent's attorneys.

11. …

12. ... I refer this honourable court to the supporting affidavit of ... Daniel Rangarirai Gusha which contains details of the meeting with the officials of the Reserve Bank of Zimbabwe who confirmed to him that the first G respondent did not have a mortgage facility with them and that it was not correct that he was paying back for any facility as his name was not anywhere on their database."

The first respondent opposes the application on the ground that the grant of the application will occasion him serious prejudice and therefore this is not an appropriate case for the reopening of the case which is awaiting judgment. H

2012 (1) ZLR p427

Hungwe J

A An application of this nature is never lightly granted. The principles applicable in an application of this nature were set out in *Farmers' Co-op Ltd v Borden Syndicate (Pvt) Ltd* 1961 R & N 28 at 31B-C; 1961 (1) SA 441 (FC) where Clayden FJ stated:

"In *Brown v Dean* [1910] AC 373 at 374, Lord Loreburn LC stressed –

'the extreme value of the old doctrine *interest reipublicae ut sit finis litium*, remembering, as we should, that people who have means at their command B are easily able to exhaust the resources of a poor antagonist.'

And in *Colman v Dunbar* 1933 AD 141 at 161 Wessels CJ said:

> 'It is essential that there should be finality to a trial, and therefore if a suitor elects to stand by the evidence which he adduces he should not be allowed to adduce further evidence except in exceptional circumstances.'"

C Clayden FJ continued at 31D:

> "There are certain guiding principles which the courts apply in exercising their discretion. The first is that the evidence tendered could not have been obtained with reasonable diligence for use at the trial. See *Ladd v Marshall* [1954] 3 All ER 745 at 748*; Colman v Dunbar supra* at 161. The second is that the evidence must be such as is 'presumably to be believed' or 'apparently credible', see *Ladd* D *v Marshall supra* at 748; *Colman v Dunbar supra* at 162. The third relates to the effect which it would have on the case … The last is that conditions since the trial must not have so changed that the fresh evidence will prejudice the opposite party – see *Colman v Dunbar supra* at 162.
>
> In regard to the third principle it was laid down by the House of Lords in *Brown v Dean supra* that the evidence must be such as 'if believed would be E conclusive'. Lord Shaw was not prepared to make so stringent a test. And in *Ladd v Marshall* supra at 751, Hodson LJ said:
>
> > 'the more modern cases have proceeded on the view that perhaps 'conclusive' is too strong a word'.
>
> Denning LJ at 748 used the phrase 'would probably have an important influence on the result of the case, although it need not be decisive'.
>
> F See also *Braddock v Tillotson's Newspapers Ltd* [1950] 1 KB 47 at 51-2. In *Hip Foong Hong v H Neotia & Co* [1918] AC 888 at 894, the Privy Council set out the principle as:
>
> > 'it would, as far as can be foreseen, have formed a determining factor on the result'."

In *Colman v Dunbar supra* at 162, Wessels CJ gave the judgment of the G court and said that the evidence must be such that "it would be practically conclusive, for if not it would still leave the issue in doubt and the matter would still lack finality".

I am aware that the court on the *Farmers Co-op* case was dealing with a matter in which the appellant, on appeal, wished to re-open his case so as to H lead evidence in a matter on appeal. I am also aware of the difference in the

rules relied upon in that case and the present. But, in my view, the principles A laid out in the *Farmers Co-op* case apply with equal force. The critical issue for determination was whether there had been a double sale. Therefore the question whether the sale to the first respondent was valid or not is of critical importance to the resolution of that dispute where judgment is pending. In any event, I am strengthened in the view that I take in this matter by the fact that a re-opening of trial at this stage would be in keeping with the B principle of finality to litigation, the importance of which Lord Loreburn LC stressed in *Brown v Dean supra*. In my respectful view a re-opening will in all probability be conclusive of the issues between the parties.

In the event I grant the application with costs. C

C Nhemwa & Associates, applicant's legal practitioners

Chinamasa, Mudimu, Chinogwenya & Dondo, first respondent's legal practitioners D

© 2015 Juta and Company (Pty) Ltd.

Document 53 of 75

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2012/Volume 1/ZIMBABWE NATIONAL WATER AUTHORITY v KARIBA MUNICIPALITY 2012 (1) ZLR 429 (H)

ZIMBABWE NATIONAL WATER AUTHORITY v KARIBA MUNICIPALITY 2012 (1) ZLR 429 (H)

Citation 2012 (1) ZLR 429 (H)

Case No	Judgment No. HB-124-12
Court	High Court, Bulawayo
Judge	Makonese J
Heard	6 March 2012; 7 March 2012; *CAV*
Judgment	31 May 2012
Counsel	*N Ndlovu*, for the plaintiff *C W Gumiro*, for the defendant
Case Type	Civil trial
Annotations	No case annotations to date

Flynote

Water – *ownership – vested in President – management of water resources – duty of Zimbabwe National Water Authority – abstraction of water from Lake Kariba – water taken from territorial waters of Zimbabwe – person* D *abstracting water liable to pay for water abstracted*

Headnote

In terms of an agreement between the plaintiff and the defendant council, the defendant would abstract raw water from Lake Kariba and the plaintiff would receive payment for the abstraction of water from the lake. E Pursuant to the agreement the defendant made two payments towards "the purchase of the water", but then refused to pay any more, arguing that there was no legal basis for the payments to the plaintiff. The defendant contended that it acquired its water from the Zambezi River Authority, which was the owner of Kariba Dam. It further contended that it owned all the equipment for the procurement of the water from the lake and F accordingly there was no basis for raising charges against the defendant.

Held, that it was clear from the provisions of the Zambezi River Authority Act [*Chapter 20:23*] that the Authority was an entity or vehicle through which the governments of Zambia and Zimbabwe administered their common interests over the Zambezi River and its waters. Before the G establishment of the Authority, the Zambezi River and Kariba Dam complex were administered by the Central African Power Corporation under the provisions of the Federation of Rhodesia and Nyasaland (Dissolution) Order in Council, 1963 (United Kingdom). The Authority, as an inter-state body or organ, regulates and administers matters of common interest between the two contracting states. The Authority does H not regulate and has no jurisdiction to deal with internal water issues of

Makonese J

each respective State. The abstraction of water from the lake is an issue A left to each state's domestic laws.

In terms of s 3 of the Water Act [*Chapter 20:24*], all water is vested in the President of Zimbabwe. The President, through Parliament, appointed the plaintiff to manage the water resources of Zimbabwe, that is, all the water within the borders of Zimbabwe, under the Zimbabwe National B Water Authority Act [*Chapter 20:25*]. The Zambezi River Authority is not vested with any ownership rights over the water which is within the territorial borders of Zimbabwe. If, as the evidence showed, the defendant abstracted water within the territorial jurisdiction and geographical boundaries of Zimbabwe, then such water is vested in the President and the defendant was liable to pay for it. C

Cases referred to

Commercial Union Assurance Co Ltd v Waymark NO 1995 (2) SA 73 (Tk)

UDC Ltd v Shamva Flora (Pvt) Ltd 2000 (2) ZLR 210 (H) D

Legislation considered

Water Act [*Chapter 20:24*] ss 3 & 4(1)

Zambezi River Authority Act [*Chapter 20:23*], Schedule, arts 9 & 18

Zimbabwe National Water Authority Act [*Chapter 20:25*], s 5(1)(b)

Case information

N Ndlovu, for the plaintiff E

C W Gumiro, for the defendant

Judgment

Makonese J: The plaintiff in this matter is the Zimbabwe National Water Authority, hereinafter referred to as "ZINWA" which was established in terms of s3 of the Zimbabwe National Water Authority Act [*Chapter 20:25*], as a F body corporate capable of suing and being sued in its own name, subject to the Act, and capable of performing all acts that bodies corporate may in law perform. The defendant is Kariba Municipality, a local authority established in accordance with the provisions of section 4 of the Urban Councils Act [*Chapter 29:15*].

The plaintiff issued summons against the defendant for payment of US$102 G 803, 49 in respect of "water sold" and "supplied" to the defendant from January 2009 to September 2009. The plaintiff's claims were opposed by the defendant. Both plaintiff and defendant called one witness each and after leading their evidence submitted written closing arguments in support of their respective positions. H

Makonese J

A **Background**

The brief background to this case as follows: sometime in 2003 the parties entered into a written agreement in terms whereof the plaintiff sold to the defendant who agreed to purchase raw water from Lake Kariba at a price agreed to in Zimbabwean dollars. The written agreement is however fraught B with certain irregularities which I shall set out below:

(a) the face of the written agreement is not completed properly in that it refers to a resolution granting the Town Clerk authority to sign on behalf of the plaintiff but the date of such Resolution is not recorded. The resolution itself was never presented to court nor tendered in evidence. C

(b) the plaintiff is referred to as the "owner" of Lake Kariba but evidence adduced does not prove that assertion with any certainty.

(c) the agreement is initialled by an unidentified party on each page and dated 25 August 2003 on the foot of each page.

(d) at page 3 of the agreement the agreement provides that *"notwithstanding* D *the date of execution, the agreement shall be deemed to have commenced on 1 January 2003."*

(e) at page 12 of the agreement the agreement is dated 25 August 2003 and signed on behalf of the plaintiff by one S T Pazvakawambwa, for and on behalf of the Chief Executive Officer. E

(f) at the same page the agreement is signed at Kariba Municipality on 9 June 2003 by an unidentified party.

From the a foregoing it would seem therefore that the agreement between the parties was signed in different places and on different dates.

I am not persuaded that the irregularities on the face of the agreement are so F material or fundamental as to go to the root of the contract. I conclude that the parties entered into a valid and

binding agreement.

In terms of the agreement between the plaintiff and the defendant, the defendant would abstract raw water from Lake Kariba and the plaintiff would receive payment for the abstraction of water from the said lake. It is not in dispute that pursuant to such agreement the defendant made two G payments towards "the purchase of the water" totalling US$16 000 in July and September 2009. At some point however, the defendant refused to comply with the terms of the agreement, arguing that there was no legal basis for the payments to the plaintiff.

The arguments that have arisen between the parties are captured in the pre- H trial memorandum of issues as follows:

Makonese J

(1) whether the defendant is liable to pay for water consumption to the A plaintiff

(2) whether or not there is a binding agreement between the parties

(3) whether defendant owes plaintiff the sum of US$102 803.49.

Whether or not the defendant is liable to pay for water consumption to the plaintiff B

In its plea the defendant contends that it acquires its water from the Zambezi River Authority who are the owners of Kariba Dam and not the plaintiff. It further contends that all the equipment for the procurement of the water from Kariba Dam is owned by the defendant and as such there is no basis for raising charges against the defendant. The defendant further raised issues C *in limine* which are not part of the pleadings.

The critical issue for determination is whether or not the plaintiff is entitled to raise charges for consumption of water against the Kariba Municipality. The water consumed by the defendant is drawn from the Kariba Dam. The dam is situated on the Zambezi River. Prior to the promulgation of the ZINWA D Act there was in existence the Zambezi River Authority Act [*Chapter 20:23*] whose date of commencement was 1 October 1987.

The Zambezi River Authority Act has as its objects the following:

> "An Act to enable effect to be given to certain provisions of an inter-state agreement relating to the utilization of the Zambezi River concluded between E the governments of the Republics of Zimbabwe and Zambia; and to provide for matters incidental to or connected with the foregoing."

In terms of Article 9 of the Zambezi River Authority Act the functions of the Authority shall be *inter alia* to:

(a) operate, monitor and maintain the Kariba Complex;

(b) in consultation with the National Electricity Undertakings, investigate F the desirability of constructing new dams on the Zambezi River and make recommendations thereon to the Council;

(c) subject to approval of Council construct, operate, monitor and maintain any other dams on the Zambezi River.

In terms of Article 18 of the said Act the contracting states undertake to: G

> "(a) keep each other informed of any proposals approved by them for the abstraction of water from the Kariba Dam or any other dam that may be constructed on the Zambezi River or for the impounding or abstraction of water from the sources of the said Dam or other future dams for irrigation to other purposes; H

Makonese J

(b) consult A the Authority on any proposals for the impounding or abstraction of substantial quantities of water from the Kariba Dam or any other dams that may be constructed on the Zambezi River, and seek the approval of each other before approving such impounding or abstraction;

(c) consult with each other and the Authority, if so requested by the Authority through the Council, in regard to any problems arising from the abstraction of B water from the Kariba Dam or any other future dams that may be constructed on the Zambezi River, or the impounding or abstraction of water from the sources of the said dam or other future dams."

What seems to be abundantly clear from the aforegoing is that the Zambezi River Authority is an entity or vehicle through which the governments of Zambia and Zimbabwe administer their common interests over the Zambezi C River and its waters. Prior to the establishment of the Zambezi River Authority, the Zambezi River and Kariba Dam complex were administered by the Central African Power Corporation under the provisions of the Federation of Rhodesia and Nyasaland (Dissolution) Order in Council, 1963 (United Kingdom).

D It is also clear that the waters in the Kariba Dam are jointly owned by the governments of Zambia and Zimbabwe and the common interests of both countries are monitored and maintained through the Zambezi River Authority. However, the abstraction of water from the Kariba Dam is an issue left to each State's domestic laws.

E The enactment of the Water Act [*Chapter 20:24*] and the ZINWA Act *supra* constitute the application of Zimbabwe's own laws in respect of water usage, taking into account the provisions of the Zambezi River Authority Act highlighted hereinabove. Thus the Zambezi River Authority, as an inter-state body or organ, regulates and administers matters of common interest between F the two Contracting States. The Zambezi River Authority does not regulate and has no jurisdiction to deal with internal water issues of each respective State. The plaintiff herein is a statutory body through which the Zimbabwe government administers the provision of water in Zimbabwe, including the Kariba Dam which falls under its jurisdiction and control.

In terms of the Water Act, under s 3 thereof, all water is vested in the President G of Zimbabwe. Section 4(1) provides as follows:

> "No person shall be entitled to ownership of any water in Zimbabwe and no water shall be stored, abstracted, apportioned, controlled, diverted, used or in any way dealt with except in accordance with this Act."

In accordance with the provisions of s 5(1)(b) of the ZINWA Act, the functions H of the Authority shall be *inter alia:*

Makonese J

> "subject to the Water Act [*Chapter 20:24*], to assist and participate in or advise A on any matter pertaining to the planning of the development, exploitation, protection and conservation of water resources."

It therefore stands to reason that the President of Zimbabwe, through Parliament, appointed the plaintiff to manage the water resources of Zimbabwe, that is, all the water within the borders of Zimbabwe, under the B ZINWA Act. The argument by the defendant that the water on the Kariba Dam and Zambezi River which is within the borders of Zimbabwe is not vested in the President of Zimbabwe in terms of the Water Act has no legal basis nor foundation and is simply based on a false premise. The Zambezi River Authority is not vested with any ownership rights over the water which C is within the territorial borders of Zimbabwe.

The pertinent question therefore is: where is the defendant abstracting water from? If the defendant is abstracting water from points which are outside Zimbabwe, then the abstracted water does not vest in the President of Zimbabwe. However, if the defendant abstracts water within the territorial D jurisdiction and geographical boundaries of Zimbabwe, then such water is vested in the President. In his evidence-in-chief, the Director of Finance for the defendant confirmed that they abstract water at two points, that is, along the Zambezi River and on Lake Kariba. Under cross-examination the defendant's witness revealed that the points where they are abstracting E water are within the borders of Zimbabwe. In other words, the defendant is abstracting water where the state of Zimbabwe has jurisdiction. These are therefore clearly territorial waters. Only the area of water which falls outside the territory of a sovereign state is regarded as international waters. The defendant is therefore liable to pay the plaintiff for the water which it abstracts within the jurisdiction of Zimbabwe, which water is vested in the F President of Zimbabwe, in accordance with the provisions of the ZINWA Act.

The defendant's witness alleged that the defendant was given authority to abstract water by the Zambezi River Authority. On being challenged to provide any agreement to that effect, the defendant's witness could neither confirm its terms, neither could he confirm the signatories to the alleged agreement. G On being quizzed on whether besides paying to the plaintiff, the defendant has ever paid anything to the Zambezi River Authority for the abstraction of water, the defendant failed to produce the alleged agreement, such agreement was not discovered and it was not tendered into evidence. It would seem logical to conclude that such agreement in fact does not exist at all. H

Makonese J

A **Whether or not there is a binding agreement between the parties**

The defendant argued at length in the closing arguments that there is no binding legal agreement between the parties. The defendant argued that the agreement produced by the plaintiff does not disclose the parties to the agreement. I have already dealt with the irregularities with regards the B agreement and I am satisfied that the matters raised do not go to the root of the contract. It is important to note that the defendant never raised the defence of the validity or invalidity of the 2003 contract in its plea. The defendant did not seek leave of the court to deviate from the Rules of Court by introducing a new ground of defence at trial. The defendant should be bound by its plea. The issue of the invalidity of the agreement is therefore C an afterthought by the defendant which cannot be taken into consideration. In any event such a defence would not be available to the defendant because it deals with peripheral issues.

The general rule is that every allegation of fact not specifically dealt with by the defendant in its plea is taken to have been admitted together with the D implied allegation of fact which arose from that allegation. In the same vein the court may at any stage allow either party to amend its pleadings. The court has to exercise its discretion judiciously. The approach of our courts is to allow amendments quite liberally. This liberality is only affected where the amendment would cause considerable inconvenience to the court or E prejudice to a party, or where there is no prospect of the point raised in the amendment succeeding or where the matters in the amendment are vague and embarrassing. There will be no prejudice if the parties can be placed in the same position as they were when the pleading was originally filed. If the pleading is clear and concise, the other party must deal with it as it F is. See the remarks of Chinhengo J in *UDC Ltd v Shamva Flora (Pvt) Ltd* 2000 (2) ZLR 210 (H). See also *Commercial Union Assurance Co Ltd v Waymark NO* 1995 (2) SA 73 (Tk) where White J examined a number of cases dealing with amendments to pleadings.

Whether defendant owes plaintiff the sum of us$102 803.49

The defendant did not seriously challenge the amount being claimed by G the plaintiff. The amount being claimed in the summons and declaration is based on a statement/invoice tendered into evidence as Exhibit 3, dated 30 October 2009. In its plea, the defendant pleads in the alternative as follows:

> "the amount claimed has not been substantiated as plaintiff does not have any manpower to ascertain the amount of water being consumed by defendant neither H does plaintiff have the capacity to ascertain the amounts due it by defendant."

Makonese J

The defendant's defence on the amount being claimed against it is, to say A the least, vague, to the extent that it has no meaning. The summons in this matter was issued and served in November 2009. The defendant filed its plea in the matter on 25 March 2010. Up to the time of the trial the defendant made no effort to ascertain for itself the amount of water consumed by the defendant and what it considered to be an appropriate charge for the water usage for the period in question. The defendant clearly has no defence to the B amount being claimed against it. The defendant ought therefore to be taken to indeed owe the amount being demanded by the plaintiff.

Issue of *locus standi*

In its closing submissions the defendant raised the issue of *locus standi* as a point *in limine*. It is apposite to note that action proceedings are different from C application proceedings. The major difference is that in action proceedings, the plaintiff is at liberty to call witnesses to give *viva voce* evidence in support of its claims. *In casu*, the plaintiff called its credit controller to testify. The witness is in charge of the plaintiff's accounts and therefore qualified to testify. It is the credit controller who controls and manages the plaintiff's accounts D and has direct knowledge of the charges levied against the defendant. The credit controller has possession of the records and is the custodian of all records pertaining to the defendant's account. The plaintiff in the present case was

entitled to call the credit controller to testify on its behalf. The defendant cannot choose witnesses it deems suitable for the plaintiff. The plaintiff's chief executive officer has no information concerning this dispute E as the account is controlled and handled by the credit controller. The evidence of the credit controller was therefore properly adduced into the record. In any event, the issue of *locus standi* was only raised by the defendant during the trial. The defendant has no basis therefore for suggesting that the credit controller had no authority to testify. I have no difficulty in rejecting this defence as having no substance whatsoever. F

Having examined all the issues raised in the pleadings and the evidence led in court by both parties, I am satisfied that the plaintiff has proved its case against the defendant on a balance of probabilities.

In the circumstances judgment is entered in terms of the summons, with costs on the ordinary scale. G

Cheda & partners, applicant's legal practitioners

Mhiribidi Ngarava & Moyo, c/o Lazarus & Sarif, respondent' legal practitioners H

© 2015 Juta and Company (Pty) Ltd.

Document 54 of 75

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2012/Volume 1/MAKEK ENTERPRISES (PVT) LTD v ZB FINANCIAL HOLDINGS 2012 (1) ZLR 437 (H)

MAKEK ENTERPRISES (PVT) LTD v ZB FINANCIAL HOLDINGS 2012 (1) ZLR 437 (H)

Citation	2012 (1) ZLR 437 (H)
Case No	Judgment No. HB-126-12
Court	High Court, Bulawayo
Judge	Ndou J
Heard	17 May 2012; *CAV*
Judgment	31 May 2012
Counsel	*C P Moyo*, for the plaintiff *J Moyo*, for the respondent
Case Type	Civil action
Annotations	No case annotations to date

Flynote

Practice and procedure – *set down – consent of parties to set down date fixed by Registrar – consent not required – alteration of set down date* D *– action required by party desiring alteration*

Headnote

The consent of the parties to the set down of a civil action is not a requirement imposed by r 215 of the High Court Rules. Once the Registrar allocates a date, it is incumbent upon a party seeking alteration of the set down to apply to the registrar in terms of r 215(3) or to a judge or the court E in terms of r 217. The set down date remains good even where a party had not consented to it. There is no legal requirement for the Registrar to request that the parties file or lodge consent to the set down, although it has been the practice of the Registrar to seek such written consent of the parties to the set down date. Where a plaintiff's legal representative F is aware of this practice, it would be tantamount to allowing the plaintiff to snatch at a judgment resulting in compromising the ends of justice if the plaintiff were allowed to take advantage of the failure of the defendant to appear. The conduct of the defendant could be dealt with by an award of costs.

Legislation considered G

High Court Rules 1971 (RGN 1047 of 1971), rr 215 & 217

Case information

C P Moyo, for the plaintiff

H *J Moyo*, for the respondent

2012 (1) ZLR p438

Ndou J

Judgment

Ndou J: On 23 April 2012, the Deputy Registrar of this court addressed a A notice to the parties in the following terms:

> "Re: Makeh Enterprises (Pvt) Ltd vs ZB Financial Holdings HC 1116/07 "B"
>
> In terms of the provisions of r 215(2) of the High Court Rules 1971 "the Rules", I have allocated the under-mentioned dates for hearing of this matter: B
>
> Thursday 17 May 2012 and Friday 18 May 2012 at 10:00 a.m.
>
> Please lodge a consent set-down as soon as possible.
>
> Yours faithfully
>
> T. Hwara
>
> For Deputy Registrar"

The notice was served on the plaintiff's legal practitioners on 20 April C 2012. It was served on the defendant's legal practitioners (through their corresponding legal practitioners) on 23 April 2012.

The defendant's legal practitioners did not lodge a consent to set down with the Deputy Registrar. Notwithstanding such failure to lodge the consent to set down, the Deputy Registrar placed the matter on the roll for trial. The D defendant and his legal practitioner are not in attendance. Mr *J J Moyo,* their correspondent, only appeared after being contacted by Mr *C.P. Moyo* for the plaintiff. Mr *J J Moyo* informed the court that the defendant's view is that the matter was not properly set down as the defendant had not signed and lodged the consent to set down. Mr *C P Moyo* holds a contrary view. The E issue is whether the matter was properly set down.

Order 31 rr 215 and 217 deal with the issues.

Rule 215 provides:

> "(1) Subrules (2), (3) and (4) –
>
> 'date' includes a period not exceeding two weeks. F
>
> (2) Once a date becomes available for the hearing of a case placed on the list in terms of rule 214 the Registrar shall allocate a date for the case to be heard and shall give the parties notice of the date.
>
> (3) The Registrar may for good cause, and after consultation with the parties, alter a date of set down allocated in terms of subrule (2), and shall give the G parties notice of any such alteration.
>
> (4) Notice given by the registrar in terms of subrule (2) and (3) –
>
> (a) shall be delivered by the Registrar to each party's legal practitioner; or
>
> (b) in the case of a party who is not represented by a legal practitioner, shall be posted by the registrar by registered post to the address for service or last known address of the party. H

Ndou J

> (5) At A the request of one or more of the parties, the registrar may, in consultation with the Judge President, allocate a fixed date for the hearing of a case, whether in or out of term."

Rule 217 provides:

> "Where a case has been set down for trial or argument any party may apply to the court or a judge to have the set down set aside and for good cause shown B the court or judge may set it aside and fix another day for the trial or argument or make such other order as it or he, as the case may be, considers just:
>
> Provided that with the consent of all parties and with approval of the registrar a set down may be altered without application to court or to a judge."

In casu, the Deputy Registrar set down the matter in terms of the provisions of r 215(2). If the defendant sought alteration of this date, it should have C approached the Deputy Registrar in terms of r 215(3). The defendant did not do so, resulting in the plaintiff and its legal practitioner attending on the set down date. The Deputy Registrar was not shown good cause for alteration of the set down date by the defendant, so he could not have exercised the powers bestowed on him by r 215(3).

D The application for alteration of set down date was made by the defendant's corresponding legal practitioner in the absence of the defendant. This oral application was made presumably in terms of r 217, *supra*.

From the provisions of r 215, it is clear that the consent of the parties to the set down is not a requirement. Once the Registrar allocates a date, it is E incumbent upon a party seeking alteration of the set down to apply to the registrar in terms of r 215 (3) or a judge or the court in terms of r 217. The set down date remains good even where a party had not consented to it. Strictly speaking, there is no legal requirement for the Registrar to seek that the parties file or lodge consent to the set down. It has, however, been the practice of the Registrar to seek such consent of the parties to the set down date. Mr *C* F *P Moyo,* for the plaintiff, is aware of this practice. It would be tantamount to allowing the plaintiff to snatch at a judgment resulting in compromising the ends of justice if the plaintiff was allowed to take advantage. The conduct of the defendant can be dealt with by an award of costs.

Accordingly, it is ordered that the matter be postponed to 1 and 2 August G 2012 for trial, with the defendant bearing wasted costs for this hearing.

Moyo & Nyoni, plaintiff's legal practitioners

Gill, Godlonton & Gerrans c/o Calderwood, Bryce Hendrie & Partners, H defendant's legal practitioners

© 2015 Juta and Company (Pty) Ltd.

Document 55 of 75

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2012/Volume 1/S v DUBE 2012 (1) ZLR 440 (H)

S v DUBE 2012 (1) ZLR 440 (H)

Citation	2012 (1) ZLR 440 (H)
Case No	Judgment No. HB-133-12
Court	High Court, Bulawayo
Judge	Ndou J
Heard	31 May 2012

Judgment 31 May 2012

Counsel Detail not supplied

Case Type Criminal review

Annotations No case annotations to date

Flynote

Court – contempt – *contempt committed in facie curiae – summary punishment* C *for – procedure to follow – need for formality and to observe audi alteram partem rule – approach court should take – when alleged contempt should be ignored*

Headnote

The magistrate presiding over civil proceedings adjourned the court after D the parties claimed that they needed an interpreter for another language, as they were not conversant with the languages spoken by the court interpreter. In the corridor outside the court, the accused was allegedly heard by the interpreter to have uttered words to the effect that the court was "fake". This was reported to the magistrate, who had the accused E brought into court, where the interpreter made an unsworn statement about the incident. The accused gave a different story, saying that his remarks were directed at the parties, because, he said, they could speak the language spoken by the interpreter. The magistrate nonetheless convicted the accused of contempt of court and sentenced him to seven days' imprisonment. On review: F

Held, that the alleged offending words having been uttered outside the court and in the absence of the magistrate, the alleged contempt was committed ex facie curiae. In the case of contempt committed in facie curiae, the magistrate would have heard the offending utterances himself and there would be no need for evidence to introduce the contemptuous utterances. G Where the magistrate was not privy to the contemptuous utterances, some degree of formality would be required to bring the offender before the court and put the allegations to him and allow him to challenge the witness's statement. The audi alteram partem principle applies to all cases in which magistrates try an offender summarily for contempt of court in terms of s 71 of Magistrates Court Act [*Chapter 7:10*]. In any H

2012 (1) ZLR p441

Ndou J

A event, magistrates should summarily convict for contempt of court only as last resort and when it is absolutely necessary. Very often, conduct which, strictly speaking, constitutes contempt of court can quite fittingly merely be ignored without really impairing the dignity or the authority of the court or the orderly conduct of the proceedings. Too liberal a use B of the court's powers to punish persons for contempt can undermine the very reason for the existence of such power. A restrained reaction to insult should be the first step in the process of asserting the decorum of the court where contempt occurs *in facie curiae* because the judicial officer acts to protect his office and not himself personally. Trivial instances of contempt are best ignored.

C *Editor's note*: in view of the provisions of s 9A of the Criminal Procedure and Evidence Act [*Chapter 9:07*], the proceedings in this matter were probably invalid from the outset. The section provides that, while a court or tribunal "may, on its own motion, institute proceedings for contempt of court against any person who is alleged to have impaired its dignity, reputation or authority *in the presence of the court or tribunal*" (italics supplied), proceedings for contempt in other circumstances (i.e. *ex facie curiae*) may only be instituted by the Attorney-General or someone acting D on the express authority of the Attorney-General.

Cases referred to

S v Musa 1997 (2) ZLR 149 (H)

S v Mushaya 1994 (1) ZLR 296 (S)

E *S v Nyalambisa* 1993 (1) SACR 172 (Tk)

S v Tobias 1966 (1) SA 656 (N)

Legislation considered

Magistrates Court Act [*Chapter 7:10*], s 71

Judgment

F **Ndou J:** This matter was forwarded for review by a Plumtree magistrate with the following minute:

> "Re: Contempt of court proceedings
>
> May you place these proceedings before an Honourable Judge of the High Court. The accused person was a witness in a civil case between Tshilambi G Dube and Mkuleko Nleya.
>
> On 10 November 2010, the court was in session and I was presiding over the civil case involving the parties mentioned above. The interpreter, Mr Wonder Jambwa, then indicated that the parties intended to use Kalanga and he was not conversant with the Kalanga language. I then adjourned court for the reason that an interpreter who was conversant with the Kalanga language was being H looked for in the premises and I informed the parties.

Ndou J

> As the accused was leaving the court room with other people who had been seated A in the gallery, he uttered the following words in Ndebele language, 'Icourt leyi ngeye fake' which means 'This is a fake court'. He was heard by an interpreter, Nobukhosi Ndlovu, who met him as she was going into the courtroom.
>
> I was then informed by the interpreter that the accused had uttered such words and people had laughed. I then immediately ordered the court orderly to arrest the accused and put him in the cell. B
>
> When I convened court I ordered the accused to be placed before me and I questioned him with regard to his utterances. I then convicted the accused and sentenced him to 7 days' imprisonment."

The magistrate's longhand notes reflect the following –

Q (by court) What did you say as you were leaving the courtroom?

A I said the ladies could not fail to speak Ndebele because at home they C speak Ndebele, it seems that they are fake.

Q *Who did you say was fake*?

A *The two ladies*

Q *Where did you say it?*

A *Just outside the courtroom, in the corridor* D

Q Did you say the court was fake?

A *No*

(Court addressing the interpreter)

Q Interpreter, what did he say?

A He said "Icourt leyi ngeyefake" in Ndebele language, which means, this is a fake court. E

(Court addressing the accused)

Q Why did you say so?

A Well, I am sorry, may I be made to pay a fine.

Q Did you not realize that there was a real risk that you would impair the authority and dignity of this court?

A Well, I realized it, I am sorry F

Q Do you have any defence to offer?

A No

Verdict – I find you guilty as charged.

(emphasis added)."

This matter was sent for review after the accused had already served the sentence of seven days.

From the above scant record of proceedings it is apparent that the alleged G offending words were uttered outside the court and in the absence of the magistrate. The magistrate only heard about the alleged offending words from the court interpreter. In the circumstances the alleged contempt was *ex facie curiae – S v Musa* 1997 (2) ZLR 149 (H) and *S v Tobias* 1966 (1) SA 656 (N) at 660. H

2012 (1) ZLR p443

Ndou J

A Further, the accused was summarily committed for contempt of court even though he raised a defence i.e. the utterances were directed to "two women" who said they could not speak IsiNdebele. No evidence was adduced in this regard save for the unsworn single sentence statement by the interpreter. In the case of contempt committed *in facie curiae* the magistrate would have heard the offending utterances himself or herself. There is no need for evidence B to introduce the contemptuous utterances. *In casu*, the magistrate was not privy to the contemptuous utterances. They were said in the corridor of the court complex. They were heard by the court interpreter. In the circumstances some degree of formality was required to bring him before the court and put the allegations to him. The accused was not given an opportunity to C challenge the interpreter's statement. If the utterances were directed at "two ladies" it is not clear why the accused was convicted. There is no judgment by the learned magistrate explaining the basis of the conviction. There is no evidence showing that the magistrate afforded the accused the opportunity to defend himself. Magistrates will be well advised to accept that the *audi alteram partem* principle applies to all cases in which they try an offender D summarily for contempt of court in terms of section 17 of Magistrates Court Act [*Chapter 7:10*]; *S v Musa, supra; S v Nyalambisa* 1993 (1) SACR 172 (Tk) and *S v Mushonga* 1994 (1) ZLR 296 (S). In my view, magistrates should summarily convict for contempt of court as a last resort when it is absolutely necessary. In this regard I respectfully share the sentiments of Chaitkobo J E in the *Musa* case *supra* at 158F-159A where the learned judge stated:

> "… I entertain serious doubts about the efficacy of routinely resorting to summary committal of a contemnor as a vehicle for preserving the dignity of the court in each case of contempt *in facie curiae*. I doubt if the court's dignity can be protected by punishing fools for their indiscretions. I respectfully share the sentiments expressed by Botha JA in *S v Nel* 1991 (1) SA 730 (A), which regrettably for me was in Afrikaans. The head note to the report reads in part:
>
> F A presiding judge or magistrate who is of the opinion that someone has acted in contempt of court should just consider whether it is necessary and desirable for him to take action. Very often conduct which strictly speaking constitutes contempt of court can quite fittingly merely be ignored without really impairing the dignity or the authority of the court or the orderly conduct of the proceedings. Too liberal a use of the court's powers to punish persons for contempt can G undermine the very reason for the existence of such power."
>
> The saying that one should not argue with a fool lest people fail to notice the difference is not without a moral. A restraint reaction to insult should be the first step in the process of asserting the decorum of the court where contempt occurs *in facie curiae* because, as the cases emphasize, the judicial officer acts to protect his office and not himself personally. Compare *S v Silber* 1952 (2) SA 475 (A) G at 480G-H."

2012 (1) ZLR p444

Ndou J

In this case the magistrate should have investigated further and not relied A on one unsworn statement by a court interpreter to condemn a man to a custodial sentence. The accused's conduct did not have the effect of disrupting proceedings. Trivial contempts are best ignored. The accused apologized repeatedly for his conduct and the magistrate should not have acted in the heat of the moment in anger. He should have recovered from his temper and acted objectively: *Magistrate Handbook* by Prof G Feltoe at pages 195-196. B

From the foregoing the conviction cannot stand. Accordingly, it is ordered that the conviction is quashed and the sentence set aside.

Kamocha J concurred. C

© 2015 Juta and Company (Pty) Ltd.

Document 56 of 75

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2012/Volume 1/TRUSTEES, ALEXANDRA CLUB v PATHFINDER INTERNATIONAL (PVT) LTD 2012 (1) ZLR 445 (H)

TRUSTEES, ALEXANDRA CLUB v PATHFINDER INTERNATIONAL (PVT) LTD 2012 (1) ZLR 445 (H)

Citation	2012 (1) ZLR 445 (H)
Case No	Judgment No. HH-230-12
Court	High Court, Harare
Judge	Mutema J
Heard	27 March 2012; *CAV*
Judgment	6 June 2012
Counsel	*I Mabulala*, for the plaintiff *C Tawanda*, for the defendant
Case Type	Civil trial
Annotations	No case annotations to date

Flynote

Landlord and tenant – *lease – cancellation – grounds for – failure to pay rent on time – previous late payments of rental and acceptance thereof by landlord – effect – tenant entitled to resist eviction notwithstanding* D *non-waiver and non-variation clauses in lease agreement – subsequent late payment not accepted by landlord – no waiver or estoppel created*

Headnote

An attempt by a landlord (lessor) to go back in time to previous defaults of rental payments can be resisted by the tenant in a claim for his E eviction. He will be able to raise the exceptio doli against the landlord, notwithstanding the existence of a non-waiver and a non-variation clause in the lease agreement. However, this would not apply where the tenant once again makes a late payment the following month and the landlord cancels within the month or before the remedy of the breach is effected. Because of the existence of these clauses, the tenant cannot F be heard to argue that the previous late payments have been accepted in circumstances amounting to waiver or estoppel.

Cases cited

Masukusa v Tafa 1978 RLR 167 (A)

NSSA v Ryals & Ors HH-236-10

G *Parkview Properties (Pvt) Ltd v Chimbwanda* 1998 (1) ZLR 408 (H)

Stracon Development (Pvt) Ltd v Gruer 1990 (1) ZLR 354 (H)

TM Supermarkets (Pvt) Ltd v Chadcombe Properties (Pvt) Ltd 2010 (1) ZLR 196 (H)

Case information

H *I Mabulala,* for the plaintiff

Mutema J

C Tawanda, for the defendant A

Judgment

Mutema J: The plaintiff's claim against the defendant is for the cancellation of the oral lease agreement in respect of two tennis courts situate at Alexandra Club, eviction of the defendant therefrom, holding over damages of $460 per month from August, 2010 to date of eviction plus costs of suit. The claim is B premised upon the following:-

The defendant was renting two tennis courts from plaintiff's premises since 1997, initially under a written lease agreement and subsequently under an oral lease agreement from 2005. The essential terms of the current lease agreement are:

a) that the defendant rents the premises for purposes of conducting the C business of motor vehicle sales,

b) that the rent shall be in the sum $400 plus $60 for legal practitioners' administrative charges per month,

c) that the rentals are payable monthly in advance on or before the seventh D day of each month.

The defendant breached the lease agreement in that it paid the July, 2010 rent late, on 21 July instead of on or prior to 7 July 2010 and also that it defaulted in paying the August 2010 rent. The plaintiff issued its summons on 27 August 2010. E

Three issues were referred to trial, *viz*:

1 what were the essential terms of the oral lease agreement between the parties?

2 whether the defendant breached the lease agreement in any way?

3 whether the plaintiff is entitled to cancel the lease agreement, eviction F of defendant and payment of holding over damages?

The plaintiff led evidence from one witness, Mathew Mtunzi. His evidence is this: he is the plaintiff club's manager. In April, 2002 the parties signed a written lease agreement which was supposed to endure for ten years but "expired" in 2005 by mutual agreement on account of hyperinflation. The parties verbally agreed that from 2009, the defendant would pay rent in advance G of $200 per month *per* tennis court which meant that the defendant would pay a total of $400 *per* month for the two tennis courts. That rent would be paid by the first of each month, the latest being by the seventh of the month. He said the defendant has habitually failed to pay rent on time, paying as and when it felt like. The plaintiff never received rentals for July and August H

Mutema J

A 2010. He denied the defendant's averment contained in para 3.3 of its plea that "rent was payable whenever possible on or before the last day of the month in which the rent was due." He also denied the averment in para 3.5 of the plea that "the parties further agreed that the defendant would have on or before the 20th of each month to clear its rent arrears for the previous month."

B He also explained that the defendant was paying rent late and the plaintiff would accept late payments because the money belonged to it, not that it was by arrangement. Arrear rentals were cleared in October 2011, after sixteen months and he was unsure whether that payment included the July 2010 rentals.

C He said the plaintiff still persisted with the claim for holding over damages as even the March 2012 rental had not been paid. He was not aware that the August 2010 rent was tendered to plaintiff's legal practitioners who refused to accept it. He produced exhibits 1,2 and 3, being letters by the plaintiff's legal practitioners to the defendant demanding payment for the rent. The plaintiff thereafter closed its case.

D The defendant called two witnesses. The first was Andrew Magirazi, the defendant's chief executive officer.

He averred that the defendant paid its rentals in full and that whenever arrears were incurred it was due to negotiations regarding the amount. The July 2010 rent was fully paid to the plaintiff's legal practitioners. The rental payment E stalemate dates back to beyond July 2010 which resulted in negotiations with the plaintiff's legal practitioners whereupon it was suggested that the rent would be paid to plaintiff's legal practitioners in the amount of $400 representing rent and $60 representing collection fees. He produced exhibit 4, being a letter to the defendant by the plaintiff's legal practitioners showing F that $460 was paid to them for the July 2010 rent, though the letter alleged that rent had been increased to $600. He referred to exhibit 3, a letter from the plaintiff's legal practitioners alleging falsely that outstanding arrears were, as at 16 August 2011, in excess of $11 385. He also produced exhibit 5, a letter he wrote in response to exhibit 3, containing a counter calculation of outstanding rentals from August 2010 in an amount of $6 440, which the G plaintiff's legal practitioners accepted thereby negating the allegation that rent for July, 2010 had not been paid. Non-payment of rent was not willful but was occasioned by the plaintiff who was refusing to accept payment. He said the defendant thereafter paid off all the outstanding amount for 16 months and was issued with a receipt for the payment, which means that the H defendant is fully paid from August 2010.

Mutema J

The second witness was Aleck Chakanyuka who is the defendant's manager. A He was seated in court from the onset of the trial. The defendant's legal practitioner explained that as this was her first trial and that she was not aware that the witness was not supposed to be in court until called to testify. His evidence, to be treated with caution, was that in August 2010 he went to pay the August 2010 rent to the plaintiff's legal practitioners, who refused B to accept it. He tried to talk to Sophie, the plaintiff's legal practitioners secretary, who promised to speak to her boss, but he was advised that the rent could not accepted.

The defendant's current legal practitioners then later engaged the plaintiff's legal practitioners and it was agreed that the outstanding rent be paid. In December 2011, $2 300 was paid towards advance rentals of five months at C the rate of $460 per month. The defendant then closed its case.

I am constrained to remark here that had the agreement between the parties been handled professionally as well as the pleadings, the court would not have been presented with such blurred evidence by both parties. It is now my singularly unenviable task to try to unravel the mystery in an endeavour D to find where the probabilities lie.

In its submissions, the defendant relied on *Stracon Development (Pvt) Ltd v Gruer* 1990 (1) ZLR 354 (H) which held that a lessor who, notwithstanding underpayment of rent by a lessee, accepts further underpayments in respect of succeeding months, evinces an election not to cancel the lease on the grounds of the earlier underpayments and cannot thereafter seek to cancel E the lease on the same set of facts covering the same period.

It also relied on *Parkview Properties (Pvt) Ltd v Chimbwanda* 1998 (1) ZLR 408 (H), which held that despite the existence of non-waiver and the non-variation clauses, the lessor must, if there is a late or partial payment, make his election within a reasonable time, and at the latest when the next F payment is tendered. Failing such an election, the acceptance without reservation of a subsequent payment must be taken as an election not to cancel on the grounds of the past breach and a condonation of the breach (though the landlord would retain the right to recover the unpaid rent due). To allow the landlord to accept the late or partial payments for a long time and rely on a breach which had occurred months previously as grounds for G cancellation would be most unfair.

The other cases relied upon by the defendant are *TM Supermarkets (Pvt) Ltd v Chadcombe Properties (Pvt) Ltd* 2010 (1) ZLR 196 (H) which held at 200 that "… the lessor cannot straddle both options of formally demanding and accepting the late payment of rent on the one hand and then claiming the H

Mutema J

A right to terminate the lease on the other..", and *Masukusa v Tafa* 1978 RLR 167 (A) where the principle was stated that the lessor must, if there is a late payment, make his election within a reasonable time and at the latest when the next payment is tendered, failing which acceptance without reservation of a subsequent payment must be taken as an election not to cancel on the B grounds of the past breach.

In para 3 of the written closing submissions, the defendant's counsel made the following startling statement:

> "It is submitted that the plaintiff failed to prove on a balance of probabilities that the defendant at the time the summons was (*sic*) in arrears which constituted a breach. At the time of issuance of summons the plaintiff had already accepted the July 2012 (*sic*) rentals therefore waivering (*sic*) his (*sic*) right to issue summons C for cancellation based on the particular rental as it had already been paid. This principle was enunciated in the case of *Masukusa v Tafa* 1978 RLR 167 (A)".

Clearly the facts of the instant case are not supported by that principle. I shall revert to this quoted paragraph later on.

As I observed above, the agreement between the parties was chaotic in that D when the written one extinguished itself before it ran its full life, due to a conspiracy of economic factors extant at the time, the parties desisted from amending it in writing. Instead they amended it orally. The oral agreement was silent regarding existence of a non-waiver or non-variation clause.

Regarding when payment of rent was due, the parties were at a divergence. E The plaintiff averred that rent was payable monthly in advance on or before the seventh day of the month. On its part, the defendant averred that the agreement was that rent was payable "whenever possible on or before the last day of the month", or "before the 20th of the month." I am constrained to believe the plaintiff's version on this respect on the grounds that: F

(a) it is improbable that a landlord would agree that rent would be payable whenever possible on or before the last day of the month;

(b) the defendant was dithering on this aspect, giving two conflicting versions for it, *viz* the one above and the other that rent was payable before the 20th of the month;

(c) the plaintiff's witness said the timeline within which rent was due was G that which the parties agreed orally and remained the same as the one in the original written agreement. This was not refuted and only a feeble and non-committal cross-examination was mounted regarding this witness' evidence. He remained unshaken.

The crux of the suit hinges on the alleged breach of the lease regarding non H payment or late payment of the rent. Regarding this, the defendant in paragraph

---

Mutema J

3 cited *supra* concentrated on the July 2012 (supposed to be 2010) rental A arguing that by the time the summons was issued that rent had already been paid; hence by accepting the rent the plaintiff had waived its right to issue summons for cancellation of the lease based on the alleged late payment. The *ratio* in the *Parkview Properties* case *supra* is premised on the *ratio* in *Masukusa v Tafa supra.* The issue in these cases was whether a landlord could B successfully invoke a non-waiver and non-variation clause where the landlord had previously accepted late payments of rental without reservation and had not made his election to cancel the lease within a reasonable time and, at the latest, when the next payment is tendered. The answer was found to be in the negative. In other words, an attempt by a landlord to go back in time to previous months' defaults after acceptance of subsequent timeous payments C (even late payments) enables the lessee to resist a claim for ejectment by raising the *exceptio doli* against the landlord, notwithstanding the provisions of a non-waiver and non-variation clause in the lease agreement.

In *National Social Security Authority v Ryals & Ors* HH-236-10, I had occasion to deal with facts falling on all fours with those *in casu*. At p 4 of D the judgment I observed:

> "However, the *Parkview* case *supra* is distinguishable from the present case. What was held therein does not detract from the operation of the non-waiver and nonvariation clauses, for where the lessee again makes late payment the following month, and the lessor cancels within that month or before any remedy of the breach is done, the lessee cannot, because of these clauses, be heard to argue E that previous late payments have been accepted in circumstances amounting to waiver or estoppel. To hold otherwise would definitely yield iniquitous results."

In the instant case para 5 of the plaintiff's declaration avers thus:

"The defendant breached the contract in that:

(a) It was late in paying the July 2010 rent. The rent was paid and accepted without prejudice to the landlord's right to cancel the lease on 21 July 2010, F instead of a date prior to 7 July 2010.

(b) The defendant has defaulted in paying the August 2010 rent."

What is important regarding the July 2010 rental payment on 21 July 2010 is that it was paid late and was accepted "on a without prejudice basis". See exhibit 4. It therefore cannot be said that this late payment was accepted G without reservation to enable the defendant to successfully invoke the *ratio* in *Masukusa v Tafa supra*. Even if this could be held in the defendant's favour, the defendant would still be non-suited on the basis of the fact that the summons was issued on 27 August 2010 when the August rent had still not been paid by the cut off date of the seventh of the month or twentieth (if one goes by defendant's argument). H

2012 (1) ZLR p451

Mutema J

A The *ratio* in the *Tafa* case *supra* would not help the defendant. The scenario falls on all fours with that in *NSSA v Ryals supra*. In the event the defendant breached the lease agreement, by failing to pay rent timeously and the plaintiff was entitled to cancel the lease while the defendant was still *in mora.* The averment by the defendant's witnesses that the August 2010 rent was tendered and refused by the plaintiff's legal practitioners is fallacious because B having accepted the late payment for July 2010 on 21 July 2010 it is highly improbable that the legal practitioners would refuse to accept the following month's rent. In any event, as late as September 2011 the plaintiff's legal practitioners were still willing to accept payment of arrear rentals including the August 2010 one, as evidenced by exhibit 2. Even if the August 2010

C rent was later paid in 2011, it was long after issue of summons for breach and its acceptance cannot cure the breach committed in 2010. In the event, I find that the essential terms of the oral lease agreement between the parties were that the defendant was to pay rent in advance by the seventh of the month in the amount of $4600 per month (by August 2010); the defendant breached the lease agreement by not paying the August 2010 D rent on due date and the plaintiff is perfectly entitled to cancel the lease agreement, to evict the defendant and to payment of holding over damages if any. In the event, judgment be and is hereby entered for the plaintiff in terms of the summons.

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

F *Kanyenze & Associates*, defendant's legal practitioners

© 2015 Juta and Company (Pty) Ltd.

Document 57 of 75

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2012/Volume 1/WAMAMBO v MUNICIPALITY OF CHEGUTU 2012 (1) ZLR 452 (H)

WAMAMBO v MUNICIPALITY OF CHEGUTU 2012 (1) ZLR 452 (H)

2012 (1) ZLR p452

Citation	2012 (1) ZLR 452 (H)
Case No	Judgment No. HH-234-12
Court	High Court, Harare
Judge	Mathonsi J
Heard	8 May 2012; 9 May 2012; *CAV*

Judgment 6 June 2012

Counsel *F Piki,* for the plaintiff
A Zeure, for the defendant

Case Type Civil trial

Annotations No case annotations to date

Flynote

Practice and procedure – *admission – withdrawal of – when party may withdraw admission made*

Headnote

A party may not, without the leave of the court, withdraw an admission made D (including any admission made at a pre-trial conference), nor may it lead evidence to contradict any admission.

Cases referred to

Adler v Elliot 1988 (2) ZLR 283 (S)

Copper Trading Co (Pvt) Ltd v City of Bulawayo 1997 (1) ZLR 134 (S) E

Legislation considered

Civil Evidence Act [*Chapter 8:01*], s 36

Contractual Penalties Act [*Chapter 8:04*], s 8

High Court Rules 1971 (RGN 1047 of 1971), r 121(1) F

Case information

F Piki, for the plaintiff

Ms *A Zeure,* for the defendant

Judgment

Mathonsi J: The plaintiff instituted proceedings against the defendant on 18 March 2011 seeking contractual damages arising from what she perceived G to be an unlawful cancellation of an agreement of sale of a vacant stand entered into between the parties.

The action was defended and after entering appearance to defend the defendant filed a plea on 24 May 2011 denying liability and stating that it had cancelled the agreement of sale as a result of the plaintiff's failure to H

Mathonsi J

A comply with a provision in it requiring her to develop the stand within the time prescribed in the sale agreement.

I mention the dates when the processes were filed because, much later on 24 October 2011 the defendant purported to file a claim in reconvention which, although it may have been abandoned at the pre- trial conference, B the defendant appeared to resuscitate at the trial. I need to dispose of this issue now before taking the matter further.

The filing of a claim in reconvention is provided for in Order 18 of the High Court of Zimbabwe Rules, 1971, r 121(1) which is of peremptory application. It provides:

"A claim in reconvention shall be so described and *shall be bound and filed with* C *he defendant's plea"* (emphasis added).

As stated above, the defendant's claim in reconvention was not filed with its plea. It was filed exactly five months after the plea was filed and in clear violation of r 121(1). This was incompetent.

While a departure from the rules can be allowed, this can only be through D condonation by the court. No application for condonation was made and such cannot be given unsolicited. The defendant was not entitled to counter-claim and its nervous attempt to reintroduce the irregular claim in reconvention at the trial cannot be accepted.

Even if I am wrong in that conclusion, the defendant's claim in reconvention would still fail on the basis that it was not among the issues for trial agreed E at the pre-trial conference. I shall return to that later in this judgment.

At the pre-trial conference of the matter, only one issue was identified as being the issue for trial, namely whether or not the plaintiff is entitled to damages in the sum of US$19 500. The parties also made the following admissions which are contained in the joint pre-trial conference minute: F

"3. Admissions Made

3.1 That the plaintiff was in breach of the deed of sale between the plaintiff and the defendant.

3.2 That the Contractual Penalties Act is applicable.

3.3 That the defendant did not give adequate notice to the plaintiff to rectify breach as required in terms of the Contractual Penalties Act. G

3.4 That the stand 1279 Chegutu Township, belonging to the plaintiff was sold to a third party by the defendant and is longer available".

At the trial of this matter, the plaintiff gave evidence which is to the effect that in 2002 she entered into a written agreement of sale with the defendant Municipality in terms of which she purchased from the defendant a vacant H stand, being stand 1279 Hintonville, Chegutu, for $35 000 Zimbabwean

---

currency. She paid cash for the stand. The said agreement was produced A as an exhibit.

It was a term of the agreement that she would develop the stand by constructing a dwelling within two years of signing the agreement. Although she submitted plans for the building to the defendant, which plans were approved by the defendant, she was unable to develop the stand due to financial constraints. B She however continued to pay rates and taxes to the defendant, which the latter gladly accepted.

Sometime in 2009, she sent someone to the offices of the defendant to pay the rates but the defendant refused to accept the rates payment on the basis that her stand had been repossessed by the defendant. The plaintiff testified that at no point had she been served with a notice of repossession or any C notice for that matter. She only got to know of it when the defendant refused to accept rates payment.

She stated that she proceeded to the offices of the defendant where she spoke to the housing officer, a Mrs Mandeya, who told her that the defendant had repossessed the stand owing to her failure to develop it. When she tried to D negotiate to get it back she was advised that she would have to pay for it again but this time at a value of US$10 per square metre and, given that the stand in question measured 1950 square metres, simple arithmetic meant that she had to pay an extra US$19 500.

The plaintiff stated that the defendant, however, made it clear to her that E stand 1279 Hintonville, Chegutu, was no longer available for her to even re-purchase it as it had been re-sold to someone else. Her further investigations revealed that it had in fact been sold to Mr and Mrs Shiku of Chakari, who still owed the defendant a sum in excess of US$16 000 towards the purchase price although he did not know for how much it had been sold. F

The plaintiff produced a document with the title:

"Rates Calculation: Replacement Stand for Stand 1279 C. Wamambo. Basis: Vacant/Undeveloped Occupied Land. Rates based on valuation of land and expected improvements. Expected Development: Standard low density dwelling measuring 300m2

Valuation done at current rates". G

The document in question was prepared by the town planner, Douglas Chimande, who testified in court on behalf of the defendant. It captures the value of land, that is 1920 square metres, as being US$19 200 and computed what the plaintiff had to pay as rates for the period 2002 to 2011 as US$12 960. The plaintiff submitted that, if one divided the value of land given by Chimande as $19 200 by the area used, that is 1920 square metres, the answer is $10 H

2012 (1) ZLR p455

Mathonsi J

A which she says is the value of land at current rates. This means that for her to replace stand 1279 Hintonvile, Chegutu, which measured 1950 square metres and was unlawfully taken away from her by the defendant, with a 1950 square metre comparable stand, she would require $19 500, which is what she is claiming in this action. It represents the replacement value of the stand she lost using the defendant's own valuation.

B Under cross-examination, the plaintiff maintained that what she was claiming was what the defendant would charge at current rates for a similar stand as the one she lost.

Alois Mutyanda also testified on behalf of the plaintiff. He is a registered estate agent and valuer with 12 years experience. At the request of the plaintiff, he C conducted a valuation of stand 1279 Hintonville, Chegutu, visiting the place on 4 May 2012 and then proceeding to the offices of the defendant where he made inquiries about the stand. He was attended to by an assistant of one Mr Matande, by the name Mr Mukandiwa. He was unable to interview anyone at the housing office as he had to rush back to Harare for other commitments D and it was almost lunch time.

On 7 May 2012, he telephoned the defendant's offices and obtained information he used to compile his valuation report dated 4 May, 2012 which was produced as an exhibit. The witness reiterated the contents of that report, that stand 1279 Chegutu is now owned by M V and F Shiku of Chakari. It is still vacant. In his opinion its open market value is US$13 650 while its E forced market value is US$10 737.50.

Alois Mutyanda added that in the course of his investigations he discovered that the defendant did not have any stands available in Hintonville. However those that it had elsewhere, are selling for US$5 per square metre for residential stands and US$10 for commercial stands. Using these rates and F inquires from other valuers, he had come up with the figure of US$7 per square metre, which he used to determine the market value of US$13 650.

The plaintiff's case was closed after the presentation of the evidence of Alois Mutyanda. Her evidence was presented in a simple manner and is not only straightforward but also easy to follow.

The defendant led evidence from Douglas Chimande, the town planner, who G has held that position for seven years and boasts of 20 years experience in the town planning business. He was not employed by the defendant at the time the sale agreement with the plaintiff was concluded, but is aware of it.

He testified that the defendant is a service provider which provides opportunities for home seekers to build houses. As a municipality, the H defendant lays out and services stands for residential purposes, a process

---

2012 (1) ZLR p456

Mathonsi J

which involves providing the roads, sewage and water reticulation, as well as A street lighting. The defendant would then invite home-seekers to contribute to the servicing costs through the purchase price of stands which would be set out in agreements of sale signed with such home seekers.

Douglas Chimande went on to say that in order to determine the purchase price of each unit, the defendant would add up the whole gamut of costs of B servicing and divide that by the number of stands. The defendant does not sell land *per se* but recovers the costs of the benefit.

After the plaintiff failed to construct a dwelling, the defendant concluded that she was holding the land for speculative purposes, even though no home seeker is allowed to sell an undeveloped stand, which is the preserve of the municipality. The stand was then repossessed. The witness stated that the C plaintiff is not entitled to a refund of the purchase price she paid because not only would that

amount to an abuse of public funds which the defendant does not have anyway, but also that the defendant does not have a formula for refunding Zimbabwe dollar transactions.

In respect of exh 1, the document he authored containing computations D of rates payable by the plaintiff for the stand and the value of the stand in question, the witness stated that it was an account of the punitive rating system used by the defendant on vacant/undeveloped but occupied land. The punitive measures are taken because the home seeker offered the stand would have wilfully left it undeveloped for speculative purposes. It sums up the total damage that the defendant suffers when occupiers do not meet E their obligations in terms of the agreement of sale.

From there on, Douglas Chimande went off the rails, departing not only from the pleadings filed on behalf of the defendant, but even from the admissions made by the parties at the pre-trial conference, which admissions I have already quoted above. F

While in the pleadings the defendant admitted that the Contractual Penalties Act [*Chapter 8:04*] applied to the relationship between the parties, the witness was steadfast in his evidence that it did not apply as the relationship was governed solely by the Urban Councils Act [*Chapter 29:14*]. While the defendant made an admission that it did not give adequate notice to the G plaintiff to rectify the breach as required by the Contractual Penalties Act, in his evidence the witness sought to distance himself from that admission, electing to say that written notice was given to the defendant, which notice was delivered at the vacant stand in dispute. This, despite the fact that he stated that before repossessing the stand, the defendant conducted an inspection which must have revealed that no one resided there and the fact H

A that it would have been foolery of gigantic proportions to deliver a notice at a vacant stand.

More importantly, the agreement of sale signed by the parties provided an address for service for the plaintiff, namely PO Box 6328 Harare. He did not explain why this was not used.

B Matande also claimed that a further notice was given to the plaintiff via *The Sunday Mail* of 22-28 July 2007, which notice gave the effective date of repossession as 21 days from the date of publication. This, despite the fact that the defendant had earlier on, on 30 March 2006, sent another written notice to the plaintiff which was delivered at the vacant stand being 1279 Hintonville aforesaid. He did not give any meaningful explanation as to C why it became necessary to give another notice more than a year after the repossession.

Needless to say the ubiquitous town planner did not tender a copy of either the notice of 30 March 2006 or that of 22 July 2007 as exhibits. If one takes this part of his evidence with the *in situ* admissions made earlier at the pre-trial D conference it is not difficult to reject it.

Matande could not even confirm that stand 1279 was no longer available, choosing to hedge behind saying he could not recall offhand and needed to consult records at the housing desk. It is not clear why he did not do so before venturing to court when he knew he was the sole witness for the defendant. E This prevarication should also be considered together with the admission made by the defendant that the said stand was sold to a third party and is no longer available, an admission made six months before the trial commenced.

To his credit, Matande did confirm that there are no vacant stands available for sale in Hintonville. He mentioned that the defendant has a current F scheme called Chegutu East which is contiguous to Hintonville wherein the defendant incurred the same costs in developing it as Hintonville at current rates. It is these servicing costs which he used when computing the replacement value and rates of the disputed stand which are contained in exhibit 1 which I have referred to.

Douglas Chimande did not give his evidence well. He prevaricated a lot and G in the process contradicted not only himself but also the defendant's case set out in the pleadings. His evidence is unreliable in many respects.

Mr *Piki* appearing for the plaintiff has strongly argued that the defendant cannot lawfully attempt to disprove admissions that it has made. He relies on s 36 of the Civil Evidence Act [*Chapter 8:01*]. That section provides, in H relevant part, as follows:

"**36 Admissions** A

(1) An admission as to any fact in issue in civil proceedings, made by or on behalf of a party to those proceedings, shall be admissible in evidence as proof of that fact, whether the admission was made orally or in writing or otherwise.

(2) …

(3) It shall not be necessary for any party to civil proceedings to prove any fact admitted on the record of the proceedings. B

(4) It shall not be competent for any party to civil proceedings to disprove any fact admitted by him on the record of proceedings:

Provided that this subsection shall not prevent any such admission being withdrawn with leave of the court, in which event the fact that the admission was made may be proved in evidence and the court may give such weight to the admission as the court considers appropriate, bearing in mind the circumstances C in which it was made and withdrawn".

Ms *Zeure* for the defendant did not make any submissions on that legal point. The defendant did not seek leave of the court to withdraw the admissions it made as provided for in the proviso to subs (4) of s 36 of the Civil Evidence Act. Indeed no attempt was made to amend the joint pre-trial conference D memorandum.

It is therefore mysterious that the defendant led evidence which had the effect of withdrawing a confessionary pleading without attempting to amend such pleading, and ultimately without any leave of the court. No explanation whatsoever was given for doing so. Even if I was inclined to do so, I am unable to exercise the discretion reposed upon me to allow the E defendant to withdraw the admission because, as stated earlier, I have not been requested to do so.

The admissions made by the defendant amount to a confessionary pleading and as such they are taken for granted, making it unnecessary for the plaintiff to prove them: *Adler v Elliot* 1988 (2) ZLR 283 (S) at 288C; *Copper Trading Co* F *(Pvt) Ltd v City of Bulawayo* 1997 (1) ZLR 134 (S) at 143H-144B and 144G.

Having come to that conclusion, it means that the testimony of Matande in which he attempted to renege from the admissions made at the pre-trial conference was an exercise in futility. The defendant is bound by those admissions.

There is a related issue, which is the attempt by the defendant to revive a G claim in reconvention which it abandoned at the pre-trial conference.

Ms *Zeure*, for the defendant, submitted that the defendant did not abandon the claim in reconvention for rates in the sum of US$7 338. I have already stated that it was not competent for the defendant to file the claim in reconvention in violation of r 121(1) of the High Court rules. H

Mathonsi J

A In addition to that, when the defendant attested to a joint pre-trial conference minute in which the only issue for trial was set out as whether the plaintiff is entitled to damages in the sum claimed, it was effectively abandoning its counter-claim and it is bound by that unless it had applied to amend the minute. It did not. Pre-trial conference proceedings are part of the process of resolving the dispute between the parties. It would be a sad day indeed B if parties to an action were to be allowed to flip flop and agree on issues at the pre-trial conference and then, without more, just reinstate settled issues at the trial. That would make nonsense of the very important and useful process of curtailment of proceedings.

In casu, the parties entered into an agreement for the purchase and sale of C land in instalments. There is a valid admission that there was no notice given to the plaintiff to rectify the breach and that the Contractual Penalties Act applies to the relationship between the parties.

Section 8 of the Contractual Penalties Act, which the defendant has admitted applies to this case, provides:

D "**8 Restriction of seller's rights**

(1) No seller under an instalment sale of land may, on account of any breach of contract by the purchaser –

(a) enforce a penalty stipulation or a provision for the accelerated payment of the purchase price; or

(b) terminate the contract; or E

(c) institute any proceedings for damages;

unless he has given notice in terms of subsection (2) and the period of the notice has expired without the breach being remedied, rectified or discontinued, as the case may be.

(2) Notice for the purposes of subsection (1) shall – F

(a) be given in writing to the purchaser; and

(b) advise the purchaser of the breach concerned; and

(c) call upon the purchaser to remedy, rectify or desist from continuing; as the case may be, the breach concerned within a reasonable period specified in the notice, which period shall not be less than – G

(i) the period fixed for the purpose in the instalment sale of the land concerned; or

(ii) thirty days;

whichever is the longer period.

(3) Without derogation from section 40 of the Interpretation Act [*Chapter 1:01*], a notice shall be regarded as having been duly given to the purchaser for H the purposes of subsection (1) –

2012 (1) ZLR p460

Mathonsi J

(a) if it has been delivered to the purchaser personally or to an agent chosen A by the purchaser for the purpose of receiving such notices; or

(b) if it has been posted by registered post to the address chosen by the purchaser for the delivery of correspondence or legal documents relating to the instalment sale of land concerned or, in the absence thereof, to the purchaser's usual or last known place of residence or business".

In the present case, there was a wholesale failure to comply with the foregoing B provisions as no notice to rectify the breach was given to the plaintiff. For that reason, the defendant's purported cancellation of the sale was a nullity. It would have been proper to direct the defendant to return the land to the plaintiff and, if still persistent to enforce the penalty stipulation in the agreement, to comply with the law. However, as the evidence has shown, the C defendant has made it impossible for such an order to be made, by alienating the land in question, it having been re-sold to a third party.

It is for that reason that the plaintiff amended her claim to seek contractual damages in the sum of US$19 500 which she claims is what she requires to replace the stand unlawfully taken from her. The plaintiff is entitled to D a stand, comparable to stand 1279 Hintonville, Chegutu, which she would have had if the defendant had not unlawfully terminated the sale agreement.

According to R H Christie *Business Law in Zimbabwe* 2 ed, Juta & Co Ltd, (1998) at p 124.

> "Damages for breach of contract are intended to place the innocent party in the E position he would have occupied had the contract been performed, so far as that can be done by the payment of money, and without undue hardship to the defaulting party. Damages for breach are therefore not calculated in the same way as damages for delict, which are intended to compensate the innocent party for what he has lost rather than what he should have gained".

The question which arises is: how much does the plaintiff require in F monetary terms to secure a 1950 square metre stand comparable to stand 1279 Hintonville, Chegutu? The evidence that is available is that only the defendant sells vacant stands in Chegutu. Private individuals are not allowed to sell vacant stands they would have obtained from the defendant as that would amount to a breach of the agreement with the defendant.

The plaintiff testified that the sum of $19 500 she is claiming was arrived G at using the figure of US$10 per square metre obtained from the defendant. This was disputed by the town planner whose evidence was to the effect that the value in question represents the punitive figures used to recover arrear rates from defaulting home seekers. The town planner is the author of the document the plaintiff seeks to rely on. H

2012 (1) ZLR p461

Mathonsi J

A I found Douglas Chimande to be an extremely unreliable witness whose main concern was to hedge the defendant from liability even when it was not possible to do so. It is therefore difficult to place any weight on his figures, especially as he disowned those figures in his evidence and flatly refused to release the figures the defendant is now using to sell land.

B Happily, though, we have the evidence of the valuer, Alois Mutyanda, whose evidence was not impeached at all and can be relied upon in determining the replacement value of the stand. That witness conducted inquiries from both the municipality and other independent valuers. He discovered that the defendant is currently selling residential land at US$5 per square metre. He then came up with the market value of US$13 650 having regard to all the C other relevant factors. I believe him.

In my view, it matters not what one calls these damages – whether they represent the market value of the stand in question or the replacement value. What is clear from the evidence which I have accepted is that the defendant currently sells vacant land at the rate estimated by a qualified valuer. For the plaintiff to secure that land in lieu of that which was improperly taken D from her, she has to approach the same source, the defendant, as the sole seller of such land and purchase it at that price.

I conclude therefore that on a balance of probabilities, the plaintiff has proved that she is entitled to damages in the sum of $13 650 arising out of the breach of the agreement of sale committed by the defendant.

E In the result I make the following order, that:

1. Judgment be and is hereby entered against the defendant in favour of the plaintiff in the sum of US$13 650 in respect of damages for breach of contract.
2. Interest on the sum of $13 650 at the rate of 5 per cent per annum from F the date of judgment to date of payment.
3. Costs of suit on the ordinary scale.

I E G Musimbe & Partners, plaintiff's legal practitioners

F *Warara & Associates*, defendant's legal practitioners

© 2015 Juta and Company (Pty) Ltd.

Document 58 of 75

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2012/Volume 1/SUB SAHARAN MANAGEMENT CONSULTANTS (PVT) LTD v SIRITUTA INVESTMENTS (PVT) LTD & ORS 2012 (1) ZLR 462 (H)

SUB SAHARAN MANAGEMENT CONSULTANTS (PVT) LTD v SIRITUTA INVESTMENTS (PVT) LTD & ORS 2012 (1) ZLR 462 (H)

Citation	2012 (1) ZLR 462 (H)
Case No	Judgment No. HH-249-12
Court	High Court, Harare
Judge	Chatukuta J
Heard	6 June 2012
Judgment	6 June 2012
Counsel	*S Simango*, for the applicant *B Magogoe*, for the first and second respondents
Case Type	Urgent chamber application
Annotations	Link to case annotations

Flynote

Appeal – *execution ending appeal – application – when court should grant stay of execution – principles*

Appeal – *validity – determination of validity of appeal – appeal from magistrates court to High Court – only High Court entitled to determine* D *whether appeal validly before it*

Practice and procedure – *application – ex parte – nature of order sought – order final in effect – should not be granted on ex parte basis – should not be executed before return day*

Headnote

The applicant obtained default judgment in the magistrates court for the E eviction of the respondents from premises occupied by the applicant. The respondents obtained an ex parte order for rescission of the eviction order, as well as an order restoring them to occupation of the premises. The applicant appealed against both orders. The respondents obtained an order from the magistrates court that the earlier decision had been F interlocutory and thus that there was no appeal pending, and a further order for the eviction of the applicant. The applicant noted a further appeal, this time against the magistrate's ruling that there was no appeal pending, and sought an order for stay of execution of the order evicting it from the premises. The respondents opposed the application, on the G grounds that there was no valid appeal before the High Court. The decisions of the lower court were interlocutory, pending the determination of the applicant's application for the eviction of the respondent, and the applicant ought therefore to have set down the application for eviction.

Held, that the the whole purpose of stay of execution proceedings pending an appeal is to prevent irreparable prejudice from being suffered by H

2012 (1) ZLR p463

Chatukuta J

A the prospective appellant. In an application of this nature the court must therefore be satisfied that injustice would be caused if a stay is not granted. In considering whether injustice might be occasioned, the court would also have regard to the prospects of success on appeal, the potentiality of irreparable harm or prejudice to either of the parties and the balance of hardship or inconvenience.

B *Held*, further, that if an order sought is effectively a final order, it may not be granted on an *ex parte* basis. Proper notice must be given to the other party. If it is granted, it may not be executed before the return day.

Held, further, that the magistrate issued an order which was final in effect on an *ex parte* basis. While the order appeared to be interlocutory, it C was in fact final in effect, in that it provided for the ejectment of the applicant from the premises and the reinstatement of the respondents. Once a tenant is evicted from commercial premises through an order of the court, even where the order is wrongful, the tenant cannot regain possession of the premises. The principle is that, although an order may later be found to be wrongful, it is lawful and binding at the time of D execution if it has not been set aside.

Held, further, that in any event, the order rescinding the eviction order, even if interlocutory in effect, was appealable in terms of s 39(2) of the Magistrates Court Act [*Chapter 7:10*].

Held, further, that it was not for the magistrates court to pronounce the E appeal before the High Court a nullity. The appeal was before the High Court and only the High Court could determine whether or not the appeal was a nullity.

Cases referred to

Chibanda v King 1983 (1) RLR 116 (H)

F *Chioza v Independent Property Development (Pvt) Ltd & Anor* HH-76-94

Cohen v Cohen (1) 1979 RLR 184 (G); 1979 (3) SA 420 (R)

Delco (Pvt) Ltd v Old Mutual Properties & Anor 1998 (2) ZLR 130 (S)

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

Hubert Davies Employees Trust (Pvt) Ltd & Ors v Croco Hldgs (Pvt) Ltd 2009 (2) ZLR 53 (S)

G *Murumbechi v Townsend* HH-185-90

Mydale Intl Mktg (Pvt) Ltd v Kelly & Anor HH-4-10

Nyandoro v Sithole & Ors 1999 (2) ZLR 353 (H)

Ritenote Printers (Pvt) Ltd v A Adam & Co & Anor 2011 (1) ZLR 521 (S)

Santam Ins Co v Paget 1981 ZLR 132 (H)

H *Strime v Strime* 1983 (4) SA 850 (C)

2012 (1) ZLR p464

Chatukuta J

United Merchant Bank Zimbabwe Ltd v Zimbabwe Independent & Anor 2000 (1) ZLR 234 (H)

Legislation considered

Commercial Premises (Rent) Regulations 1983 (SI 676 of 1983), ss 22(2) & 23 B

Magistrates Court Act [*Chapter 7:10*], ss 39 & 40

Case information

S Simango, for the applicant

B Magogoe, for the first and second respondents

Judgment

Chatukuta J: This is an application for stay of execution of orders of C the magistrates court in case No. 255/12 dated 9 and 23 February 2012.

The background to the application is that on 5 January 2012, the applicant filed an application seeking the ejectment of the respondents from No. 144 Nelson Mandela Avenue, Harare (the premises). The applicant alleged in the application that it is in occupation of No 142/4 Nelson Mandela Avenue, Harare D pursuant to a lease agreement with a company called Zeolite Investments (Pvt) Ltd, dated 22 March 2011. Prior to the conclusion of the lease agreement, the premises were being occupied by Bramhope Investments (Pvt) Ltd (BHI Properties). The deponent to the founding affidavit to the present application and the second respondents were directors in that company. BHI Properties E was dissolved and the applicant became the successor to the company. The second respondent assumed directorship of the first respondent and remained on the premises, occupying Suite No. 144 without the applicant's authority as the leaseholder.

The first and second respondents did not oppose the application and default F judgment was granted on 17 January 2012. The respondents were served with a notice of eviction and were duly evicted from the premises.

On 8 February 2012, the first and second respondents applied on an *ex parte* basis for an order restoring them to the property pending the determination of an application for the rescission of the default judgment. The following G order was granted on 9 February 2012:

"IT IS ORDERED THAT:

1. A rule nisi returnable on 17 (*sic*) day of Feb (*sic*) 2012 calling upon the Respondents to show cause why an order should not be made in the following terms:
2. TERMS OF THE FINAL ORDER SOUGHT A

2012 (1) ZLR p465

Chatukuta J

2.1 The A applicants be and are hereby restored into occupation of Suite No 144 Nelson Mandela Avenue, Harare, pending the disposal of the respondents' application for eviction in Case number 255/12.

2.2 Each party to bear its own costs.

PENDING THE RETURN DATE THE FOLLOWING BE AND IS HEREBY GRANTED: B

3. INTERIM RELIEF

3.1 The applicants be and are hereby restored into occupation of Suite No 144 Nelson Mandela Avenue, Harare pending the finalization of application for rescission of judgment in case No 255/12.

3.2 The first respondent and all those claiming occupation through them be and C are hereby ordered to vacate the property being Suite Number 144 Nelson Mandela Avenue, Harare pending the finalization of the application for rescission of judgment Case Number 255/12 (*sic*).

3.3 The second respondent be and is hereby ordered to return applicants into occupation of suite Number 144 Nelson Mandela Avenue, Harare and into possession all (*sic*) the applicants' property listed on its removal notice D dated 2 February 2012 which it attached on that day.

3.4 Each party to bear its own costs.

In the event of the respondents breaching any of the terms of this provisional order, the messenger of court and if need be with the assistance of the Zimbabwe Republic Police, be and are hereby authorized to effect this order."

E The application for rescission of the default judgment of 17 January 2012 was granted on 23 February 2012.

On 27 February 2012, the applicant appealed against the order for rescission on the basis that the magistrates court had grossly erred in rescinding the default judgment where the respondents were in wilful default. It appealed, F at the same time, against the order of 9 February 2012 on the basis that the order provided for the restoration of the respondents into the premises on an *ex parte* basis when the respondents had been lawfully evicted pursuant to a lawful order.

The first and second respondents filed an application for leave to execute pending the appeal by the applicant. On 16 March 2012, the magistrates court G ruled that its order (presumably of 23 February 2012) was interlocutory and therefore there was no appeal before the High Court. On 19 March 2012, the applicant appealed yet again against this decision. The ground of appeal was that the notice of appeal was valid by virtue of s 39(2) of the Magistrates Court Act [*Chapter 7:10*], which permits appeals against orders rescinding H judgments made by the magistrates court.

Chatukuta J

Following the decision of 16 March 2012, the first and second respondents A obtained a writ of execution. A notice of ejectment, for the ejectment of the applicant on 10 April 2012, was served on the applicant propelling the applicant to file this application.

The respondents contested the urgency of the application. Mr *Magogoe* submitted that the applicant was aware of the decisions in February 2012 B and March 2012 yet it did not seek the intervention of the court then. Mr *Simango* submitted that the noting of its appeals suspended the operation of the orders until the appeals were determined. The applicant was surprised when the respondents proceeded to serve it with a notice for eviction, to be carried out on 10 April 2012, despite the appeals.

I am inclined to agree with the applicant that the matter is urgent. It is my C view that the cause of action is not the order of rescission but the notice of eviction served on the applicant. Until the decision of 16 March 2012, the applicant was under the impression that it had a valid appeal pending in the High Court. It is therefore understandable that it considered it not necessary to approach this court for relief, genuinely believing (whether rightly or D wrongly) that the orders of 9 and 23 February had been suspended by the noting of the appeal.

The applicant again appealed against the decision of the lower court of 16 March 2012. The respondents did not dispute that the decision of the court declaring the appeal a nullity was final in effect. The applicant would therefore have been in the right to protect its occupancy by appealing against that E decision. The applicant's apprehension upon being served with a notice of eviction is therefore understandable under the circumstances. It is that notice of ejectment that, in my view, gives rise to the need to act. It is therefore my view that the matter is urgent.

Turning to the merits of the application, Mr *Simango* submitted that there F were two appeals pending against the judgments of the magistrates court. If the appeals succeed after the judgment

has been executed and the applicant has been ejected from the property, the applicant would suffer irreparable harm as it would not be able to be restored into the premises. He submitted that the decision of 9 February 2012 was irregular in that it was made in the absence of the applicant following the eviction of the applicant in terms of a G lawful order. The lower court also erred on 16 March 2012 in declaring the appeal before the High Court a nullity, when in fact the appeal was permitted in terms of s 39 of the Magistrates Court Act.

The first and second respondents opposed the application, on the grounds that there was no valid appeal before this court. The decisions of the lower court H

2012 (1) ZLR p467

Chatukuta J

A were interlocutory, pending the determination of the applicant's application for the eviction of the respondent. The applicant ought therefore to have set down the application for eviction.

The whole purpose of stay of execution proceedings pending an appeal is to prevent irreparable prejudice from being suffered by the prospective appellant. B In an application of this nature, the court must therefore be satisfied that injustice would be caused if stay is not granted. See *Chioza v Independent Property Development (Pvt) Ltd & Anor* HH-76-94 at p 3; *Murumbechi v Townsend* HH-185-90; *Cohen v Cohen* 1979 RLR 184 (G): 1979 (3) SA 420 (R) at 423B-C; *Chibanda v King* 1983 (1) ZLR 116 (H); *Santam Insurance Co Ltd v Paget* 1981 ZLR 132 (H) and *Strime v Strime* 1983 (4) SA 850 (C).)

C In considering whether injustice might be occasioned, the court would also have regard to the prospects of success on appeal, the potentiality of irreparable harm or prejudice to either of the parties and the balance of hardship or inconvenience.

It appears that the applicant has prospects of success in its appeal against D the order of 9 February 2012. The first and second respondents could not advance any meaningful defence to the applicant's contentions that the magistrate issued an order which is final in effect on an *ex parte* basis. The order appears to be interlocutory, as the restoration of the respondents into the premises was ordered pending the determination of the application for the rescission of the default judgment. The order is, in my view, in fact E final in effect, in that it provides for the ejectment of the applicant from the premises in issue and the reinstatement of the respondents.

My view is premised on the finding in *Delco (Pvt) Ltd v Old Mutual Properties & Anor* 1998 (2) ZLR 130 (S) that once a tenant is evicted from commercial premises through an order of the court, even where the F order is wrongful, the tenant cannot regain possession of the premises. The court's finding was based on the principle that although an order may later be found to be wrongful, it is lawful and binding at the time of execution if it has not been set aside. Whilst the court in that case was considering the provision of s 22(2) as read with s 23 of the Commercial Premises (Rent) Regulations 1983 (SI 676 of 1983) which protect the right of the statutory G tenant in actual physical possession of premises to resist eviction, it is my view that the principle enunciated in that case is equally applicable in the present case. It appears to me that the applicant would therefore not be able to be restored into the premises if it is ejected pursuant to the decisions of the lower court of 9 and 23 February 2012, which may in fact be found to H be wrong on appeal.

2012 (1) ZLR p468

Chatukuta J

Assuming that I am correct in holding that the principles in the *Delco* case A are equally applicable in the present case, it follows that the court erred in restoring the respondents into the premises. Further, what makes the order of 9 February 2012 patently wrong is that it provided for the ejectment of the applicant in its absence and before the return date. In *United Merchant Bank Zimbabwe Ltd v Zimbabwe Independent & Anor* 2000 (1) ZLR 234 (H) B at 244H-245B Bartlett J had this to say:

> "I indicated earlier that I would comment on the effect of seeking what amounts to a final order on an *ex parte* basis. As stated by Le Grange J in *Cleggy v Priestly* 1985 (3) SA 950 (W) at 954F-G it is a 'fundamental principle of our law that the court will not make a final order that may prejudice the rights of a person without notice to him: *cf Network Video (Pty) Ltd v Universal Studies Inc & Ors* 1984 (4) SA 379 (C)'. See also Herbstein and van Winsen *The Civil* C *Practice of the Supreme Court of South Africa* 4 ed at p 232

> Accordingly, if I am correct that the order sought was effectively a final order, the *ex parte* nature of the application precluded the granting of the order sought – and the applicant would, despite the lateness of the hour and the shortness of the time, have needed to serve the papers on the respondents and given them D an opportunity to appear."

In *Nyandoro v Sithole & Ors* 1999 (2) ZLR 353 (H) at 353H, Cheda J observed as follows:

> "I should say at the onset that it is not proper for a court to grant an *ex parte* application for eviction without the applicant being heard. The applicant could only be evicted after the provisional order was confirmed." E

The learned judge further observed at 356G that –

> "It was also most irregular for the respondent to seek and obtain an order which provided for the eviction of the applicant even before the return day and before the applicant was heard. The Rules do not permit this."

Since the order of 9 February 2012 provided for the eviction of the applicant from the premises before it had been given an opportunity to be heard, the F lower court erred, in my view, in granting the order. The interim relief was granted on 9 February and the return was 17 February 2012, but the order for eviction was granted before the return date. The lower court, in my view, further erred in that regard.

It appears to me that the applicant may again succeed in its appeal against the G order for rescission of 23 February 2012 as the first and second respondents might have been in wilful default. It was not disputed by the respondents that the reason for their default advanced in their application for rescission was that they were not aware of the implications of failing to file a notice of opposition. The application for their ejectment clearly stated that the applicants were seeking an order for their ejectment. The respondents cannot H

Chatukuta J

A be heard to state that they were not aware of the nature of the application and the consequences of the relief sought being granted. Despite the clear intention of the applicant, the respondents did not oppose the application, neither did they attend court on the date of hearing to establish what was to happen to them. In my view, this amounts to willful default.

B The next issue for determination is whether or the lower court also erred in holding, in its order of 16 March 2012, that the applicant's appeal dated 27 February 2012 is invalid. The applicant asserted that the decision of the court was appealable as it was made in terms of s 39(2) of the Magistrates Court Act. Its appeal to the High Court suspended the decision of the lower court and it was not required to seek leave of the court. The first and second C respondent maintained that the decision was interlocutory and therefore not appealable as held by the lower court.

Section 39 reads:

> **"39 Rescission and alteration of judgment**
>
> (1) In civil cases the court may – D
>
> (a) rescind or vary any judgment which was granted by it in the absence of the party against whom it was granted;
>
> (b) rescind or vary any judgment granted by it which was void ab origine or was obtained by fraud or by mistake common to the parties;
>
> (c) correct patent errors in any judgment in respect of which no appeal is pending.
>
> (2) The powers given in subsection (1) may only be exercised after notice by E the applicant to the other party *and any exercise of such powers shall be subject to appeal*.
>
> (3) Where an application to rescind, correct or vary a judgment has been made, the court may direct either that the judgment shall be carried into execution or that execution thereof shall be suspended pending the decision upon the application and the direction shall be made upon such terms, if any, as the court F may determine as to security for the due performance of any judgment which may be given upon the application (my emphasis)."

The order of 23 February 2012, being an order for the rescission of a judgment granted in the absence of an interested party, clearly falls within the ambit of s 39. Such a judgment is appealable by virtue of s 39(2), whether or not the judgment is interlocutory (which I do not believe it is for the reasons G advanced earlier). The lower court therefore erred in holding that the order was not appealable.

What is in issue, in my view, is whether or not the notice of appeal suspends the operation of order, as submitted by the applicant. The Supreme Court was recently seized with the same issue in *Ritenote Printers (Pvt) Ltd v A* H *Adam and Company & Anor* 2011 (1) ZLR 521 (S). In that case the court

---

2012 (1) ZLR p470

Chatukuta J

was considering s 40(3) of the Magistrates Court Act, which is similar to A s 39(3). The section provides as follows:

> **"40 Appeals**
>
> (1) …
>
> (2) …
>
> (3) Where an appeal has been noted the court may direct either that the judgment B shall be carries into execution or that execution thereof shall be suspended pending the decision upon the appeal or application."

Chidyausiku CJ had this to say at 524C:

> "In my view, the wording of *s* 40(3) of the Act leaves a lot to be desired, but a proper reading of the section reveals that it confers on the magistrate the power to stay execution despite the noting of an appeal. The section also confers on C the magistrate the power to order execution despite the noting of an appeal. It follows therefore that for the magistrate to exercise the discretion in terms of *s* 40(3) of the Act, the party seeking to have the discretion exercised in its favour has to make an application. Upon the making of such application the magistrate exercises the judicial discretion and make a proper determination."

The applicant in the present case was clearly under the erroneous view that D the noting of the appeal suspended the order of the lower court. It was, in fact required to have made an application before the lower court for stay of execution of the order. However, the fact that it did not do so did not render the appeal a nullity.

In any event, it was not for the lower court to pronounce the appeal before E the High Court a nullity. The appeal is before the High Court and it is only the High Court that can determine whether or not the appeal is a nullity. The rationale for that principle is apparent in *Hubert Davies Employees Trust (Pvt) Ltd & Ors v Croco Holdings (Pvt) Ltd* 2009 (2) ZLR 53 (S) and the cases therein referred to where the court stated that the higher court can, where notice of appeal is defective for want of compliance with the law, F grant, on application, an extension of time within which to regularize the notice of appeal. See also *Econet (Pvt) Ltd v Telecel Zimbabwe (Pvt) Ltd* 1998 (1) ZLR 149 (H) at 153G and *Mydale International Marketing (Pvt) Ltd v Kelly & Anor* HH-4-10 at p 4.

What was before the lower court was an application by the first and second G respondents (and in my view properly before it) for leave to execute the judgment of 23 February 2012. The issue before the court was not whether or not its order was appealable. The court was therefore required to pronounce on the application for leave to execute. What is in the order would, in my view, be the reasons of the court for arriving at a decision whether or not the respondents had succeeded in their application. H

2012 (1) ZLR p471

Chatukuta J

A I now turn to the question of the balance of convenience. It appears to me that the balance in this matter weighs in favour of the applicant. It is currently in occupation and has sub-leased part of the property to sub-tenants since February 2012. The applicant is likely to suffer irreparable harm should its appeals succeed when execution has been allowed to proceed. On the other hand, the first and second respondents were evicted and have not been in B occupation of the premises since the eviction in February of this year.

In my view, the irregularities highlighted justify the stay of execution pending the outcome of applicant's appeals.

It is accordingly ordered that:

1. The execution of the orders of the magistrates court in case No. 255/12 C and dated 9 and 23 February 2012 be and are hereby stayed pending the determination of the appeals in the High Court in cases No. CIVA 113/12 and No. CIVA 164/12.

2. The respondents be and are hereby ordered to pay costs on a higher scale

D *Nyikadzino, Simango & Associates*, applicants' legal practitioners

E *Matsikidze & Mucheche*, first & second respondents' legal practitioners

© 2015 Juta and Company (Pty) Ltd.

Document 59 of 75

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2012/Volume 1/FITZGERALD v CHONG & ORS 2012 (1) ZLR 472 (H)

FITZGERALD v CHONG & ORS 2012 (1) ZLR 472 (H)

Citation	2012 (1) ZLR 472 (H)
Case No	Judgment No. HB-135-12
Court	High Court Bulawayo
Judge	Cheda AJ
Heard	28 February 2012; *CAV*
Judgment	7 June 2013
Counsel	*P Madzivire*, for the applicant Ms *H M Moyo*, for the respondents
Case Type	Civil application
Annotations	No case annotations to date

Flynote

Family law – *child – child born out of wedlock – legal relationship to father – no right to succeed to its father*

Succession – *intestate – heirs ab intestato – child born out of wedlock – child acknowledged by father – no right of succession* D

Headnote

The applicant sought an order setting aside the third respondent's appointment as executor of her father's estate and declaring her to be the sole beneficiary of the estate. She admitted that her mother was never legally married to the deceased. She lived with the deceased for a period of more than a year. He supported her and her mother. Her birth certificate bore his E name and he made sure that she got a passport in terms of the legislation in his country of origin. After the deceased's death, she and her mother went to a great deal of effort to bury him, there being no relatives of his who could assist. She later reported the deceased's estate and filed his death notices.

Held, that an illegitimate child is one whose father and mother were never F married. An illegitimate child does not, and is not entitled to, inherit from its father. Illegitimate children do not succeed to their natural father and his relations, but do succeed to their mother and her relations. Some

writers have gone so far as to say that an illegitimate child is related to its mother and her relations and not to its natural father. This legal G position has remained so for a long time in Zimbabwe. On this basis the applicant had no *locus standi* to make the application.

Editor's note: the judgment does not say so, but presumably the deceased died intestate.

Case information

P Madzivire, for the applicant

Ms *H M Moyo*, for the respondents H

2012 (1) ZLR p473

Cheda AJ

Judgment

A **Cheda AJ:** The applicant in the main application, Miss Fitzgerald, filed an application seeking a provisional order for the suspension of the executor in the estate of the late David Neil Fitzgerald, and that she be declared the sole heiress and beneficiary to the estate.

The third respondent filed opposing papers to the application. Following B allegations made by the applicant for the removal of the executor, the third respondent also filed an application for the striking out of the applicant's affidavit, claiming that it contains offensive allegations against him.

It was decided at the hearing that these applications be heard together. In her founding affidavit, the applicant in the main application says she is the daughter of the deceased. Her mother, Roseann Johnson, was never legally C married to the deceased. She lived with the deceased for a period of more than a year. He supported her and her mother. Her birth certificate bears his name and he made sure that she got a New Zealand passport in terms of the legislation in his country. After the deceased's death in January 2008, she struggled with her mother to bury him and did not know of any relatives of his who could assist. She later reported the deceased's estate and filed D his death notices. She was later surprised, when she perused the record, to find that the third respondent had taken over and was now the executor. She said there was no proof that the second respondent had appointed him. She complained that the power of attorney, which was issued outside the country, is not commissioned and has no seal as required by law. She challenged the E authenticity of the said "piece of paper". She complained about the role played by Shelagh Majorie Meikle, who is the employee of the third respondent and said she could be working in cahoots with the third respondent as she appointed her boss as the Executor. She said there was no proof that an edict meeting was ever advertised. She said letters of waiver of security had not been done by all the beneficiaries. She said that the third respondent had F also filed consent to transfer stocks held by her late father. She said he had not advertised for debtors and creditors and he was spending time trying to dispose of the property of the estate and that was maladministration of the estate. She accused him of wanting to plunder the estate. She said there were no feasible merits for allowing him to remain in that position as this G was not in the best interest of the administration of the state.

Alarmed by these complaints, the third respondent filed an application for the applicant's affidavit to be struck out. In his heads of argument, the executor conceded that the rules pertaining to strike out in rr 137(c) and 141(a) of the High Court Rules do not apply to application proceedings, but the High Court is not restricted to the provisions of Order 21 but could grant relief on H its inherent powers. He said the High Court can strike out a whole document

---

2012 (1) ZLR p474

Cheda AJ

and consequently dismiss the claim on that basis. He said the respondent A should state her case in simple factual terms, instead of embarking on an abusive attack of the applicant. He complained that she accused him of plundering her father's estate and of maladministration and that he was only interested in defeating her claim. He said the whole affidavit was couched in objectionable terms and ought to be struck out. He said the allegations B against him are not based on facts, but on speculation, and were offensive.

Dealing first with this second application, it is clear that the respondent used very strong language. She expressed her concern against the applicant's conduct as she considered it improper. She was clearly unhappy about certain aspects of the way the estate was being conducted, such as the

failure to advertise for creditors and debtors, the failure to advertise an edict meeting, C his appointment by his own employee and other issues.

From the information he subsequently gave, it would appear she was wrong in some of the allegations, but I am unable to find that there was any malice on her part. She acted as any aggrieved person would have done who felt that her interests were threatened. I do not think that she intended simply D to be offensive or abusive of the applicant. If what she had said was found to be true, there would have been full justification for her allegations. The fact that it turned out that she did not have the full information which he later released, does not, in my view, prove that she was being deliberately offensive or abusive. For that reason, I am unable to hold that her affidavit was so offensive as to warrant being struck out as she gave her reasons for E her thinking.

Turning now to the main application, our law on inheritance is very clear. She is the daughter of a man and a woman who were never married. The court was called upon to determine her *locus standi* on the basis that she is an illegitimate child. F

What is an illegitimate child?

An illegitimate child is one whose father and mother were never married. See E Spiro *Law of Parent and Child* 3 ed p 416. In her own papers the applicant concedes this point. An illegitimate child does not, and is not entitled to, inherit from its father. O J Oosthuizen *The Law of Succession* G (Juta's Legal Guide Services) p 18 says illegitimate children do not succeed to their natural father and his relations, but do succeed to their mother and her relations. Some writers on this topic have gone as far as saying that an illegitimate child is related to its mother and her relations and not to its natural father. See Spiro *op cit*. This legal position has remained so for a long time in Zimbabwe and I am not aware of any change. On this basis the applicant H

2012 (1) ZLR p475

Cheda AJ

A in the main action has no *locus standi* to make the above application. This finding disposes of her claim that she be declared sole heiress to the deceased estate of the late David Neil Fitzgerald.

The other issues raised in this application no longer fall for determinations in view of this finding.

B Accordingly, I order as follows.

1. The applicant's main application is dismissed with costs.
2. The provisional order granted against the respondent on 14 June 2010 is discharged.
3. On the counter application for striking out the application is dismissed C with no order as to costs.

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

D *Webb, Low & Barry,* respondents' legal practitioners

© 2015 Juta and Company (Pty) Ltd.

Document 60 of 75

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2012/Volume 1/MOORE v MOORE 2012 (1) ZLR 476 (H)

MOORE v MOORE 2012 (1) ZLR 476 (H)

2012 (1) ZLR p476

Citation 2012 (1) ZLR 476 (H)

Case No Judgment No. HH-233-12

Court	High Court, Harare
Judge	Chitakunye J
Heard	6 June 2011; 5 September 2011; 6 September 2011; *CAV*
Judgment	7 June 2012
Counsel	*J Samukange*, for the plaintiff *A P de Bourbon SC*, for the defendant
Case Type	Civil trial
Annotations	No case annotations to date

Flynote

Family law – *husband and wife – divorce – division of property and related* D *matters – agreement on such issues – need for such agreement and details thereof to be recorded*

Family law – *husband and wife – divorce – division of property and related matters – wide discretion of court – proper approach to be adopted – assets of spouses – assets owned individually or jointly at the time of the dissolution of the marriage to be considered by court – exemption of property from division – onus on spouse seeking the exemption to establish such entitlement*

Headnote

In cases involving the Matrimonial Causes Act [*Chapter 5:13*], it is imperative E that where the parties have reached agreement on any issue, the nature and extent of such agreement must be recorded. It may even be in the form of a deed of settlement on those particular issues. A general statement that the parties have reached an agreement on any issue or issues, without endorsing the details of such agreement, is a disservice F to the parties and to the court and so must be avoided.

The court has a wide discretion in the exercise of its powers under s 7(4) of the Act. The assets upon which a court has to exercise such discretion are the assets of the spouses. "The terms used are 'the assets of the spouses' and not 'matrimonial property'. It is important to bear in mind G the concept used, because the adoption of the concept 'matrimonial property' often leads to the erroneous view that assets acquired by one spouse before marriage or when the spouses are separated should be excluded from the division, apportionment or distribution exercise. The concept 'assets of the spouses' is clearly intended to have assets owned by spouses individually (his or hers) or jointly (theirs) at the time of the H

Chitakunye J

A dissolution of the marriage by the court considered when an order is made with regard to the division, apportionment or distribution of such assets" (*dicta per* Malaba JA in *Gonye v Gonye* 2009 (1) ZLR 232 (S) at 237B-C followed).

In so far as the exception from division, apportionment or distribution of the B property, as provided for in s 7(3) of the Act, is concerned, the onus is on the spouse wishing to rely thereon to satisfy the court that the asset under consideration falls within the subsection.

Legislation considered

Matrimonial Causes Act [*Chapter 5:13*], s 7(3) & (4)

Cases cited C

Gonye v Gonye 2009 (1) ZLR 232 (S)

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

Case information

D *J Samukange,* for the plaintiff

A P de Bourbon SC, for the defendant

Judgment

Chitakunye J. The plaintiff and the defendant were joined in holy matrimony on 20 February 1998 at Harare in terms of the Marriage Act [*Chapter 5:11*] and the marriage still subsists.

E The defendant was born in Zimbabwe and considers Zimbabwe his country of domicile. There are two minor children of the marriage, namely: M J, born in 2000, and R P, born in 2003 *.

On 22 April 2008 the plaintiff sued the defendant for divorce alleging that the marriage relationship had irretrievably broken down. The reasons for F the breakdown she alluded to included that:

(1) the defendant has, throughout the marriage, persistently consumed intoxicating liquor to excess and frequently has become very drunk;

(2) the defendant treats the plaintiff with a lack of affection, consideration and respect and has, throughout the marriage, frequently insulted her G and criticized her causing her significant distress, emotional trauma and destruction of her confidence;

(3) the defendant has consistently spent unreasonable periods away from the family home enjoying pursuits of his own to the plaintiff's distress;

Chitakunye J

(4) the parties have grown apart from one another and no longer communicate A in a manner consistent with a normal marriage:

(5) during January the defendant publicly declared he no longer loved the plaintiff and no longer wished to be with her;

(6) the defendant vacated the matrimonial home in mid February, since when the parties have been living separate and apart from one another. B

As a consequence of the above the plaintiff claimed for –

(1) A decree of divorce with costs;

(2) Custody of the minor children with the defendant paying maintenance in the sum of USD4000 per month in respect of the plaintiff until her death or remarriage and USD 3000 per month in respect of the two minor C children until they turn 18 years or become self supporting, whichever is sooner.

(3) That the proprietary rights of the parties in respect of the matrimonial estate bedivided in such a manner that the plaintiff shall receive no less than one half by value of the assets constituting the matrimonial estate. D

In his plea, the defendant admitted that the marriage had irretrievably broken down but not for all the reasons stated by the plaintiff. He only conceded to two of the reasons being that:

(a) the parties have grown apart from one another and no longer communicate E in a manner consistent with a normal marriage and;

(b) that the defendant vacated the matrimonial home in mid-February since when the parties have been living separate and apart from one another.

He admitted that he should contribute towards the maintenance of the plaintiff and of the minor children but disputed the amounts being claimed and the F periods such maintenance should be paid.

On proprietary rights, he simply denied what the plaintiff put forth and put the plaintiff to proof thereof.

At the closure of pleadings, neither party had disclosed that during the tenancy of their marriage any assets had been acquired and, if so, the nature and extent of such assets. Thus, the assets that court was being asked to settle G in terms of s 7 of the Matrimonial Causes Act [*Chapter 5:13*] remained a mystery. The nature of the dispute pertaining to the assets was not clear from the pleadings as none had been disclosed.

On 19 January 2011 a pre-trial conference was held at which the issues referred to trial were identified as: H

2012 (1) ZLR p479

Chitakunye J

(1) What A are the matrimonial assets and how should they be divided between the plaintiff and the defendant;

(2) Costs of suit.

The other issues were recorded as having been resolved in this manner:

> "(1) The plaintiff and the defendant have reached agreement as regards: B
>
> (a) the division of the movable matrimonial assets;
>
> (b) custody of the minor children (to the plaintiff);
>
> (c) the defendant's access to the minor children;
>
> (d) The defendant's maintenance of the plaintiff and the minor children."

As with the other pleadings already referred to, no further details of the C nature and extent of what the parties had agreed to was stated. As it turned out during the trial, the omission of details of the nature and extent of the agreement the parties had reached did not seem to have been clear to counsel who appeared, hence no much reference was made to what the parties had agreed on. If anything, the manner in which evidence was led was as if no agreement had been reached on some of the issues.

D For instance, whilst the pre-trial conference minute showed that the parties had agreed on the question of maintenance for the plaintiff and the minor children, the plaintiff's counsel, without stating whether the agreement on this issue had been abrogated or not, said that the plaintiff was withdrawing her claim for maintenance because she had lodged an application for maintenance at E the magistrates court. It was not made clear whether this was in accordance with the agreement the parties reached at the pre-trial conference or not.

It is imperative, in my view, that where parties have reached agreement on any issue, the nature and extent of such agreement must be recorded. It may even be in the form of a deed of settlement on those particular issues. F A general statement that the parties have reached agreement on any issue or issues, without endorsing the details of such agreement, is a disservice to the parties and to the court and so must be avoided.

The major issue for determination pertained to immovable property. That is: "what are the immovable matrimonial assets and how should they be divided between the plaintiff and the defendant?"

G The division and distribution of assets consequent to a divorce is governed by s 7 of the Matrimonial Causes Act [*Chapter 5:13*] hereinafter referred to as the Act. Section 7(1) of the Act states that:

> "(1) Subject to this section, in granting a decree of divorce, judicial separation or nullity of marriage, or at any time thereafter, an appropriate court may make H an order with regard to –

2012 (1) ZLR p480

Chitakunye J

> (a) the division, apportionment or distribution of the assets of the spouses, A including an order that any asset be transferred from one spouse to the other."

Subsection (4) of s 7 enjoins the appropriate court to consider all the circumstances of the case in the exercise of its discretion by stating that:

> "In making an order in terms of subsection (1) an appropriate court shall have B regard to all the circumstances of the case, including the following:
>
> (a) the income-earning capacity, assets and other financial resources which each spouse and child has or is likely to have in the foreseeable future;
>
> (b) the financial needs, obligations and responsibilities which each spouse or child has or is likely to have in the foreseeable future;
>
> (c) the standard of living of the family, including the manner in which any C child was being educated or trained or expected to be educated or trained;

(d) the age and physical and mental condition of each spouse and child;

(e) the direct and indirect contribution made by each spouse to the family, including contributions made by looking after the home and caring for the family and any other domestic duties;

(f) the value to either of the spouses or to any child of any benefit, including a D pension or gratuity, which such spouse or child will lose as a result of the dissolution of the marriage;

(g) the duration of the marriage;

and in so doing the court shall endeavour as far as is reasonable and practicable and, having regard to their conduct, is just to do so, to place the spouses and E children in the position they would have been in had a normal marriage relationship continued between the spouses."

It is important to recognize that court has wide discretion in the exercise of its powers. The assets upon which court has to exercise such discretion are assets of the spouses. That concept must be clearly understood. As aptly noted by Malaba JA in *Gonye v Gonye* 2009 (1) ZLR 232 at 237B-E F

"The terms used are the 'assets of the spouses' and not 'matrimonial property'. It is important to bear in mind the concept used, because the adoption of the concept 'matrimonial property' often leads to the erroneous view that assets acquired by one spouse before marriage or when the parties are separated should be excluded from the division, apportionment or distribution exercise. The concept 'the assets of the spouses' is clearly intended to have assets owned G by the spouses individually (his or hers) or jointly (theirs) at the time of the dissolution of the marriage by the court considered when an order is made with regard to the division, apportionment or distribution of such assets.

To hold as the court *a quo* did, that as a matter of principle assets acquired by a spouse during the period of separation are to be excluded from the division, apportionment or distribution a court is required to make under s 7 of the Act H

Chitakunye J

A is to introduce an unnecessary fetter to a very broad discretion, on the proper exercise of which the rights of the parties depend."

In *Takafuma v Takafuma* 1994 (2) ZLR 103 (S) at 106B-E McNally JA laid down a basic approach that may be used in the exercise of court's discretion when he said that:

B "The duty of a court in terms of s 7 of the Matrimonial Causes Act involves the exercise of a considerable discretion, but it is a discretion which must be exercised judicially. The court does not simply lump all the property together and then hand it out as fair as possible. It must begin, I would suggest by sorting out the property into three lots, which I will term 'his', 'hers', and 'theirs'. Then it will concentrate on the third lot marked 'theirs'. It will apportion this lot using the criteria set out in s7 (3) of the Act. Then it will allocate to the husband the items C marked 'his', plus the appropriate share of the items marked 'theirs'. And the same to the wife. That is the first stage.

Next it will look at the overall result, again applying the criteria set out in s 7(3) and consider whether the objective has been achieved, namely, 'as far as is reasonable and practicable and, having regard to their conduct, is just to do so, to place the spouses…. in the position they would have been in had a normal D marriage relationship continued …'

Only at that stage, I would suggest, should the court consider taking away from one or other of the spouses something which is actually 'his' or 'hers.'"

The assets exempted from division, apportionment or distribution are stated in s 7(3) of the Act. That subsection provides that – E

"The power of an appropriate court to make an order in terms of paragraph (a) of subsection (1) shall not extend to any assets which are proved, to the satisfaction of the court, to have been acquired by a spouse, whether before or during the marriage –

(a) by way of inheritance; or F

(b) in terms of any custom and which, in accordance with such custom, are intended to be held by the spouse personally; or

(c) in any manner and which have particular sentimental value to the spouse concerned."

The onus is upon the spouse wishing to rely on s 7(3) of the Act to satisfy the court that such an asset falls within the exemption subsection.

G It was apparent from the evidence led that there were essentially two immovable properties and a construction company in contention.

The first property is Stand 633 Helensvale Township of stand 318 Helensvale Township, otherwise known as number 633 Glen Helen Way, Glen Lorne, Harare; hereinafter referred to as the Helensvale property. The property is H registered in the name of a company, YUCAP Investments (Pvt) Ltd under

---

Chitakunye J

Deed of Transfer number 2815/2005. The shareholders of the company are A the plaintiff with one share and the defendant with 99 shares.

The second property is a townhouse known as Section 4 Valley Lodge, Honeydew, Johannesburg, South Africa, hereinafter referred to as the Honeydew property.

The plaintiff argued that the Helensvale property should be shared equally B between the two of them and the Honeydew property should be exempted from consideration in terms of s 7(3)(a) of the Act.

The defendant, on the other hand, contended that both immovable properties must be considered and that he be allowed to retain the Helensvale property whilst the plaintiff is awarded the Honeydew property. He contended that C the Honeydew property was not acquired by way of inheritance.

The plaintiff gave evidence and called one witness. She tendered some documentary evidence as exhibits. The defendant thereafter gave evidence.

From the evidence led, certain aspects were common cause. It is common cause that both parties alluded to having lost love and affection for each D other. Though they differed on the cause for the loss of love and affection, the bottom line is that both no longer love each other and wish to be divorced.

It is accepted that the defendant was born in Zimbabwe and considers Zimbabwe as his country of domicile. They were married in this country in terms of the laws of Zimbabwe. This court therefore has jurisdiction to entertain the action for divorce. Where parties, as in this case, no longer E have any love and affection for each other and are desirous of dissolving their marriage, the court cannot force them to remain married. A decree of divorce will thus be granted.

The plaintiff's stance on the contentious issues was to the effect that the Honeydew property in South Africa must be treated as inherited property F and so should be exempted in terms of s 7(3)(a) of the Matrimonial Causes Act [*Chapter 5:13*].

Her evidence in this regard was to the effect that, when her mother died, she bequeathed to her a flat, namely Unit 4, Dykerhof, Earls Avenue, Windsor East, Johannesburg, South Africa. Her uncle, Wayne Marshall Ferguson, G was the executor and administrator of her mother's estate. The uncle was to administer the estate through a trust in the plaintiff's name till the plaintiff attained the age of 25 years. The plaintiff was to be handed over the total value of the trust on attaining 25 years and the trust was to terminate at that stage. However, when the plaintiff turned 25 years the uncle continued to administer the trust. H

Chitakunye J

A In the process of administering the trust the uncle decided, with the plaintiff's consent, to dispose of the flat and buy an upgraded property. This was done and the uncle used the proceeds to acquire the Honeydew property (Section 4, Valley Lodge). She thus maintained that, in as far as the entire purchase price was from proceeds of the flat she had inherited, the new property should be considered as an asset acquired by inheritance. She, however, B could neither state the date when Unit 4 Dykerhof flat was sold nor the date the Honeydew property was purchased.

The plaintiff attempted to prove her claim by producing her late mother's will showing what was bequeathed to her. The will confirmed that she inherited among other things, Unit 4 Dykerhof, Earls Avenue, Windsor East, C Johannesburg, South Africa.

The plaintiff also tendered a financial statement in respect of Muriel Joy Dicker Trust for the year ended 28 February 2003. This is the trust under which her inheritance was registered and was being

administered by the executor and administrator, W M Ferguson. A number of anomalies were D noted in this financial statement of which the plaintiff could not answer.

For instance, three immovable properties are listed as belonging to the trust. These properties are:

1 Unit 4, Dykerhof, Earls Avenue, Windsor East;

2 Section 4, Valley Lodge; and E

3 Stand 633, Helensvale, Harare, Zimbabwe.

The plaintiff could not explain why Unit 4 Dykerhof, Earls Avenue, still appeared as part of trust property when, according to her evidence, it is the property that was sold and proceeds therefrom utilized to purchase Section 4 Valley Lodge. She also could not explain why the Helensvale property F was included as trust property when evidence adduced showed that it is registered in the name of a company in which the plaintiff and the defendant are the only shareholders. The trust is not a shareholder in that company at all. When pressed for answers, the plaintiff made it clear she did not know but the administrator would know.

The plaintiff's witness, Mrs Beryl Della Colley, gave evidence in support G of the plaintiff's version. Unfortunately, as was the case with the plaintiff, she did not participate in the administration of the trust and so did not know why the three properties were listed as trust properties for the year ending 28 February 2003.

Mrs Colley indicated that her evidence was based on information she had H received from Mr Ferguson. She virtually had no credible evidence of her

own on the issues at hand. It is my view that not much credence could be A accorded to this witness's evidence. As is evident from above, the trust administrator's evidence was of crucial importance to the plaintiff's case. In the absence of the administrator's evidence, the plaintiff's evidence remained unconvincing.

The defendant, on the other hand, contended that the Honeydew property B must be considered as matrimonial property because it was acquired during the subsistence of the marriage. He conceded that he did not make any contribution towards the acquisition of the Honeydew property. Without being emphatic, he indicated that part of the money could have come from a mortgage bond the plaintiff obtained from ABSA Bank.

On the Helensvale property the defendant contended that they contributed C equally towards the purchase price for Stand 633 Helensvale as a vacant stand. He further argued that the plaintiff's contribution towards the cost of construction on the stand was minimal.

He went on to say that, at the time they separated, the value of the property was D only about US$120 000 as the house was incomplete. He has since continued with the construction and the house is now valued at about US$340 000.

The defendant's view seemed to be that what is available for division, apportionment and distribution is the value as at the time of separation which he put at 25 per cent for the plaintiff and 75 per cent for himself. The 25 per E cent for the defendant would then be offset by awarding the plaintiff the Honeydew property which he valued at between 700 000 and one million South African rand.

As alluded to above, whilst admitting that the plaintiff made some contributions to the Helensvale property, the defendant conceded that he did not make any contribution towards the Honeydew property and so that property was F purchased from the plaintiff's resources.

From the evidence adduced it was common cause that the plaintiff applied for a mortgage bond on 2 September 2001 and such was granted in the sum of ZAR155 837.

The access bond which the plaintiff obtained was also used by the parties for G family needs such as when they went to South Africa on holidays, for their children's medical needs and for the purchase of some fixtures and fittings for the Helensvale property. It would appear that it is a result of these other various uses to which the bond was applied, that the defendant agreed to pay half of the balance of the access bond as at 6 June 2011. H

Chitakunye J

A The parties could not agree as to whether the entire or part of the mortgage bond was used in the purchase of the Honeydew property.

The plaintiff argued that the bond was obtained after the Honeydew property had already been paid for and so it could not have been used in that regard, whilst the defendant contended that that assertion was not true. The person B who transacted the purchase of the Honeydew property is the administrator of the Trust who did not testify.

The administrator's evidence was imperative to confirm the source of the money used to purchase the Honeydew property and to also confirm whether any part of proceeds from the sale of Unit 4 Dykerhof flat were used in this regard, as was being argued by the plaintiff. Such evidence was also C necessary to clarify an apparent inconsistency in the plaintiff's evidence whereby she said the Honeydew property was bought from proceeds of the sale of the Unit 4 Dykerhof flat and before the mortgage bond was obtained on 2 September 2001; yet the financial statement for the year ending 28 February 2003 listed Unit 4 Dykerhof flat as part of the Trust property. The D plaintiff appeared not to know when Unit 4 Dykerhof was sold and for how much and also when the Honeydew property was paid for.

I am not satisfied that the plaintiff has shown, on a balance of probabilities, that the Honeydew property was acquired entirely from the proceeds of the sale of Unit 4, Dykerhof Earls Avenue and that it should be exempted in terms of s 7(3)(a) of the Act. The property is however in the category of E "hers" as the defendant never contributed anything to its purchase and it is in a trust under her name.

Pertaining to the Helensvale property, the plaintiff's evidence was to the effect that when the defendant and herself decided to buy Stand 633 Helensvale, she requested her uncle to send them some money from her inheritance. About F ZAR50 000 was sent and it was the money they used to purchase Stand 633, as a vacant stand. This money was from her inheritance. Thereafter, whenever they needed money for construction she would inform her uncle and the uncle would send the money to the defendant. However, she did not know how much was sent on each occasion or in total.

G She said they also bought some fixtures and fittings for the house from South Africa using her money in South Africa. She thus maintained that she contributed to the purchase and development of the Helensvale property to an extent where she deserves a 50 per cent share in the property.

The evidence led showed that both parties accepted that the Helensvale property is registered in the name of a company in which they are the only H shareholders. Though the plaintiff seemed not to know how the property

---

Chitakunye J

came to be registered in the name of a company in which she was allotted A a single share, the reality is that it is in the name of a company and it has been so since its purchase as a vacant stand. The company was apparently formed for purposes of owning the property and nothing else. The property can safely be treated as "theirs". The difference in the shareholding structure was created by the defendant, despite his own evidence that they contributed B equally to the purchase price for the stand. The defendant was unable to explain satisfactorily why he opted to give his wife a single share when, from his own evidence, at the time of purchasing the stand she contributed 50 per cent of the purchase price. I will thus not read much into the share holding structure.

The defendant admitted that, besides contributing to the purchase price of C the vacant stand, the plaintiff's money from South Africa was also used to purchase some fixtures and fittings. He, of course, tried to downplay the quantity and value of such items.

I am of the firm view that, whatever contribution the plaintiff made in this regard, it was towards the needs of the family. As she said in her evidence, D this was their dream house and so, naturally, she put in the best she could. The Helensvale property is a property they both contributed towards and, in any case, it is registered in the name of a company in which they are the only shareholders. It is therefore "their" asset.

In the circumstances I am of the view that the plaintiff deserves an award E in the Helensvale property. The question is: what percentage share should be awarded to her?

The plaintiff also claimed a 50 per cent share in Blacklock Enterprises (Pvt) Ltd. The plaintiff's evidence on this item was to the effect that when the defendant wanted to open his own construction company she asked for the F starting capital from her uncle, Mr Ferguson. Mr Ferguson sent some money through to the defendant for him to start the company. The plaintiff did not know how much was sent for the purpose; all she could say was that it was the money used to form and to start operating the company. That appeared the only basis she was claiming a 50 per cent share in that company.

The defendant refuted the plaintiff's assertion and contended that he is only G a holder of 70 per cent shares in Backlock Enterprises, whilst his father is the holder of the 30 per cent shares. He also contended that the company is in fact insolvent and so there is nothing to share. If the plaintiff were to get a half share of the defendant's shares, which would be 35 per cent, it would be in liabilities. H

A The plaintiff's evidence on this issue was scant. She virtually had no evidence with which to prove her claim or rebut the defendant's assertion.

In deciding what each party is entitled to in the circumstances of this case, I have taken into account the fact that the Honeydew property is the plaintiff's', the Helensvale property is "theirs" and the construction company Blacklock B appeared to be the defendant's, at least 70 per cent of it.

The just and equitable distribution of the Helensvale property would have been at 40 per cent for the plaintiff and 60 per cent for the defendant. However, as the plaintiff will retain the Honeydew property, that may not be just and equitable. The construction company was not shown to be of great value. It is my view that in an endeavour to place the parties as far as C is reasonable and practicable, in the position they would have been in had a normal marriage relationship continued, it is necessary to take part of what would have been the plaintiff's share in the Helensvale property and add it onto the defendant's share. I am of the view that a reduction in the plaintiff's share by about 15 per cent would be adequate.

D In the circumstances, the plaintiff will be awarded a 25 per cent share in the Helensvale property and the defendant a 75 per cent share.

As already alluded to, the other issues were recorded as having been resolved at the pre-trial conference stage. However, though the parties agreed that the plaintiff be awarded custody of the two minor children, the issue of access was not spelt out. The plaintiff did not allude to this issue at all in her evidence. E I am of the view that the defendant should be granted reasonable rights of access. Had there been a good reason why the defendant should be denied access, I am sure the plaintiff would have alluded to it.

The issue of maintenance was recorded as having been resolved by the parties at the pre-trial conference stage. Unfortunately no details of such F settlement were recorded. Before the commencement of the trial, the plaintiff withdrew her claim for maintenance on the basis that she had already lodged a maintenance claim at the magistrates court. As a consequence, no evidence on the maintenance needs of the plaintiff and the minor children was led.

In his closing submissions, counsel for the defendant implored the court G still to go ahead and determine maintenance for the children as per the defendant's offer. However, he did not allude to the agreement the parties had reached. Whilst it is true that this court as upper guardian of minor children must endeavour to ensure that children are provided for in terms of s 10 of the Act, the circumstances of this case would not be best met by such an approach. The needs of the children have to be ventilated before a H court can decide on what is appropriate. The plaintiff has chosen to claim

---

maintenance in another court of law, using a procedure counsel for the A defendant expressed misgivings about, but that is her choice. Whilst being appreciative of the argument against the procedure adopted by the plaintiff in seeking maintenance under the Domestic Violence Act, it is my view that, as she is ably represented, she has made a choice she must live with.

As for the children, the defendant, as a concerned father, can still provide B maintenance for the children to the best of his ability without the need for a court order pending the determination of the plaintiff's application for maintenance in the magistrate' court.

The last issue for consideration pertains to costs of suit. The plaintiff prayed for costs on a higher scale. No basis whatsoever was laid for such a claim. Indeed, counsel did not allude to any reason why costs should not be as C per the trend in matrimonial matters. The defendant's counsel opposed the plaintiff's claim and properly pointed out that no basis for costs to be awarded against the defendant was made. It is my view that each party should bear their own costs. Clearly this is not a case were parties had no cause to fight their case. Each party had some measure of success in their claim or defence, D hence no need to penalize one party.

Accordingly it is hereby ordered that:

1. A decree of divorce be and is hereby granted;
2. Custody of the minor children be and is hereby awarded to the plaintiff;
3. The defendant is hereby granted reasonable rights of access to the minor E children, which rights shall include, but are not limited to, one afternoon each week during school term, alternate weekends during school term to include alternate weekends, and alternative half of each school holiday, upon reasonable notice and in consultation with the plaintiff;
4. Each party shall retain as his or her own property all movable property F presently in his or her possession;
5. The plaintiff shall retain as her sole and exclusive property the town house known as Section 4 Valley Lodge, Honeydew, Johannesburg, South Africa;
6. The defendant shall within six months of the date of this order pay to ABSA Bank 50 per cent of all sums outstanding as at 06 June 2011 on G the access mortgage bond in the name of the plaintiff;
7. The defendant shall retain sole ownership of the shares presently held by him in Blacklock Enterprises (Pvt) Ltd;
8. The plaintiff be and is hereby awarded a 25 per cent share of the value of the immovable property being Stand Number 633 Helensvale Township H

Chitakunye J

A of Stand 318 Helensvale Township, also known as 633 Glen Helen Way, Glen Lorne, Harare registered in the name of YUCAP Investments (Pvt) Ltd, with the plaintiff retaining 75 per cent thereof;

9. The parties shall agree on the value of the property within 14 days of the date of this order, failing which they shall appoint a mutually agreed B evaluator to evaluate the property within 30 days of the date of this order;
10. Should the parties fail to agree on an evaluator the registrar of the High Court shall be and is hereby directed to appoint one from his list of independent evaluators to evaluate the property;
11. The defendant shall bear the cost of evaluation; C
12. The defendant shall pay off the plaintiff her share within six months from the date of receipt of the report of evaluation unless the parties agree on a longer period and such agreement is in writing;
13. Should the defendant fail to pay or to make a payment plan acceptable to the plaintiff within the period stipulated in (12) above, the property shall be sold to best advantage by a mutually agreed estate agent or one D appointed by the Registrar of the High Court. The net proceeds thereof shall be shared as per their respective shares in the property;
14. Each party shall bear their own costs of suit.

Venturas & Samkange, plaintiff's legal practitioners

E *Coghlan, Welsh & Guest*, defendant's legal practitioners

* The full names of the children and their dates of birth have been omitted. – *Editor*

© 2015 Juta and Company (Pty) Ltd.

Document 61 of 75

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2012/Volume 1/MUDZUMWE & ORS v MDC & ANOR 2012 (1) ZLR 490 (H)

MUDZUMWE & ORS v MDC & ANOR 2012 (1) ZLR 490 (H)

Citation	2012 (1) ZLR 490 (H)
Case No	Judgment No. HH-232-12
Court	High Court, Harare
Judge	Patel J
Heard	2 February 2012; *CAV*
Judgment	12 June 2012
Counsel	*T Mpofu*, for the applicants *A P de Bourbon SC*, for the respondents
Case Type	Opposed application
Annotations	No case annotations to date

Flynote

Association – *voluntary association – constitution – interpretation – approach to be taken to – flexible approach, to ensure that object of rule in question is achieved*

Words and phrases – *"send" – requirement to "send" notice of meeting* D *to various levels of an organization – what duty is imposed on person required to send notice*

Headnote

The applicants contended that the congress of the first respondent political party was convened and conducted in violation of the party's constitution in three different respects, namely, the failure to send notices convening E the congress to all provinces and districts, defects in the process of nominations for elections at the congress, and the unprocedural conduct of elections at the congress in the absence of the first applicant, the national chairman. They averred that the second respondent usurped various functions and powers vested in other officials and organs of the party for his own political interests and sought an order declaring the congress F and all of its outcomes null and void, as well as an order directing the second respondent to reconvene the congress. The respondents averred that notices convening the congress were duly sent and delivered as required and that the procedures governing nominations for elections to the national council were substantially complied with. As regards the G elections, they averred no elections actually took place at the congress, as all the appointees to the national council were declared to have been elected unopposed. It was common cause that the first applicant decided to boycott the congress.

Held, that in interpreting the constitutions regulating the activities and administration of voluntary associations and organisations, it is necessary H

2012 (1) ZLR p491

Patel J

A to consider whether what was done is in fact what is prescribed in the governing rules, so as to achieve the object sought to be achieved by the rules. To command or compel slavish adherence to every jot and tittle of the rules may not necessarily and invariably secure the fulfilment of the intended objective. In many cases, it may even impede or frustrate that objective. In certain instances, however, strict or exact compliance with B the prescribed procedures may be necessary, as in a case where what is at stake is something as fundamental as the amendment of the rules of the association or the dissolution of the association itself. In any event, having regard to the circumstances of each case, a flexible approach may be called for in order to advance the objects that the members of the C organisation have associated together to attain. In the final analysis, this purposive or teleological approach commends itself as being the most appropriate one to the interpretation of domestic constitutions generally.

Held, further, that, with regard to the provision in the constitution of the respondent political party that a notice convening the congress of the party "shall be sent to all Provinces and Districts by the Secretary- D General with the approval of the National Council at least one month before the date of the Congress", the verb "to send" ordinarily denotes a variety of actions, *viz.* to consign, convey, direct, dispatch, forward or transmit. Applying any one or more of these synonyms to the words under consideration, taken in their context, they must be construed to mean that E the notices in question must be dispatched, forwarded or transmitted to the provinces and districts. There was no justification for extending the phrase to encompass the actual receipt of notices by the provinces and districts. Apart from deviating from the ordinary grammatical meaning, any such construction would place upon the Secretary-General the unenviable and intolerable burden of having to achieve what might be F practically impossible to achieve on the ground. Similarly, there was no requirement that notices must be sent to the districts directly and not indirectly through the provinces. What matters, at the end of the day, is that notices are in fact sent to the districts through an appropriate and acceptable form of transmission. There was nothing objectionable in G the dispatch of notices to the districts through the provincial structures, as happened in this case, in the usual manner of communication within a pyramidal hierarchy.

Held, further, that a person cannot rely on his own wrongful conduct to found a cause of action. Having deliberately absented himself from the congress, the first applicant could not then rely on his absence to argue H that all of the proceedings at the congress were a nullity because he

---

2012 (1) ZLR p492

Patel J

was not present in person to chair those proceedings. To allow him to A do so would enable him to benefit from his own deliberate abstention to the extreme prejudice of the entire party membership. Indeed, such an approach would render unmanageable the convening and conduct of all political party conferences. It would also allow party leaders to circumvent and frustrate the electoral process and remain in office B indefinitely through the simple stratagem of non-attendance.

Cases referred to

Baird v Wells (1890) 44 Ch D 661; [1890] All ER Rep 666

Dynamos Football Club (Pvt) Ltd & Anor v ZIFA & Ors 2006 (1) ZLR 346 (S) C

Howard v Bodington (1877) 2 PD 203

MacFoy v United Africa Co Ltd [1961] 3 All ER 1169 (PC)

Sterling Products International Ltd v Zulu 1988 (2) ZLR 293 (S)

Case information

T Mpofu, for the applicants

A P de Bourbon SC, for the respondents D

Judgment

Patel J: This matter emanates from the third National Congress of the Movement for Democratic Change (the MDC) which was held in January 2011. The Congress was convened in December 2010 by Prof Welshman Ncube, the second respondent, who was at that time the Secretary-General of the MDC. E

The applicants contend that the Congress was convened and conducted in violation of the MDC Constitution in three different respects, to wit, the failure to send notices convening the Congress to all provinces and districts, defects in the process of nominations for elections at the Congress, and the unprocedural conduct of elections at the Congress in the absence of the F National Chairman. They aver that the second respondent has usurped various functions and powers vested in other officials and organs of the MDC for his own political interests. They seek an order declaring the third National Congress and all of its outcomes null and void, as well as an order directing the second respondent to reconvene the Congress. G

The respondents contend that all of the applicants ceased to be members of the MDC immediately before the Congress and, therefore, they have no *locus standi in judicio* in this matter. On the merits, they aver that notices convening the Congress were duly sent and delivered one month before the Congress and that the procedures governing nominations for elections to the National Council were substantially complied with. As regards the elections H

Patel J

A held at the Congress, they were duly conducted by the National Organising Secretary because the National Chairman, the first applicant, had deliberately absented himself from the Congress. In any event, no elections actually took place at the Congress, as all the appointees to the National Council were declared to have been elected having been unopposed.

B At the hearing of the matter, counsel for the respondents did not pursue the challenge to the applicants' *locus standi*. Consequently, notwithstanding the voluminous papers filed of record, the principal issue for determination herein is whether the convening of the Congress and its results were invalid on the three grounds raised by the applicants. The other salient issues canvassed at the hearing pertain to the assessment of facts in motion proceedings and C the interpretation of domestic constitutions.

It is trite that in motion proceedings the applicant must make out his case on the founding affidavit. Questions of fact that are contested are generally decided on the respondent's averments, taken with facts that are common cause. If a material dispute of facts is or should have been anticipated, the D application must ordinarily be dismissed. It is common cause that this is the approach to be adopted in the present matter.

Interpretation of domestic constitutions

As was succinctly declared by the Privy Council in the oft-cited case of *MacFoy v United Africa Co Ltd* [1961] 3 All ER 1169 (PC) at 1172, if an E act is void then it is in law a nullity, it is automatically null and void without more ado, and every proceeding which is founded on it is also incurably bad. Mr *Mpofu* urges the court to follow this time-honoured principle in the interpretation and application of the MDC Constitution. He submits that this instrument constitutes a binding contract between the members of the MDC. F It must be strictly complied with and substantial compliance is not enough.

The decision of the Supreme Court in *Dynamos Football Club (Pvt) Ltd & Anor v Zimbabwe Football Association & Ors* 2006 (1) ZLR 346 (S), is highly instructive in this context. It was held *per* Malaba JA at 351:

> "When a constitution says that rules of a club can only be amended or new rules made at an annual general meeting, they cannot be changed or new rules added G at an extraordinary or special general meeting. Where the rules demand that the alterations or additions be effected at an annual general meeting of a specified composition of members, and upon written notice of a prescribed number of days having been given, the changes or additions which are not made in accordance with the prescribed procedures and without the preconditions having been met are null and void."

H It was further observed at 356A, that:

Patel J

> "The duty of a court of law is to determine whether what is claimed to have A been done is in fact what was prescribed by the members of the Club in strict compliance with the procedure they laid down for validity to attach to those acts."

Dealing specifically with notification of the meeting in question, it was held, at 360B, as follows:

> "There was failure to give proper notice of the meeting according to the rules. B The facts show that the notice was given by the executive committee of ZIFA. The rule is that failure to give due notice to even one member of the Club who was entitled to attend and vote at the meeting renders it a mere nullity."

In this regard, the Supreme Court followed the decision in *Baird v Wells* (1890) 44 Ch D 661 at 671; [1890] All ER Rep 666, dealing with a similar C failure to comply with a rule governing the amendment of a club constitution:

> "If the election of the committee was to be confirmed and new rules were to be adopted proper and distinct notice should have been given to the members. No such notice was given and consequently the proceedings were not binding on the members who were not present."

Mr *de Bourbon* propounds a somewhat different approach. He submits D that a domestic constitution falls to be interpreted like an ordinary contract and must be given business efficacy. The question of compliance is to be considered in the light of the object of the provision in question. Not every failure to comply with a procedural requirement would render the action taken a nullity. He refers in this regard to the *dictum* of Lord Penzance in *Howard v Bodington* (1877) 2 PD 203 at 211: E

> "… you must look to the subject matter, consider the importance of the provision that has been disregarded and the relation of that provision to the general object intended to be secured by the Act … ."

This approach to the interpretation of statutory provisions is aptly captured by the observations of Gubbay JA in *Sterling Products International Ltd v* F *Zulu* 1988 (2) ZLR 293 (S) at 301B-F as follows:

> "The categorisation of an enactment as 'peremptory' or 'directory', with the consequent strict approach that if it be the former it must be obeyed or fulfilled exactly, while if it be the latter substantial obedience or fulfilment will suffice, no longer finds favour. As was pertinently observed by van den Heever J (as he then was) in *Lion Match Co Ltd v Wessels* 1946 OPD 376 at 380, the criterion is not the quality of the command but the intention of the legislator, which can only G be derived from the words of the enactment, its general plan and objects. The same sentiment was expressed by Milne J in *JEM Motors Ltd v Boutle & Anor* 1961 (2) SA 320 (N) at 327 *in fine*–328B. This approach received the *imprimatur* of the South African Appellate Division in *Maharaj & Ors v Rampersad* 1964 (4) SA 638 (A) where, after concluding that the provision with which he were concerned was imperative van Winsen JA went on to enquire whether H

Patel J

A the failure in strict compliance therewith was fatal. He expounded the following test, at 646C-E:

> 'The enquiry, I suggest, is not so much whether there has been 'exact', "adequate" or "substantial" compliance with this injunction but rather whether there has been compliance therewith. This inquiry postulates an application of the injunction to the facts and a resultant comparison B between what the position is and what, according to the requirements of the injunction, it ought to be. It is quite conceivable that a court might hold that, even though the position as it is is not identical with what ought to be, the injunction has nevertheless been complied with. In deciding whether there has been a compliance with the injunction the object sought to be achieved by the injunction and the question of whether this object has been achieved are of importance.'"

C Although this test is formulated with specific reference to the construction of statutes, I think that it is equally apposite in the context of domestic instruments regulating the activities and administration of voluntary associations and organisations. In keeping with the principles enunciated in the cases, it is necessary to consider whether what was done is in fact what is prescribed D in the governing rules, so as to achieve the object sought to be achieved by the rules. It seems to me that to command or compel slavish adherence to every jot and tittle of the rules may not necessarily and invariably secure the fulfilment of the intended objective. In many cases, it may even impede or frustrate that objective. In certain instances, however, strict or exact compliance with the prescribed procedures may be necessary, as in the *Dynamos* case E *supra* where what is at stake is something as fundamental as the amendment of the rules of an association or the dissolution of the association itself. In any event, having regard to the circumstances of each case, a flexible approach may be called for in order to advance the objects that the members of the organisation have associated together to attain. In the final analysis, F this purposive or teleological approach

commends itself as being the most appropriate one to the interpretation of domestic constitutions generally.

Relevant provisions of the MDC Constitution

The Constitution of the MDC was adopted by its inaugural Congress in January 2000 and subsequently amended at the second National Congress G in February 2006. The provisions germane to this matter are contained in Articles 5 and 6 of the Constitution. They are as follows.

> Article 5.2.4: "A notice convening the Congress shall be sent to all Provinces and Districts by the Secretary-General with the approval of the National Council at least one month before the date of the Congress."
>
> Article 6.13.3(c): "The Secretary-General shall, not less than four days before H the date of the Congress, cause members of the National Executive Committee

> and each Province to be advised of the names of persons nominated by each A Province for election to the National Council."
>
> Article 6.13.3(f): "The elections shall be conducted by the National Chairperson who shall be supported by the National Organising Secretary and the Deputy National Organising Secretary, except where the election is for the position of National Chairperson, in which case such election shall be conducted by the outgoing Deputy President assisted by the National Organising Secretary and B the Deputy National Organising Secretary."

Notices convening the Congress

It is not in dispute that at the meeting of the National Council on 8 December 2010 it was resolved that the third National Congress be held on 8 and 9 January 2011. The meeting further authorised the second respondent to issue C notices convening the Congress. It is also not in dispute that at the end of that meeting the second respondent gave notices convening the upcoming Congress to all the Provincial Chairpersons and Provincial Secretaries with instructions to transmit the notices to the districts. It is common cause that the Congress was then held on 8 and 9 January 2011. What is in issue is whether there was compliance with the requirements of article 5.2.4 of the D MDC Constitution.

Mr *Mpofu* submits that delivery of the notices to the provinces was in order, but that delivery of notices to the districts through the provinces was improper and inadequate. It should have been effected directly to the districts and not by proxy. Additionally, it is implied in article 5.2.4 that notices must not only E have been sent but also received at least one month before the date of the Congress. In this instance, notices were not received within the stipulated period to enable the provinces and districts to prepare for the Congress.

Mr *de Bourbon* counters that notices need only be given to the provinces and districts and not to any named official within those structures. Moreover, the notices must be sent by any means of communication, not necessarily in F writing, and this does not involve any physical receipt. The giving of notices to all the districts through the provinces was in order as, in a pyramid system, notice to the provinces also constitutes notice to the districts within that structure. The fact that every single district sent delegates to the Congress shows that all the districts, as opposed to their respective Chairpersons, did G receive notice of the Congress.

On the pleadings, the applicants aver that they did not receive any notice of the Congress and that the second respondent chose to dispense with the notices. The second respondent avers in his opposing affidavit that he gave the requisite notices to all the provinces and, through the provinces, to the districts. In their answering affidavits, the applicants merely restate their H

A denial, based on conjecture and without further elaboration. In this respect, I agree with Mr *de Bourbon* that the second respondent's contention that notice was duly given has not been effectively disputed in the answering affidavits. Equally significantly, as I have already noted, the applicant in motion proceedings must make out his case on the founding affidavit. Contentious issues of fact are generally decided on the respondent's averments, taken B together with facts that are common

cause. In the premises, it seems to me that the second respondent's averments in this regard are to be preferred and must be upheld.

The procedure prescribed by Article 5.2.4 is relatively clear. Once the National Council has approved the date of the Congress, the Secretary- C General is required to send a notice convening the Congress to all provinces and districts at least one month before that date. Similarly, the interpretation of Article 5.2.4 should not present any major difficulties. In particular, the phrase "notice convening the Congress shall be sent" is to be ascribed its ordinary grammatical meaning. The verb "to send" ordinarily denotes a variety of actions, *viz.* to consign, convey, direct, dispatch, forward or D transmit. Applying any one or more of these synonyms to the words under consideration, taken in their context, they must be construed to mean that the notices in question must be dispatched, forwarded or transmitted to the provinces and districts. I am unable to find any justification for extending the phrase, as is argued for the applicants, to encompass the actual receipt E of notices by the provinces and districts. Apart from deviating from the ordinary grammatical meaning, any such construction would place upon the Secretary-General the unenviable and intolerable burden of having to achieve what might be practically impossible to achieve on the ground. By the same token, I see no merit in the contention that notices must be sent to the districts directly and not indirectly through the provinces. What matters, F at the end of the day, is that notices are in fact sent to the districts through an appropriate and acceptable form of transmission. In this regard, I can see nothing objectionable in the dispatch of notices to the districts through the provincial structures, as happened in this case, in the usual manner of communication within a pyramidal hierarchy.

G The intention underlying Article 5.2.4 is also fairly obvious. It is to allow all the provinces and districts to prepare for the Congress and to enable their delegates to attend and participate at the Congress. It seems to me that these objects are clear and straightforward and that they should not be obfuscated by technicalities. In the instant case, it would appear that these objects were generally achieved in that over 4000 delegates representing H all the provinces and districts actually attended the Congress. Those who

---

did not attend, including the applicants, deliberately chose to boycott the A Congress. In any event, virtually all of the applicants were members of the National Council and were present at the meeting where the dates of the Congress were fixed. They were fully aware of that date from the outset, while few of the applicants who were not on the National Council admit to having participated in the nomination processes preceding the Congress and B having been aware of the Congress dates. All in all, I am satisfied that the purpose and objects of the injunction contained in Article 5.2.4 were fully realised. It follows, in my view, that the provision was not violated in any way and was duly complied with.

Nominations for election to the National Council

Article 6.13.3(c) enjoins the Secretary-General to cause members of the C National Executive Committee and each province to be advised of the names of persons nominated by each province for election to the National Council. He is required to do so not less than four days before the date of the Congress. Both counsel appear to be in agreement that the reference to National Executive Committee in this provision is a misnomer, as no such D organ is established under the MDC Constitution, and should properly be a reference to the National Council. Be that as it may, what is in issue in this matter is whether or not the provinces were duly advised of the nominees for election to the National Council.

The first applicant contends that the second respondent convened the Congress E without receiving nominations from all the provinces. He further states that article 6.13.3(c) could not have been complied with as the National Council only met on 7 January 2011, a day before the Congress opened on 8 January 2011. The second respondent avers that he complied with article 6.13.3(c) by his letter of 3 January 2011 and that all the provinces were already aware of the nomination process. Only Masvingo province failed F to submit its nominations and this was because it had been influenced by the applicants not to do so.

The second respondent's letter of 3 January 2011 is addressed to all members of the National Executive and all Provincial Chairpersons. It states as follows:

"In terms of Article 6.13.3(c) of the Party Constitution I hereby formally advise G you of the outcome of the nomination exercise in preparation for Congress. Find attached hereto the nominations made by each Province. Please note that Masvingo did not make its nominations even though it held a Provincial Council meeting on 30th December 2010. Instead of doing nominations they chose to write a petition to my office, which I will table at the meeting of the National Council scheduled for 7 January 2010 [*sic*] for the National Council to make a determination." H

Patel J

A The first applicant's averments as to non-compliance with article 6.13.3(c) are made in paras 5 and 5.2 of his founding affidavit. The second respondent's averments disputing this, by virtue of the above letter, are contained in para 10.1 of his opposing affidavit. In his answering affidavit at para 24 the first applicant complains about chaotic, disorderly and flawed nominations, but does not deny having received the letter, nor does he dispute its contents. In B fact, none of the applicants deny having received the letter. On the papers, therefore, the second respondent's position as to having complied with article 6.13.3(c) through his letter must be sustained.

The essence of the injunction embodied in article 6.13.3(c) is for the Secretary-General to communicate the names of persons nominated by C each province for election to the National Council at least four days before the date of the Congress. It is quite clear that article 6.13.3(c) is concerned not with the nomination process *per se* but rather with the end result of that process. The primary purpose of this provision, in my view, is to ensure that all persons attending the Congress are duly notified and aware of the candidates nominated for election to the National Council. Its secondary D purpose is to enable unsuccessful candidates to invoke article 6.13.3(d) so as to nominate themselves, with the endorsement of ten members, not later than two days before the date of the Congress. The applicants chose not to invoke this option, but elected instead to boycott the Congress. On the strength of the second respondent's letter of 3 January 2011, addressed to the E recipients stipulated in article 6.13.3(c), coupled with his oral notifications to that effect, it must be accepted that the second respondent duly complied with both the requirements and objects of the provision. It follows that the applicants have failed to substantiate the alleged breach of article 6.13.3(c).

Conduct of elections at the Congress

F In terms of Article 6.13.3(f) of the MDC Constitution, elections at any Congress for positions on the National Council "shall be conducted" by the National Chairperson supported by the National Organising Secretary and the Deputy National Organising Secretary. It is common cause that at the Congress *in casu* the Acting National Chairperson at that time, the first applicant, was not present and that the elections were conducted by the National Organising G Secretary. It is also common cause that all the appointees to the National Council were elected unopposed.

Mr *Mpofu* submits that the fact that the appointees were unopposed does not mean that no elections were conducted and does not detract from the National Chairperson's critical role and function of declaring the successful H candidates. There was an electoral process and article 6.13.3(f) is couched

---

Patel J

in peremptory terms. If there were no elections, the second respondent's A position as President elected at the Congress becomes untenable.

Mr *de Bourbon* submits that the word "elections" must be construed in the narrow sense of elections by ballot. If a nominee or candidate is unopposed, there is no election to conduct. He further submits that where the National Chairperson is absent, elections can be conducted by the National Organising B Secretary, who is implicitly authorised to do so by article 6.13.3(f). Moreover, the first applicant cannot by deliberately boycotting the Congress frustrate its entire process.

It is not disputed that the first applicant walked out of the National Council meeting on 7 January 2011. Consequently, it was agreed that the meeting would proceed with the then President in the chair. It was also clear that the C first applicant would not attend the Congress. It was therefore resolved that the National Organising Secretary would perform all the functions vested in the

National Chairperson at the Congress, including the chairing of the Congress and the conduct of elections.

In determining the question at hand, it is necessary to consider other pertinent D provisions of the MDC Constitution, in particular, article 6.13.3(h):

> "All the elections for members of the National Council shall be conducted on the basis of Provincial block voting and where necessary the vote of each Province shall be determined by secret ballot and the winning candidate shall be by a simple majority of the Provinces. The outcome of each Province's vote shall be by a simple majority of delegates present and voting in that Province. In the event E of a tied vote in any election in any province, the election shall be held again until there is a winner. In the event of a tied vote among the Provinces present and voting, the tie shall be broken by having that position voted for through a system in terms of which delegates shall vote in their individual capacities by secret ballot and the candidate receiving the highest number of votes shall be declared the winner."

Also relevant is Article 15.1 dealing with oversights and omissions. It F provides that:

> "In any place where the requirements of this Constitution cannot be satisfied because of an omission or oversight in draughtsmanship, or because a body provided for has not been established, or an officer provided for in this Constitution has not been elected or appointed, or because of a procedural problem; the G National Council shall have the power to make such arrangements which, in their opinion, satisfy the spirit of this Constitution and shall seek approval for such arrangements at the next Congress."

The language of article 6.13.3(h) provides a very strong basis for the argument that the elections referred to in article 6.13.3(f) involve active contestation as between competing candidates. In other words, delegates at a Congress are H

Patel J

A required to vote as between two or more nominees for the posts in question. Having regard to the ordinary meaning of the verb "to elect" as being "to choose", to conduct an election would be to preside over a process in which the electors make their choice from amongst one or more candidates. It then follows that where a nominee or candidate is elected unopposed there would be no election to conduct or preside over. If this is correct, it must B be concluded that no elections actually took place at the Congress *in casu* because those nominated were appointed unopposed to their respective posts, thereby making it unnecessary for the National Chairperson or the National Organising Secretary or anyone else to preside over the conduct of the elections envisaged in Articles 6.13.3(f) and 6.13.3(h).

C While I must confess that this argument is very appealing, I am not entirely persuaded to accede to it. It seems to me that in an organisational context, even where an election or appointment takes place without contestation, the electors or delegates present are called upon to make a passive choice in accepting the unopposed candidate, *viz.* by not challenging or objecting to the nomination of that candidate. By the same token, the person who presides D over or conducts the election is enjoined to make a formal pronouncement, officially declaring the appointment of the candidate to the post in question. This formal act is not purely academic or otiose, inasmuch as it operates to invest the successful candidate with the substantive functions, powers and duties of the office to which he is appointed. In short, what transpired at the Congress *in casu* was an electoral process. I am therefore inclined E to conclude that the proceedings under consideration, notwithstanding the absence of any opposition to the candidates nominated, constituted elections in the formal sense, requiring the active involvement of a designated official to preside over the conduct of those elections.

The argument for implied powers vested in the National Organising Secretary F to conduct elections is not totally without merit, particularly in light of the broad power entrusted in him by article 6.8.1(h) to be "the master of ceremonies" at all of the MDC party's national functions, including any Congress. However, article 6.13.3(f) explicitly refers to him as supporting or assisting the National Chairperson or Deputy President. Consequently, I do not think that this supportive role can be translated, without further ado, G into the principal functions exercisable under article 6.13.3(f) simply by dint of the essentially ceremonial power conferred by article 6.8.1(h).

What is more critical in this regard is the action that was taken by the National Council at its meeting of 7 January 2011. Once it became clear that the first applicant had no intention of attending the Congress, the H National Council resolved that, in the event of his boycotting the Congress,

Patel J

all the functions vested in him and required to be performed by him at the A Congress would be performed by the National Organising Secretary. In my view, the National Council was fully empowered to do so by virtue of the provisions of article 15.1 of the MDC Constitution. There was "an omission or oversight" in the Constitution as to what should happen in the event that the National Chairperson failed or neglected for any reason to attend Congress. Moreover, it had become apparent that there would be B "a procedural problem" caused by his non-attendance at the Congress. The National Council then proceeded to make such arrangements as, in its opinion, satisfied the spirit of the Constitution. It follows that the resolution authorising the National Organising Secretary to perform the functions of the Acting National Chairperson at the Congress, including the conduct of C elections under article 6.13.3, was perfectly competent under the aegis of article 15.1. It further follows that there was no violation of article 6.13.3(f) in the conduct of elections at the Congress.

This conclusion is fortified by the trite principle that a person cannot rely on his own wrongful conduct to found a cause of action. In the instant case, D having deliberately absented himself from the Congress, the first applicant cannot then rely on his absence to argue that all of the proceedings at the Congress were a nullity because he was not present in person to chair those proceedings. To allow him to do so would enable him to benefit from his own deliberate abstention to the extreme prejudice of the entire MDC party E membership. Indeed, such an approach would render unmanageable the convening and conduct of all political party conferences. It would also allow party leaders to circumvent and frustrate the electoral process and remain in office indefinitely through the simple stratagem of non-attendance.

Disposition F

Having regard to all of the foregoing, I am satisfied that the applicants have failed to establish any contravention of the provisions of the MDC Constitution that they rely upon for the declarator that they seek. As regards costs, I see no justification for the punitive award of costs claimed by the respondents, which claim was in any case properly abandoned by counsel G at the hearing of this matter.

In the result, the application is dismissed with costs on the ordinary scale.

Mbidzo Muchadehama & Makoni, applicants' legal practitioners

Gill Godlonton & Gerrans, respondents' legal practitioners H

© 2015 Juta and Company (Pty) Ltd.

Document 62 of 75

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2012/Volume 1/MAKOVA v MASVINGO MIRROR (PVT) LTD & ORS 2012 (1) ZLR 503 (H)

MAKOVA v MASVINGO MIRROR (PVT) LTD & ORS 2012 (1) ZLR 503 (H)

Citation	2012 (1) ZLR 503 (H)
Case No	Judgment No. HH-241-12
Court	High Court, Harare
Judge	Mavangira J
Heard	29 November 2011; 30 November 2011; 14 December 2011; *CAV*

Judgment 13 June 2013

Counsel *T Mberi*, for the plaintiff
A Demo and *A Nemaramba* for the first, second and third defendants
No appearance for the fourth defendant

Case Type Civil action

Annotations No case annotations to date

Flynote

Damages – *delict – defamation – purpose of award of damages – factors to be taken into account when assessing quantum*

Delict – *defamation – defences – fair comment on a matter of public interest* D *– what defendant must show for defence to succeed*

Delict – *defamation – defences – justification – publishing defamatory material in spite of denial by plaintiff of truth of allegations – no defence that plaintiff has been given opportunity to respond*

Delict – *defamation – defences – truthfulness of allegation – defendant relying* E *on particular witness as being an impeccable source – defendant thereby associating itself with allegations made by such person*

Headnote

The plaintiff, a member of Parliament, claimed damages for defamation following the publication of an article about him in a weekly newspaper that circulated in the Masvingo area. The article was headed "Big War in F Bikita: Makova cited as problem: Mine workers terrorized". It referred to a letter which it said the newspaper was in possession of, which was written to Bikita Minerals top management "from a suspected highly placed ZANU PF official threatening them that they are likely to be abducted, tortured and even get killed for betraying the party in the G area". The allegation that the plaintiff was terrorising mine workers in the name of ZANU PF was attributed to unnamed "impeccable sources". The allegation that the plaintiff was the major problem and cause of unrest in Bikita was also attributed to the same sources. The defendants claimed the article constituted fair comment on a matter of public interest.

Held, that for a newspaper to describe its sources as "impeccable" means H that the newspaper has associated itself with the allegations allegedly

---

Mavangira J

made by the sources. It in fact validates and associates itself with the A allegations through its description of the sources as "impeccable".

Held, further, that for the defence of fair comment to succeed, the allegation must amount to a comment; secondly, the comment must be fair; thirdly, the factual allegations on which it is based must be true; fourthly, the comment must be on a matter of public interest and finally, the comment B must be based on facts expressly stated or referred to in the document or speech concerned, or generally known to the relevant audience.

Held, further, that the fact that the defendants confronted the plaintiff with a defamatory allegation against him did not mean that they were then entitled to go ahead and publish that allegation and that they would have protection against being sued for defamation even if the story turned out C to be without foundation. The purpose of confronting a person with an allegation is to try and check the story. If, when confronted, he admits the allegation, the press can go ahead safely and publish the story. But if he completely denies the allegation or refuses to comment on it and the press still publishes it, the person will be able to sue for defamation D if the defamatory allegation is without substance.

Held, further, that it is also no defence to say that someone else made the statement or that the statement has already been published in, say, another newspaper. Anyone who further

disseminates a defamatory statement is also guilty of defamation, because the action of spreading the story around causes more harm to the plaintiff's reputation. Merely putting E the offending words in quotes is no defence.

Held, further, that the award of damages for defamation is more as a solace for injured feelings, rather than as a way of repairing all the damage that has been done. This is the approach the courts take because once the defamatory statement has been published, it is very difficult to F rehabilitate a reputation completely, even if it is proved that the statement was misguided and a full apology is extracted.

Held, further, that the factors that the courts take into account in assessing the level of compensation are: the character and status of the plaintiff, the nature of the words used and the intended effect thereof, the extent G of the publication, and whether or not the defendant has subsequently made attempts to rectify the harm done by way of retraction and apology. The fact that the plaintiff is a politician and a public figure, whose life is necessarily in the public domain and open to criticism, does not divest him of protection against harm to his dignity and reputation. He is entitled to protection. Also amongst the factors that guide the court H

Mavangira J

A in assessing an appropriate award is the consideration of comparable awards of damages in other defamation suits

Cases referred to

Beesham v Solidarity Party & Anor 1991 (3) SA 889 (N)

Manyange v Mpofu & Ors 2011 (2) ZLR 87 (H)

B *Moyo v Nkomo & Anor* HB-38-11

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

Tekere v Zimbabwe Newspapers (1980) Ltd & Anor 1986 (1) ZLR 275 (H)

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

Zvobgo v Kingstons Ltd 1986 (2) ZLR 310 (H)

Case information

C *T Mberi*, for the plainitff

A Demo and *A Nemaramba* for the first, second and third defendants

No appearance for the fourth defendant

Judgment

Mavangira J: The plaintiff is the member of parliament for Bikita West D constituency. He claims against all the defendants jointly and severally, the one paying the others to be absolved, the sum of US$100 000, being damages for "defamation, *injuria* and impairment of dignity", arising from a newspaper article published in *The Mirror* newspaper of 3 to 9 July 2009.

The first defendant is the publisher of *The Mirror*. The second defendant is E the editor, while the third defendant is the reporter of the article published in the said newspaper and giving rise to this action. The fourth defendant is said to have directly contributed to the publication of the defamatory story in question as quoted in the article.

The first, second and third defendants deny liability, claiming that the words in the article were fair in the circumstances and that the publication was for F public benefit. The fourth defendant has not defended this action.

When the matter was referred to trial, the following issues were referred for determination by the trial court:

1. whether the newspaper article was wrongful and defamatory of the plaintiff. G
2. whether the published article was fair under the circumstances and for public benefit.

3. whether the plaintiff's reputation, dignity and integrity was impaired by the article published by the defendants.
4. whether the defendants are liable to pay the plaintiff damages for H defamation and if so, in what quantum.

2012 (1) ZLR p506

Mavangira J

The article which was published in the issue of *The Mirror* newspaper of 3 A to 9 July 2009 was headed "'Big War in Bikita:' Makova cited as problem: Mine workers terrorized". With regard to the contents of the body of the article the plaintiff summarised the article in para 7 of the plaintiff's declaration, as stating the following:

> "7.1 The plaintiff was terrorising mine workers in the name of ZANU(PF) B
>
> 7.2 The plaintiff was 'stupid and greedy'.
>
> 7.3 The plaintiff was the major problem and the cause of the unrest in Bikita.
>
> 7.4 The plaintiff was dismissing elected people and replacing them with his own."

The plaintiff contends that the words in the context of the article were wrongful and defamatory of him, in that they were intended to be, and were C understood by the readers of the newspaper to mean, that the plaintiff was a terrorist, who was terrorising management and mine workers in the name of ZANU(PF), that he was stupid and greedy, that he was the major problem and cause of unrest in Bikita, that he was destroying party structures from within by dismissing and replacing elected people from positions and replacing D them with his friends and cronies, that he is a violent person who resorted to self help and did not respect the law and is a perverter of democracy who did not respect the will of the people as expressed in elections.

The plaintiff further contends that the newspaper enjoys wide circulation in Masvingo and other provinces (which he did not name). Furthermore, that as a result of the publication of the defamatory and injurious article, his reputation E was severely tarnished and his dignity and integrity immensely impaired, thereby resulting in him suffering damages in the sum of US$100 000 for which all the defendants are jointly and severally liable.

In their plea, the first, second and third defendants admit publishing the article. They also admit that the article says what is alleged in para 7 of F the plaintiff's declaration. However, they deny that the words in the article were wrongful and defamatory of the plaintiff and aver that the "words in the article were fair in the circumstances and the publication was for public benefit". They deny that the plaintiff's reputation was tarnished or that his dignity and integrity were impaired, persisting in their stated stance.

It appears to me that there can be no doubt that the words in the article, in their G ordinary meaning, were *per se* derogatory and defamatory of the plaintiff. Being called a terrorist, being referred to as the cause of unrest, being described as a perverter of democracy, being called greedy and stupid and other such descriptions as are used in the article, are certainly derogatory descriptions or labels. They are words not complimentary of any person. Furthermore, H

2012 (1) ZLR p507

Mavangira J

A I do not understand the defendant's defence to include contestation of the defamatory nature of the words in the article. Rather, their defence *appears* to be that of fair comment. I use the word "appears" deliberately. I do so because of the manner in which the plea has been crafted, with particular reference to para 5 which reads:

> "... The words in the article were fair in the circumstances and the publication B was for public benefit."

Paragraph 7 also reads:

> "It is denied the plaintiff's reputation was tarnished or that his dignity and integrity were impaired since the words were fair in the circumstances for public benefit."

If the defendants' defence is one of fair comment, then the question, in C my view, would be whether on the evidence adduced before this court that defence avails them; this, in effect, being the second issue, or part thereof, referred for determination at trial. In *Manyange v Mpofu & Ors* 2011 (2) ZLR 87 (H) at 100 Patel J stated at P13:

> "The defence of fair comment imposes upon the defendant the onus to prove the following. The statement complained of was an opinion or comment and D 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 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 & Anor* 1981 (1) SA 1157 (A) at 1167; *Tekere v Zimbabwe Newspapers (1980) Ltd &* E *Anor* 1986 (1) ZLR 275 (H); *Velempini v Engineering Services Department Workers Committee for the Engineering Services of the City of Bulawayo & Ors* 1988 (2) ZLR 173 (H); *Johnson v Becket & Anor* 1992 (1) SA 762 (A); *Madhimba v Zimbabwe Newspapers (1980) Ltd* 1995 (1) ZLR 391 (H) at 410 *Moyse & Ors v Mujuru* 1998 (2) ZLR 353 (S) at 356."

The article starts off by stating in the first paragraph as follows:

> F "Chaos is reigning supreme in ZANU PF structures in Bikita as the big wigs in the area are clashing on several occasions as the battle to control resources mainly in Bikita Minerals intensifies."

The next paragraph states that impeccable sources within ZANU PF have since told the publication (newspaper) that power struggles which have become the pattern of life in the district would threaten the whole image of G the party "as dirty games and unscrupulous tactics are being used as means to oust each other from the position of power".

The next two paragraphs are in the form of quoted words from the source(s). The article refers to a letter which it says the newspaper is in possession of which was written to Bikita Minerals top management "*from a suspected* H *highly placed ZANU PF official* threatening them that they are likely to be

---

Mavangira J

abducted, tortured and even get killed for betraying the party in the area" A (the emphasis is mine). The next two paragraphs are excerpts from the said letter. The plaintiff's comments follow thereafter, with the plaintiff denying any wrong doing in the manner or respects alleged. The fourth defendant, who is a member of the district co-ordinating committee and also former member of parliament for Bikita East, is alleged, in the same article, to have B also been eyeing the same senatorial post as the plaintiff was reportedly also aspiring to.The fourth defendant is also quoted and reported to have said, *inter alia*, that the plaintiff is stupid and greedy. Another named person is referred to in the article as another rival of the plaintiff, but no comment was obtained from him as he was said to have continuously switched off his mobile phone. The mine manager, who was allegedly abducted on 12 C June (presumably 2009) and tortured and held hostage for about 30 minutes by ten ZANU PF youths, is reported in the article as having directed the newspaper to his lawyer for comment. The said lawyer's response about what happened at the mine is then quoted. In the final paragraph of the article the following is stated:

> "The other ten who allegedly abducted MacPhail last year initially appeared D before the courts in Bikita for kidnapping and assault. Two of the ten suspected ZANU PF youths pleaded guilty and they were sentenced to 18 months in jail. The other eight who appeared in court on Wednesday were remanded out of custody to 5 August but the people in Bikita were shocked to see them being dropped at court by a ZANU PF truck."

A perusal of the article shows that the newspaper has, in the main, quoted E the allegations made to them by their sources against the plaintiff as well as what other people said about various aspects of the story. It also contains the responses or comments given by the plaintiff when requested for the same by the newspaper before publication of the article.

The allegations made against the plaintiff are defamatory. In the article, the F allegation that the plaintiff was terrorising mine workers in the name of ZANU PF is attributed to unnamed "impeccable" sources. The allegation that the plaintiff is the major problem and cause of unrest in Bikita is also attributed to the same unnamed "impeccable" sources. Similarly, the allegation that he was dismissing elected people and replacing them with his own cronies G os attributed to such sources. The allegation that the plaintiff is stupid and greedy is attributed to Walter Mutsauri, the fourth defendant.

As already noted above, the article in issue is mainly a sequential compilation of quotes of statements by the newspaper's sources, on the one hand, and the plaintiff's comments on the other. The portion of the article that appears to me to qualify as comment that may be attributable to the newspaper is the H

Mavangira J

A description of its sources as being impeccable in the statement that reads *"impeccable sources* within ZANU PF have since told this publication" (my emphasis) about power struggles in the district, the dirty games and unscrupulous tactics being used and the negative impact they could or would have on the image of the party. This follows after the introductory paragraph quoted earlier herein, which states that chaos is reigning supreme in ZANU B PF and which precedes a few other paragraphs presumably meant to justify the opening statement of the article. The article refers to sources which informed the second and third defendants to the effect that the plaintiff is the major cause of the problems in Masvingo.

It appears to me that the description of the sources as "impeccable" is of C significance. "Impeccable" is defined in the *Concise Oxford Dictionary* as "not liable to sin; faultless". The word has also been ascribed the following meanings: faultless, flawless, perfect, unimpeachable, above reproach, immaculate, spotless, unsullied. By ascribing that description to its sources the newspaper has, in my view, associated itself with the allegations allegedly D made by the sources, in contra-distinction with the plaintiff's comments to what the sources told the newspaper. Though indirectly, the newspaper thereby subtly commented on the allegations made by its sources. The newspaper's comment, however, goes beyond commenting in the ordinary sense. In my view, it in fact validates and associates itself with the allegations through its description of the sources as "impeccable". It in fact appears to be adopting E the said allegations. A similar situation pertained in *Beesham v Solidarity Party & Anor* 1991 (3) SA 889 (N) at 898F-G where Alexander J stated:

> "This is not fair comment. It goes much further than suggesting one party is inferior to another, or that its candidates should be supported for that reason. It says of the plaintiff that he is prepared to stand on a platform tainted by the corrupt image attaching to his leader; and in so doing, makes common cause F with it. In my opinion the plaintiff's character has been besmirched without justification. He is not wrong in asserting that in the view of sensible people he is being held out as a man unconcerned about corruption. He was defamed and the magistrate was wrong in holding otherwise."

In addition to the observations made above, looming above the newspaper's patent partiality in the matter is the heading of the article which has already G been quoted earlier: "'Big War in Bikita': *Makova cited as problem:* Mine workers terrorized"(the emphasis is mine).

In *Moyse & Ors v Mujuru* 1998 (2) ZLR 353 (S) the requirements for the defence of fair comment are set out as being, firstly, that the allegation must amount to a comment; secondly, that the comment must be fair; thirdly, that H the factual allegations on which it is based must be true; fourthly, that the

---

Mavangira J

comment must be on a matter of public interest; and finally, that the comment A must be based on facts expressly stated or referred to in the document or speech concerned, or generally known to the relevant audience. See also *Manyange v Mpofu supra. In casu,* there was no evidence to the effect that the plaintiff was terrorising mine workers in the name of ZANU PF. The evidence of the plaintiff was to the effect that he was only involved in B the provision by ZANU PF of legal assistance to the youths who had been arrested in connection with acts of violence. There is no substantiation of any participation by the plaintiff in any acts of violence or terrorisation of mine workers at Bikita Minerals. The letter produced as exh 2 does not purport to have been written by the plaintiff; it makes no mention of the plaintiff and thus has not been linked to him. The plaintiff also denied that he ever C had any power to dismiss elected people and there was no substantiation of the allegation that the plaintiff had so conducted himself. No evidence was placed before the court to establish the truthfulness of, or substantiate the allegation that the plaintiff is a greedy politician and that he is the major problem and cause of unrest in Bikita. It thus appears that the factual allegations on which the defendants purport to have "commented" if their D publication can be said to be comment, have not been proved to be true. As discussed above, the defendants appear to me to have merely adopted and validated the information gathered from their sources despite the plaintiff's protestations of innocence and this they did in the absence of any proof to the truthfulness of the allegations. This specific requirement for the defence E of fair comment to avail them has thus not been met or fulfilled.

In their evidence, the second and third defendants were at pains to state that the article complained of was balanced as the plaintiff was asked to give his comments before the article was published

and which comments were incorporated in the said article. In *A Guide to Media Law in Zimbabwe* (Legal Resources Foundation, 2002) at p 22 Professor G Feltoe states: F

> "Journalists sometimes hold the erroneous view that provided they have confronted plaintiff with a defamatory allegation against him, they are then entitled to go ahead and publish that allegation and they will have protection against being sued for defamation even if the story turns out to be without foundation. This is entirely wrong. The purpose of confronting the plaintiff with the allegation is to try and check the story. If, when confronted, P admits the allegation, the G press can go ahead safely and publish the story. But if plaintiff completely denies the allegation or refuses to comment on it and the press still publishes it, the plaintiff will be able to sue for defamation if the defamatory allegation is without substance."

In casu the plaintiff, when asked to comment, completely denied the allegation. As already indicated earlier, the allegations made against the plaintiff have H

A not been shown to have any substance. The defendants nevertheless went ahead and published the same.

I am also in agreement with Mr *Mberi*'s submission that the defendants would be misguided in assuming that as the words or allegations concerning the plaintiff are in quotes no liability attaches to them. The law as stated by B Feltoe *op cit* states:

> "It is no defence that someone else made the statement or that the statement has already been published in, say, another newspaper. Anyone who further disseminates a defamatory statement is also guilty of defamation because the action of spreading the story around causes more harm to the plaintiff's reputation."

C I thus agree with Mr *Mberi*'s submission that the fact that the words may not have been those of the defendants will not avail them as they are the ones who published the story and thus defamed the plaintiff. The defence of fair comment is therefore in my view, not available to the defendants.

The defendants have tagged onto their plea in the paragraphs quoted earlier herein the words "for public benefit." It is not clear whether by the use of D these words the defendants intended to also raise the defence of justification or truth for the public benefit. If that was the intention, the question also arises whether on the evidence before this court that defence avails them. In *Manyange v Mpofu & Ors supra* at 99 Patel J said:

> "For the defence of public interest or justification to succeed, the following E 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 & Ors* 1994 (1) SA 708 (A); *Ndewere v Zimbabwe Newspapers (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 F 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* 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* G 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 a defamatory nature.'"

I have already dealt with the lack of substantiation of the defamatory allegations published about the plaintiff in the determination of the availability of the defence of fair comment. It is not necessary to revisit the discussion. Suffice G to say that for the lack of truth in the defamatory statements, the defence of

---

public interest or justification, if it was the intention of the defendants to also A raise it albeit in a vague manner, does not avail the defendants.

For the reasons discussed above, it is my opinion that the second and third defendants have failed to establish any defence to the plaintiff's claim. The fourth defendant has opted not to defend the

action at all. The plaintiff is thus entitled to judgment in his favour against all the defendants jointly and B severally the one paying the others to be absolved.

The plaintiff's claim is for US$100 000. Feltoe *op cit* at p 40 states:

> "The award of damages for defamation is more as a solace for injured feelings, rather than as a way of repairing all the damage that has been done. This is the approach because once the defamatory statement has been published, it is very difficult to rehabilitate completely a reputation even if it is proved in court that C the statement was misguided and a full apology is extracted.
>
> The factors that the courts take into account in assessing the level of compensation are the character and status of the plaintiff, the nature of the words used and the intended effect thereof, the extent of the publication, and whether or not the defendant has subsequently made attempts to rectify the harm done by way of retraction and apology." D

In *Manyange v Mpofu & Ors supra* at 101 Patel J stated:

> "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 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 E defendant; the recklessness of the publication; comparable awards of damages in other defamation suits; and the declining value of money … .
>
> … In applying these factors, it must be borne in mind that damages for defamation are intended to compensate the plaintiff for sentimental loss and should not as a rule be punitive."

In *Thomas v Murimba* 2000 (1) ZLR 209 (H) at 220A-B Chinhengo J stated: F

> "… The award must also reflect that the award is essentially compensatory in nature … ."

In casu the evidence adduced before the court was to the effect that the offending article was published in a community based weekly newspaper circulating in Masvingo Province. This would mean that as a weekly G newspaper it would remain on sale for a whole week during which readers could purchase it. Such availability for the whole week would presumably have the effect of increasing the coverage of the newspaper. The evidence also established that at the time of the publication the newspaper was not yet on the internet. The implication would thus be that to that extent the coverage of the newspaper was limited. The evidence further showed that H

Mavangira J

A the article was front page headline news. As rightly submitted by Mr *Mberi*, given the tendency of readers to skim through newspapers, the real likelihood is that a big number of readers carried with them a negative impression of the plaintiff. It was common cause there was no subsequent retraction of the article that was ever published. Rather the defendants' stance has been that the plaintiff did not suffer any harm to his reputation, that the article B had no negative impact on the plaintiff's standing. They contend that this is confirmed by the fact that there were no disciplinary proceedings taken by ZANU PF against the plaintiff despite the publication of the article.

It was also stated in evidence that on the day that the article was published many copies of the newspaper were sold. Evidence was also adduced by C the second and third defendants that both the first and third defendants had in the past received local and international recognition of their high class reporting standards through various awards. In such circumstances, most, if not all, of those who read the story would be more likely to believe that what had been published by the defendants about the plaintiff was true. In D this regard, sight is not lost of the third defendant's evidence to the effect that even before summons had been served he knew that the plaintiff would take legal action against the defendants. This must be considered in conjunction with the articulation of the headline of the story. It must also be viewed in conjunction with the extent of the defamation. In this regard the defendants' contention that the plaintiff had suffered no harm to his reputation and E that his reputation had remained unscathed by the article appears to have overlooked the presumption that as soon as defamatory matter is published, a presumption arises that the plaintiff has suffered harm to his reputation. See *Tekere v Zimbabwe Newspapers (1980) Ltd & Anor* 1986 (1) ZLR 275 (H) at 280F where Sandura JP, as he then was, stated:

> "In the circumstances, I am satisfied that there is a presumption in our law that F where the words complained of are defamatory *per se* the plaintiff is entitled to general damages."

A similar contention was also dismissed in the same case at 290C-D. The learned Judge President stated:

"... Mr *de Bourbon* submitted that the fact that the plaintiff was elected chairman G of ZANU (PF) in Manicaland and was re-elected to Parliament in 1985 reduces the amount of damages recoverable because it shows that the publication of the defamatory statements did not affect his reputation and standing. I disagree because the fact that the words complained of did not achieve their objective does not make less defamatory: *Buthelezi v Poorter* 1975 (4) SA 608 (W)."

In *Zvobgo v Kingstons Ltd* 1986 (2) ZLR 310 (H) at 325G-326A Reynolds H J stated:

2012 (1) ZLR p514

Mavangira J

"The extent of the injury is impossible to determine, and that is why, as I A understand it, the presumption exists. In the words of the Lord Atkin in *Ley v Hamilton* (1935) 153 LTR 385 (HL) at 386, 'it is impossible to track the scandal, to know what quarters the poison may reach.' It may be, for all I am aware, that the plaintiff's reputation and standing was seriously damaged, and that he was on the brink of disaster as far as his political career was concerned. It may be that members of his party and the public scoffed at the imputations, and did not B accept them. The point is that the actual effect is unknown, and it would be idle and dangerously unreliable to speculate on the possibilities."

He further stated at 326B-D:

"… it is clear that if a man has actually been ruined by a defamatory statement this is more serious than if the statement does not appear to have had any adverse C effect at all. This is certainly a matter to be taken into account.

It is usually the case in an action for defamation that one of the plaintiff's main reasons for coming to court at all is to attempt to clear his tarnished reputation. Should he eventually succeed, and be awarded substantial damages, this decision will in some measure vindicate his reputation. See *Pienaar & Anor v Argus Printing & Publishing Co Ltd supra at 323G; Rhodesian Printing & Publishing Co Ltd v Howman NO* 1967 RLR 318 at 339E. This is another factor, therefore, D that will be taken into account.

The difficult task of assessing appropriate damages in a defamation case is exacerbated by the conflicting demands of what appear to be factors of equal importance. ... ."

From the evidence it was also common cause with the parties that the E plaintiff is a high profile politician and public figure. In the defendants' closing submissions *Moyo v Nkomo & Anor* HB-38-11 is cited wherein at p18 Bere J said:

"I also would want to make the following observation. Political life is a hazardous exercise. It is not easy to walk. It can be dirty at times and those who opt for it must appreciate that by doing so they are voluntarily assuming certain risks. F In an effort to compete for the same political space there is bound to be a lot of fighting in politics. Political foes are always competing for recognition and it is not unusual that in the vicious competition for political space, day in day out politicians are busy defaming each other. That is part of the hazards of the journey in politics. It should not be the desire of the courts to settle petty political disputes. Politicians must learn to resolve their differences within the sometimes G not so friendly political environment, really politicians are in a special category when it comes to defamation suits. … ."

In casu the court is not, in my view, dealing with a petty political dispute. This is a matter involving defamation of a politician by a newspaper. Furthermore, although the plaintiff is a politician and a public figure whose life is necessarily in the public domain and open to criticism, the law does H

2012 (1) ZLR p515

Mavangira J

A not divest him of protection against harm to dignity and reputation. He is entitled to protection and this factor must also be considered in the assessment of the award that the court will grant in his favour.

Amongst the factors that guide the court in assessing an appropriate award is the consideration of comparable awards of damages in other defamation B suits. No case authorities were cited in support or justification of the amount claimed by the plaintiff. Mr *Demo*, however, cited two authorities for the court's guidance in this respect. The first is *Moyo v Nkomo supra* in which the plaintiff was Minister of Information and Publicity in the Office of the President and Cabinet. As a result of serious allegations made against him, he was unceremoniously dismissed from Government and all benefits which C he used to enjoy were taken from him. The offending article was published in national newspapers. The court awarded him US$5 000. The second is *Manyange v Mpofu supra.* The plaintiff was a mining commissioner for the district of Kadoma. The offending article was published in the *Chronicle*, a relatively widely read newspaper. In that case the court took into account, D among other factors, the fact that the plaintiff was never interviewed or invited

to present his side of the story. The publishing company was ordered to pay US$4 000. Mr *Demo* urged this court to give the plaintiff a token award or no award at all. I disagree. Whilst there are factors on the basis of which a reduction of an appropriate award would be justified, it appears to me that there are also factors that justify an increase thereof. This, in my view, is the E difficult task referred to in *Zvobgo v Kingstons Ltd supra* that is exacerbated by the conflicting demands of factors that appear to be of equal importance. The net result *in casu,* in my view, is that the two sides are almost balanced. It is therefore my view that the two cited authorities should guide this court significantly. This court's award therefore will reflect the trend exposed by F the cited authorities. It will also take into account the venomous sting of the unsubstantiated allegations which have the effect of tarnishing the plaintiff not only as morally bankrupt but also show him as a person with criminal, unruly and unbecoming tendencies. He is in fact portrayed as a menace to the district of Bikita and also as a disgrace to his political party. I am also of the view, however, that had a wider circulation been proved, ie wider than G Masvingo Province, a higher award than will be granted in this case would have been justified. In the result, the plaintiff having succeeded in his claim, costs will follow the cause.

For the above reasons it is ordered as follows:

The first, second, third and fourth defendants jointly and severally the one H paying the others to be absolved, shall

---

Mavangira J

a. pay the plaintiff the sum of US$7 000; A

b. pay costs of suit.

Hogwe, Dzimirai & Partners, plaintiff's legal practitioners

Chihambakwe, Mutizwa & Partners, first, second and third defendants' legal practitioners B

© 2015 Juta and Company (Pty) Ltd.

Document 63 of 75

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2012/Volume 1/V DAYA & CO (PVT) LTD & ANOR v SAVANNA TOBACCO (PVT) LTD 2012 (1) ZLR 517 (H)

V DAYA & CO (PVT) LTD & ANOR v SAVANNA TOBACCO (PVT) LTD 2012 (1) ZLR 517 (H)

Citation	2012 (1) ZLR 517 (H)
Case No	Judgment No. HH-242-12
Court	High Court, Harare
Judge	Mathonsi J
Heard	8 June 2012; *CAV*
Judgment	13 June 2012
Counsel	Applicant in default Ms *E Chimombe*, for the respondent
Case Type	Opposed application
Annotations	No case annotations to date

Flynote

Practice and procedure – *judgment – default judgment – rescission – grounds – existence of bona fide defence – claim to be allowed to pay* D *in instalments – not a defence*

Headnote

The applicants sought rescission of a default judgment obtained against them. After issue of the summons they had signed an acknowledgment of debt in respect of the full amount claimed by the respondent, and E undertook to pay the debt at an agreed rate per month. In spite of this undertaking they did not pay the monthly sums agreed; they paid only one amount, which was considerably less than the agreed monthly rate. The grounds for rescission were that they were not in wilful default and had a defence to the claim.

F Held, that nowhere in the world can it be a defence to say that a debtor should be allowed to pay in instalments. To say that the applicants negotiated a settlement after receipt of the summons did not even begin to explain the default. It was as unreasonable an explanation as it was dishonest. To say that the applicants should be allowed to pay the debt they acknowledged as owing in monthly instalments does not come anywhere G near presenting a bona fide defence. It put to question the bona fides of the entire application for rescission of judgment. This kind of litigation must be discouraged at all costs and legal practitioners who indulge in such egregious departures from acceptable behaviour risk the sanction H of costs de bonis propriis being visited upon them.

2012 (1) ZLR p518

Mathonsi J

Cases referred to A

Barclays Bank of Zimbabwe Ltd v CC International (Pvt) Ltd S-16-86

Govha v Ashanti Goldfields Zimbabwe Ltd & Anor HH-48-12

Sangura v Olivine Industries (Pvt) Ltd 1998 (2) ZLR 210 (S)

Stockil v Griffiths 1992 (1) ZLR 172 (S) B

Case information

Applicant in default

Ms *E Chimombe,* for the respondent

Judgment

Mathonsi J: The respondent instituted proceedings in this court in case number HC 1901/11 seeking an order for payment of the sum of US$17 735 C being the balance of the purchase price for goods sold and delivered to the two applicants, interest at the prescribed rate and costs of suit. The summons commencing action was served upon the applicants on 9 March 2011. The applicants did not enter appearance to defend but instead, on 22 March 2011, they signed a document with the title "Agreement of Debt and Form", in terms of which they acknowledged indebtedness in the whole sum claimed D in the summons and undertook to liquidate the debt at the rate of US$2500 per month. The document does not state when the first instalment was due.

Meanwhile, the respondent sought and obtained default judgment against the applicants on 10 May 2011 in the amount claimed, plus interest and costs of suit. The applicants filed this application for rescission of judgment on E 2 August 2011, and also made an urgent application for a stay of execution pending the hearing of the rescission of judgment application. The application for a stay of execution was not successful.

In his founding affidavit the second applicant confirms receipt of the summons and states that after that an acknowledgement of debt was signed. He claims F that instalments were paid in March, April, May and June 2011 in terms of the acknowledgment of debt. As proof of that, he has annexed receipts for payments made before the acknowledgment of debt was signed and not in the sums of US$2 500 stated in the agreement but in various sums ranging from US300 to US$1000. All the receipts add up to a total of US$4 700. Of this amount, only a sum of US$400 was paid after the signing of the G acknowledgment of debt.

The second applicant states further that they have not defaulted in payment. From the papers placed before me it is certainly not true that they have paid in terms of the agreement nor that they have not defaulted in payment. He states that the applicants sat back and did nothing about the summons, content H

2012 (1) ZLR p519

Mathonsi J

A that the matter had been settled by the signing of "the agreement of debt", but were shocked to receive a writ of execution.

The applicants seek rescission of the default judgment for reasons set out in paras 4, 5 and 6 of the founding affidavit which read:

> "4. What is apparently clear is that I was never in wilful default as I believed that the matter had been settled when the respondent made me to sign the B agreement of debt and agreeing to me paying US$2 500 a month. Had I known that the respondent was negotiating in bad faith and misleading me, I would have defended the matter. The responded duped us into believing that the matter had been settled, so as to snatch a judgment.
>
> 5. I was not in wilful default and I only became aware of the order on 27 July 2011, had the respondent served me immediately after being granted C the order I would have acted on time, the order was never served and the respondent proceeded to issue a writ as if I had refused to pay thus misleading the court.
>
> 6. I have a *bona fide* defence and my defence is that we have an accepted payment plan with the respondent which plan was initiated by the respondent and we have never breached that plan as we are paying US$2 500 a month D as agreed.
>
> Further, the summons as they stand are defective in that they do not comply with Order 2 r 11 (c) of the High Court Rules."

If the application had been prepared by an unrepresented litigant this would have been excusable. It was not. Instead it was prepared by a legal practitioner E who should have known that, not only were the applicants in wilful default, but also that this deposition does not come anywhere near disclosing a defence.

I have already stated that the applicants did not pay to the respondent in terms of the agreement. They also did not pay a single instalment of US$2 500 as provided for in the agreement. More importantly, the applicants admit F liability in the exact sum claimed in the summons, which is what was granted in the order they now seek to have rescinded.

Nowhere in the world can it be a defence to say that a debtor should be allowed to pay in instalments. By virtue of being a qualified legal practitioner and an officer of this court, the applicant's legal practitioner is presumed to know that for an application in terms of r 63 to succeed, subr (2) of r 63 G requires "good and sufficient cause" to be shown for the rescission of a judgment entered in default.

The factors taken into account in determining "good and sufficient cause" are well established and they include, the reasonableness of the applicant's explanation for the default, the *bona fides* of the application for rescission G and the *bona fides* of the defence on the merits: *Stockil v Griffiths* 1992 (1)

2012 (1) ZLR p520

Mathonsi J

ZLR 172 (S) at 173 D-F; *Barclays Bank of Zimbabwe Limited & Anor v CC* A *International (Pvt) Ltd* S-16-86; *Sangore v Olivine Industries (Pvt) Ltd* 1988 (2) ZLR 210 (S) at 211 C-F and *Govha v Ashanti Goldfields Zimbabwe Ltd* t/a *Freda Rebecca Mine & Anor* HH 48-12 at p 4.

To say that the applicants negotiated a settlement after receipt of the summons does not even begin to explain the default. It is as unreasonable an explanation B as it is dishonest. To say that the applicants should be allowed to pay the debt they acknowledged as owing in monthly instalments does not come anywhere near presenting a *bona fide* defence. It puts into question the *bona fides* of the entire application for rescission of judgment. Indeed this application epitomises what is slowly gaining notoriety, as the "new way of business", where debtors virtually say to creditors: "I know I owe you money but I do C not want to pay you; or I will pay you at my own time and in my own way." This kind of attitude forces those willing to do business with such people to footling court proceedings instituted on spurious grounds in order to delay the day of reckoning.

It is this kind of litigation which must be discouraged at all costs, and legal D practitioners who indulge in such egregious departures from acceptable behaviour risk the sanction of costs *de bonis propriis* being visited upon them. In my view, a legal practitioner owes it to the court to protect it from such unwarranted litigation which is clearly a complete waste of the court's time and a frustration of just claims. Fortunately for the legal practitioner involved, Ms *Chimombe* did not ask for such an award of costs to be made, E which I would not have hesitated to grant. Little wonder they did not attend the court hearing.

This application is an absolute waste of time. It is thoroughly without merit and is an exercise in futility. Not less than ten months have been lost by the respondent as a result of this ill-fated application. An award for punitive costs is therefore called for. F

Accordingly the application is dismissed with costs on the legal practitioner and client scale.

Cheda & Partners, applicants' legal practitioners

Magwaliba & Kwirira, respondent's legal practitioners G

© 2015 Juta and Company (Pty) Ltd.

Document 64 of 75

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2012/Volume 1/BHEBHE v ESTATE BHEBHE & ORS 2012 (1) ZLR 521 (H)

BHEBHE v ESTATE BHEBHE & ORS 2012 (1) ZLR 521 (H)

Citation	2012 (1) ZLR 521 (H)
Case No	Judgment No. HB-136-12
Court	High Court, Bulawayo
Judge	Ndou J
Heard	18 October 2011; *CAV*
Judgment	14 June 2012
Counsel	Miss *Y Mbayiwa*, for the plaintiff *K Phulu*, for the defendants
Case Type	Civil trial
Annotations	No case annotations to date

Flynote

Administration of estates – *estate – spouse under a putative marriage – spouse unaware of invalidity of the marriage until death of "husband" – considerable contribution of spouse toward matrimonial home and* D *rearing of children – spouse's entitlement to a share of the estate*

Succession – *spouse – who is – second wife married in terms of putative marriage – second wife unaware of existence of earlier marriage – such wife's entitlement to share of estate*

Headnote

E The provisions of s 7(1) of the Matrimonial Causes Act [*Chapter 5:13*] cover putative or bigamous marriages and, in the same way, the provisions of ss 3 and 3A of the Deceased Estates Succession Act [*Chapter 6:02*] cover a putative marriage.

The deceased B separated from his wife, the second defendant, and thereafter started a relationship with the plaintiff. Notwithstanding the fact his civil F marriage to the second defendant was not yet dissolved, B got "married" to the plaintiff in terms of the African Marriages Act [*Chapter 5:07*]. Until his death, he never disclosed to the plaintiff that his civil marriage to the second defendant was still in subsistence.

Before their separation, B and the second defendant had been allocated a stand in a township by the Bulawayo City Council. On the date B "married" G the plaintiff, he applied to the Council for a rented dwelling house and recorded the plaintiff as his wife. As B was already the holder of the right, titles and interest in and to the first stand number, the council allocated him a stand number in another township by simply transferring all the foregoing to this second stand. The council issued B and the plaintiff H a certificate of occupation and both signed it respectively as husband

---

Ndou J

and wife. B was not employed at the time that this second stand was A allocated to him.

The plaintiff alleged that she contributed towards the deposit and the loan repayments to the council through monthly deductions from her salary even up to the date she issued summons. When the second stand was allocated to B it was a four roomed house and was thereafter extended by B an additional four rooms. Apart from the plaintiff's own three children by B, the three children B had with the second defendant lived in the house and were brought up by the plaintiff and B. All this was largely through the plaintiff's contributions. As well as number of other orders, the plaintiff sought an order declaring her marriage to B invalid. However, at the commencement of the trial, her claim was amended by consent to C add an alternative claim that the house be valued and she be awarded 50 per cent of the value of the house.

Held, that there was no valid marriage between B and the plaintiff as the second marriage was bigamous. By embracing a monogamous regime, B was deemed by law to have waived his customary privileges in respect of polygamy and, for as long as he remained married, to have submitted D to the general law of the land.

Held, further, that the plaintiff should benefit from the estate. If she did not, it would work an injustice and a hardship. She had laboured and contributed towards the "marriage" and the accumulation of the property of the estate under the impression that the marriage was valid. It would unjustly enrich E the estate of B simply because the property was registered in B's name. Indirectly, it would also unjustly enrich the second defendant who had made no discernible contribution to the estate.

Held, further, that the plaintiff was entitled to the half share in the value of the property which she had claimed in her amended alternative claim. F

Cases referred to

Makwiramiti v Fidelity Life Assurance & Anor 1998 (2) ZLR 471 (S)

Sibanda v Sibanda & Anor 2002 (1) ZLR 622 (H)

Makovah v Makovah 1998 (2) ZLR 82 (S)

Muringaniza v Munyikwa 2003 (2) ZLR 342 (H) G

Legislation considered

Matrimonial Causes Act [*Chapter 5:13*], s 7(1)

Deceased Estate Succession Act [*Chapter 6:02*], ss 3 & 3A

Case information

Miss *Y Mbayiwa*, for the plaintiff H

2012 (1) ZLR p523

Ndou J

A *K Phulu*, for the defendants

Judgment

Ndou J: The plaintiff seeks an order declaring her marriage to the now deceased invalid. She also seeks an order declaring her the exclusive owner of all the assets acquired by herself personally and in the name of the deceased on the basis of the invalid marriage, including stand number 7095 B Nkulumane, Bulawayo. She also seeks an order barring the second defendant from laying any claims against any assets that were acquired by plaintiff and the deceased between 18 June 1984 and 2 April 2000.

The salient facts of this matter are the following. The first defendant is the Estate Late Elias Bhebhe, represented by Barbara Lunga in terms of the C letters of administration issued by the Assistant Master of the High Court (third defendant).

The second defendant is the surviving spouse in terms of her marriage with the deceased contracted on 12 July 1975. The late Elias Bhebhe separated from his wife, the second defendant around 1980. Thereafter he started a relationship D with the plaintiff. Notwithstanding the fact that his civil marriage to the second defendant was not yet dissolved, on 18 June 1984, he got "married" to the plaintiff in terms of the African Marriages Act [*Chapter 238* of 1974] (now the Customary Marriages Act [*Chapter 5:07*]). The plaintiff's case is basically that, until his death, the late Elias Bhebhe never disclosed to her that his civil marriage to second defendant was still in subsistence. Prior to E their separation, Bhebhe and the second defendant had been allocated stand number 7665 Pumula North by the fourth defendant (City of Bulawayo). On the date Bhebhe got "married" to the plaintiff, he applied to the fourth defendant for a rented dwelling house. In the said application, he recorded the plaintiff as his wife. As he was already a holder of the right, title and interest in and to stand number 7665 Pumula North, the fourth defendant allocated F him stand number 7095 Nkulumane s*upra* by simply transferring Bhebhe's right, title and interest in and to stand number 7665 Pumula North to stand number 7095 Nkulumane. This transfer was done on 15 November 1985. On 23 December 1985, fourth defendant issued Bhebhe and the plaintiff a certificate of occupation and both Bhebhe and the plaintiff signed on it as G husband and wife. Bhebhe was not employed at the time that stand number 7095 Nkulumane was allocated to him. The plaintiff's case is that she single-handedly contributed towards the requisite deposit and loan repayments to the fourth defendant through monthly deductions from her salary even up to the date she issued summons in this matter. When stand number 7095 Nkulumane was allocated to the late Elias Bhebhe it was a four-roomed H house. The property has since been extended by an additional four rooms.

2012 (1) ZLR p524

Ndou J

The plaintiff's case is that all this was done largely through her contributions. A At the commencement of the trial plaintiff's claim was amended by consent to add the following prayers:

> "Alternatively
>
> (e) an order that the immovable residential property being house number 7095 Nkulumane, Bulawayo be valued by an independent estate agent and from B the value so determined the plaintiff be awarded 50% thereof; and
>
> (f) an order that the costs of the valuation be shared equally between the plaintiff and second defendant."

The plaintiff, Otilliah Bhebhe, testified as the sole witness in support of her case. She is a nurse employed by the City of Bulawayo from 1 January 1987. Prior her joining the City Council she had been employed by the Ministry of C Health from 1976 to 1986. As alluded to above, she got "married" to the late Elias Bhebhe on 18 June 1984 and she produced the marriage certificate as an exhibit. At the time of the "marriage" she was resident in Plumtree and the late Bhebhe at Mpopoma. She said at the time she got "married" she asked Bhebhe whether he had a house and he said he had been resident in Pumula but the City Council ended up repossessing the house because he D failed to pay rates as he was unemployed.

Sometime in 1985, when she was still resident in Plumtree, Bhebhe contacted her telephonically and said he had found a house in Nkulumane and told her to come and pay deposit for it. Bhebhe had applied for the house. She travelled from Plumtree. She collected her marriage certificate and proceeded E to the Tshabalala Housing Office. She paid the deposit required by the City Council. She paid a deposit of Z$408,11. She paid because Bhebhe was unemployed at the time. They took occupation of the house in December 1985, but they were not physically staying there but had found a boy to live there. They were still resident in Plumtree. In 1987 she was transferred from Plumtree to Bulawayo and she moved into the house. Bhebhe had moved F into the house in 1986. She produced a certificate of occupation for house number 7095 Nkulumane. Bhebhe introduced the plaintiff as his wife and this was accordingly reflected in the certificate of occupation. Bhebhe stated his children with her, being Thembinkosi, Nompilo and Siphiwe, and his children with the second defendant, being Mkhululi, Mqondisi and Zwelithini, G as the family members occupying the premises. She said that when they took occupation it was a four roomed structure. They extended the house to an eight-room structure. At that stage Bhebhe was employed by the Cold Storage Commission. At first he was employed as a cleaner of tanks and then promoted to being a driver and later a buyer of small stock (goats). The extensions were started in 1987 and both she and Bhebhe were gainfully H

Ndou J

A employed. She said the extensions were necessitated by the size of the family, as they were living with six children in the house. They would pool their income and budget for family requirements and house extensions. Because she was living with second defendant's children in the house, she asked Bhebhe about the whereabouts of their mother. He indicated that they were once married but their marriage was dissolved. She was not aware that they B had contracted a civil marriage until 2000, after the death of the late Bhebhe. She said she had been to Bhebhe's parents' home, and the second defendant was not there as a wife. She only became aware of second defendant's status after Impact Trust Executors advertised in the newspaper in connection with the Estate Late Elias Bhebhe. She confronted the Impact people about their C advertisement and they showed her the marriage certificate between the late Bhebhe and the second defendant. Before seeing this advertisement, she had gone to Bulawayo magistrates court at Tredgold Building to register the estate of the late Bhebhe. They had given her the requisite forms to fill and told her to bring the late Bhebhe's relatives along. She had taken the late Bhebhe's burial order and death certificate to the magistrates' court. She testified that D this Nkulumane property was on rent-to-buy scheme. Initially they used to make cash payment across the counter at the City Council offices. As from 1992 she paid by stop order from her salary as she was employed by the City Council. She produced several pay slips to show deductions from her salary towards the repayment of the house in issue. Even as she testified, E such deductions were still being made from her salary well after the death of the late Bhebhe. There was a balance of Z$2 630.41 when she testified in July 2005. She disputed the second defendant's assertion that she was responsible for the demise of her marriage to Bhebhe. She said the second defendant was given Bhebhe's pension at the Cold Storage Commission. She said her own minor child got part of the pension, so did two other children F born of the late Bhebhe and another woman not involved in these proceedings.

Under cross-examination she said that she met Bhebhe in 1977 when he was working at Chibuku Breweries at Masvingo. She said he did not wear a wedding band. She went to his rural home in Matshetsheni, Gwanda, sometime in 1983. She said she went there with her aunt to meet Bhebhe's mother and G her other in-laws. She said they built a homestead at Bhebhe's rural home in Gwanda. She said that in fact, when they got married, they initially stayed at Bhebhe's homestead at Muzimuni, Matshetsheni, in Gwanda. He later sold the homestead and they built another one from scratch in 1989. She said that she started living with Bhebhe's children by the second defendant in

1986. She was still working in Plumtree. She said her relationship with H these children was extremely good until 2000.

2012 (1) ZLR p526

Ndou J

The second defendant, Sizzie Bhebhe (née Ncube), testified as the defendant's A first witness. She said she was married to the late Bhebhe in Kezi and they had another marriage in Gwanda. She said she has three children with Bhebhe. When they got married they initially lived at Mpopoma at a maternal uncle's place. Whilst at Mpopoma they made attempts to acquire their own property. They were eventually allocated stand number 7665 Pumula North B in 1979. She stated that she lived there until 1980 when she separated from the late Bhebhe.

She said that she left because of Bhebhe's relationship with the plaintiff. She said that after Bhebhe had a child with the plaintiff, his mother went to perform some traditional rituals at the plaintiff's place in Plumtree. This was the final straw, so she left the matrimonial home. She left her three children C behind at Bhebhe's rural home in the custody of her mother-in-law. Her husband later sold the rural homestead and left with their children. He went to live with them together with the plaintiff. She said she was not allowed access to the children. She went to the Pumula Housing Office to enquire about their house stand no. 7665 Pumula North. She was informed that it D had been "transferred" to Nkulumane. She said when she confronted Bhebhe about this transfer he assured her that their names still appear in the new Nkulumane property. She stated that their problems over the plaintiff started when they were still staying at Mpopoma. Even at that stage Bhebhe would tell her that he was on his way to visit plaintiff in Plumtree. If she objected he would subject her to physical abuse. She, however, never considered E divorcing her husband and the latter also indicated that he had no intention to divorce her. Under cross-examination, she said she deserted her husband from the rural homestead. She also said that between 1979 and 1980 she was not gainfully employed. She conceded that she did not make any payments towards the purchase of the Pumula house but claimed her right on account of her marriage to Bhebhe. She also accepted that their Pumula property F was three-roomed, compared to the eight-roomed Nkulumane property, the subject matter of this matter. She said she only entered the Nkulumane property for the first time after the death of her husband. She said she did not take any action against the plaintiff for adultery as she did not know her rights and also as a rural dweller she tried to have the matter resolved in G a customary manner. She said she was also afraid that her husband would beat her up if she took action. Dissimulation and compromise are inevitable in such marriages by a person with a strong rural background. She said she believed they would eventually resolve their differences. That never happened between 1980 and 2000, when her husband passed on. She waited for twenty years and she was still hopeful. H

2012 (1) ZLR p527

Ndou J

A The second witness called by the defendants was the Regional Housing Officer at the City of Bulawayo, one Christopher Moyo. He said he has been employed in this capacity for 25 years. He said that, according to his knowledge and their records, the late Elias Bhebhe applied for a house in 1974. In 1979 they allocated him stand number 7665 Pumula North. In 1985 Bhebhe requested to be transferred to Nkulumane. This was permissible as far B as the City Council was concerned. He said that the application for transfer could not have been made in 1984 because the Nkulumane house had not been built then. He explained that when Bhebhe was allocated the Pumula house he did not pay any deposit as it was rented accommodation. He, however, had to pay a deposit when he transferred to the Nkulumane house because C the latter was under a home ownership scheme. He said in 1979 a woman could apply for a stand only if she was not married. He said because the second defendant's marriage certificate had been used in the application for the Pumula North property, she would only qualify for allocation of a house upon production of a divorce order against the late Bhebhe. He said that the change of the marriage certificate to that of plaintiff when the transfer was D done was improper. He said according to their records the Pumula property was never repossessed for non-payment of rates and rentals. In any event if there was such non-payment, the City Council would not have approved and facilitated the transfer. He confirmed that the Application For Use of Dwelling House/Flat (Exhibit 2) is part of the records in his office. But, he E said, there were four additions made in a hand writing different from the original one that made the entries. The new additions were, under marital status, "married 2/8/84" and also "Ottilliah Tshuma" was added. He said on transfer the late Bhebhe would have collected the relevant

documents (rent card) from the Pumula Housing Office and taken them to the Nkulumane Office together with the marriage certificate and the deposit of Z$480.11.

F The third witness called by the defendants was Mkhululi Bhebhe, i.e. the second defendant's son by the late Bhebhe. He said that he ordinarily resided at the rural homestead between 1979 and 1980 because he was very young then. He said that the plaintiff came to their rural home to be introduced to late Bhebhe's family. He said a beast was slaughtered for the ceremony. His G grandmother introduced the plaintiff as his "mother". Thereafter, when schools closed, he came to Bulawayo for the holidays and the plaintiff would visit them at the Pumula house from Plumtree. She used to come over weekends and by then he knew her as their stepmother. He was adamant that the plaintiff used to visit the Pumula North house. He also said that the plaintiff would come home very drunk and argue with his father as she demanded to know H why he was not divorcing his mother. He said that when his father passed

on in 2000 he stopped staying with the plaintiff as he was not happy and did A not feel safe. He also stated that the plaintiff had another house in Plumtree so it would be unfair if she got 50 per cent of the Nkulumane property.

Assessment of evidence and the law

I find that the plaintiff gave a credible account. I am satisfied that she was truthful when she said that the late Bhebhe did not disclose to her that he B was still married to the second defendant. It is for this reason that she paid a deposit for the Nkulumane property. She went on to repay the balance of the loan over a period of time. She even effected a stop order against her salary for such repayments. The reason why she expended so much on the house is because she was under the impression that she was lawfully married C to Bhebhe. For 20 years the second defendant never visited the Nkulumane house nor the rural homestead. She was introduced to the Bhebhe family at the rural homestead as described by the second defendant's own son. She was formally introduced to the second defendant's children by the late Bhebhe's mother as their stepmother. In those 20 years the second defendant never asserted her matrimonial rights. She let the plaintiff bring up her own D children as their stepmother. It is not surprising that the plaintiff contracted a customary marriage with Bhebhe. The second defendant, in her own words, only featured after the death of Bhebhe, waving a civil marriage certificate. She also used her son to get a copy of the death certificate from the plaintiff. The second defendant does not say where she was and what she was doing in all the twenty years when the plaintiff brought up her children and paid E for the Nkulumane property. I am satisfied that the second defendant and her son are untruthful witnesses. The second defendant's son obtained the death certificate from the plaintiff by way of misrepresentation and gave it to his mother. Using that copy of the death certificate, they clandestinely registered Bhebhe's estate without even informingBhebhe's mother. The F second defendant even managed to go and collect a pension from the late Bhebhe's employer even though she had not lived with him for over twenty years. The second defendant does not even state what her contribution was towards the estate. My finding is that the plaintiff was not aware of the existence of a monogamous civil marriage between Bhebhe and the second defendant. It is, however, trite that there was no valid marriage between Bhebhe G and the plaintiff as the marriage was bigamous. See *Makwiramiti v Fidelity Life Assurance & Anor* 1998 (2) ZLR 471 (S). At 473C-F Gubbay CJ said:

> "The learned judge was undoubtedly correct in his view that the marriage of the deceased and Rosemary was bigamous and consequently, illegal and of no validity. This was because at the time it was contracted the deceased was married to Rosaria under a monogamous or civil type marriage entered into under the H

> A Marriage Act. By embracing a monogamous regime, the deceased was deemed by law to have waived his customary privileges in respect of polygamy and, for as long as he remained married, to have submitted to the general law of the land. He is precluded from marrying another person, not only under the general law, but under customary law as well. He suffered from absolute incapacity to marry."

B See also *Sibanda v Sibanda & Anor* 2002 (1) ZLR 622 (H) at 626; *Makovah v Makovah* 1998 (2) ZLR 82 (S) at 89B-C and *Muringaniza v Munyikwa* 2003 (2) ZLR 342 (H) at 349-50.

Since I have found that the plaintiff was not aware, in June 1984 that the late Elias Bhebhe was married to the second defendant, that means that their C "marriage" is in fact a putative marriage. The plaintiff should benefit from the estate. If not, it would work an injustice and hardship on the plaintiff who laboured and contributed towards the marriage and the accumulation of the property of the estate under the impression that the marriage was valid. It would unjustly enrich the estate of the dishonest Bhebhe, simply because the property in question was registered in his name. Indirectly, it unjustly D enriches the second defendant who has not made a discernable contribution towards the estate, beside waving the marriage certificate. The plaintiff offered the second defendant a percentage of the Nkulumane property.

The Supreme Court, in *Makovah v Makovah supra,* and this court, in *Sibanda v Sibanda & Anor supra* and *Muriganiza v Muringaniza supra*, held that E the provisions of the s 7(1) of the Matrimonial Causes Act [*Chapter 5:13*] cover putative or bigamanous marriages. Using the same reasoning, I hold that the provisions of ss 3 and 3A of the Deceased Estates Succession Act [*Chapter 6:02*] cover a putative marriage, such as the present one, which is declared null and void. If a putative marriage can give rights to an innocent F spouse in her lifetime, it should equally do so after death of the husband. In the circumstances, the plaintiff is entitled to the share of the Nkulumane property. As alluded to above, she was the major contributor to the conversion of the Pumula North property under the rent-to-buy ownership scheme to the Nkulumane property. She paid the deposit required for such transfer. The Nkulumane property was four roomed when it was acquired. She contributed G towards repayment of the loan to the City Council. She contributed towards its extension from a four-roomed house to eight-roomed house. At the time of the commencement of the trial, she was still repaying the Nkulumane property through monthly deductions from her salary. She has not benefited from the late Elias Bhebhe's pension; the second defendant did.

H Accordingly, it is ordered that:

Ndou J

(a) The immovable residential property, being stand number 7095 A Nkulumane, Bulawayo, be valued by an independent estate agent and from the value so determined the plaintiff be awarded 50 per cent and second defendant 50 per cent thereof.

(b) The costs of the evaluation be shared equally between the plaintiff and the second defendant. B

(c) Each party bears own costs.

Lazarus & Sarif, plaintiff's legal practitioners

Phulu & Ncube, first and second defendant's legal practitioners C

© 2015 Juta and Company (Pty) Ltd.

Document 65 of 75

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2012/Volume 1/NDLOVU v DEBSHAN (PVT) LTD & ANOR 2012 (1) ZLR 531 (H)

NDLOVU v DEBSHAN (PVT) LTD & ANOR 2012 (1) ZLR 531 (H)

Citation	2012 (1) ZLR 531 (H)
Case No	Judgment No. HH-362-12
Court	High Court, Harare
Judge	Mutema J
Heard	14 June 2012

Judgment 14 June 2012

Counsel *A Moyo*, for the plaintiff
T Mpofu, for the first defendant

Case Type Civil action

Annotations No case annotations to date

Flynote

C **Delict** – *Aquilian action – pleadings – what plaintiff must allege and prove – need to plead fault – failure to do so – normally fatal*

Practice and procedure – *pleadings – declaration – defective – defendant nevertheless pleading to claim and proceeding to pre-trial conference and* D *trial – not open to defendant at trial to claim declaration was defective*

Headnote

In an Aquilian action, a plaintiff must establish a wrongful act or omission as well as fault, in the form of intention or negligence, in addition to causation and patrimonial loss. Failure to specifically plead fault renders E a declaration fatally defective as not disclosing a valid cause of action. In casu, the defendants pleaded to the claim as couched. They saw it fit not to raise any complaint pursuant to r 140(1) of the High Court Rules to have the defect rectified. The matter proceeded through a pre-trial conference, where the parties agreed that what was being pleaded was the lex Aquilia and that the real issue for determination was whether the F first defendant was vicariously liable for the second defendant's wrongful and unlawful act of discharging a firearm at the plaintiff.

Where a trial is held, the defendant having pleaded without complaint and having agreed to the issues at the pre-trial stage, fault can be implied from the evidence led or to be adduced despite the plaintiff not having G specifically pleaded it in the declaration

Cases referred to

Border Timbers Ltd v ZRA 2009 (1) ZLR 131 (H)

J D M Agro-consult & Mktg (Pvt) Ltd v Editor, The Herald & Anor 2007 (2) ZLR 71 (H)

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

2012 (1) ZLR p532

Mutema J

Nyaguse v Skinners Auto Body Specialists & Anor 2007 (1) ZLR 296 (H) A

Parish v King 1992 (1) ZLR 216 (S)

Legislation considered

High Court Rules 1971 (RGN 1047 of 1971), rr 4C, 138(c) & 140(1)

Case information

A Moyo, for the plaintiff B

T Mpofu, for the first defendant

Judgment

Mutema J: The plaintiff in this case issued summons claiming US$78 000 against the two defendants jointly and severally, the one paying the other C to be absolved, on 1 June 2010. The cause of action, as gleaned from the plaintiff's declaration, is premised on the fact that the second

defendant (a farm guard), acting within the course and scope of his employment with the first defendant, "wrongfully and unlawfully pointed and discharged a firearm at the plaintiff" at Debshan Ranch, Gweru, on 26 April 2008. As a result of the second defendant's wrongful and unlawful conduct the plaintiff sustained D injuries, pain, shock and suffering, the nature and effect whereof is detailed in the medical report that was attached to the summons and declaration.

As a result of the foregoing the plaintiff suffered the following damages;-

1.	Medical/ hospital expenses	US$ 8 000
2.	Pain, shock and suffering – past, present and future E	US$20 000
3.	Anticipated future medical expenses and operations	US$50 000
	Grand Total	US$78 000

In a joint pre-trial conference minute, the matter was referred to trial on four agreed issues, *viz*:

1. Whether or not the second defendant was acting within the course and F scope of his employment with the first defendant.
2. Whether or not the second defendant acted wrongfully and unlawfully in discharging the firearm at the plaintiff.
3. What injuries were sustained by the plaintiff
4. The quantum of damages. G

The battle at the trial pitted the plaintiff against the first defendant, the second defendant having had his plea struck out for defaulting the pre-trial conference.

When the trial was about to commence on 14 June 2012, Mr *Mpofu* raised a point *in limine* which, he said, it being a point of law, would be able the court to dispose of the matter. His contention is summarised hereunder. H

Mutema J

A The plaintiff is suing in delict. Under Aquilian liability the plaintiff must, *inter alia,* specifically plead the wrongfulness of the defendant's action as well as fault, which may consist of either intention or negligence. *In casu*, the plaintiff in para 4 of his declaration alleges that "the second defendant wrongfully and unlawfully pointed and discharged a firearm at the plaintiff". What is therefore alleged therein is only wrongfulness and not fault. The B result is that the plaintiff's cause of action has not been disclosed. On that ground the plaintiff's claim must be dismissed.

For this legal proposition, a number of authorities were relied upon. These are:

(a) Boberg *The Law of Delict* Vol 1 p 24-25 where the learned author states that in order to succeed under the Aquilian action a plaintiff must establish C four requirements, *viz*: (a) wrongful act or omission; (b) fault, which may consist of either intention or negligence; (c) causation which must not be too remote; and (d) patrimonial loss.

(b) *Nyaguse v Skinners Auto Body Specialists & Anor* 2007 (1) ZLR 296 (H), in which Patel J upheld the defendants' exception and dismissed D the plaintiff's claim in delict for failure to allege fault in the declaration – having only alleged wrongfulness and unlawfulness and having failed to remedy the defect despite having had his attention drawn to the anomaly via a letter from the defendant's legal practitioners. It was held that the absence of a specific averment of fault rendered the declaration fatally E defective as not disclosing a valid cause of action.

(c) *Border Timbers Ltd v Zimbabwe Revenue Authority* 2009 (1) ZLR 131 (H) at 139B-E. In that case, Makarau JP (as she then was) returned a finding of absolution from the instance at the end of a contested trial. The court held that the plaintiff alleged only wrongfulness leading to an economic loss without grounding its claim in the *lex Aquilia* which F requires a mental element in the form of negligence or *dolus* before liability can be founded.

(d) *Amler's Precedents of Pleadings* 4 ed p 192 which states that if fault is grounded on negligence then the negligence must be specifically pleaded and the particular grounds of the negligence must be alleged. *In casu,* G fault was not specifically pleaded.

(e) *Muchakata v Netherburn Mine* 1996 (1) ZLR 153 (S) which held that a point of law can be raised at any stage of proceedings.

(f) *JDM Agro-consult & Marketing (Pvt) Ltd v Editor,* The Herald *& Anor* 2007 (2) ZLR 71 (H) which allows a defendant to raise a point *in limine* H even at trial stage.

2012 (1) ZLR p534

Mutema J

(g) Order 21 Rule 138 (c) of the High Court Rules, 1971 which contemplates A that an exception can be argued before trial commences. And Order 1 Rule 4C which authorises a court/judge to condone departure from the rules in the interests of justice cannot be invoked because dealing with void proceedings is a waste of court's time.

(h) *Parish v King* 1992 (1) ZLR 216 (S), which ruled that delictual damages B are calculated as at the date of the delict. *In casu* the alleged delict was committed in 2008. The plaintiff's claim is denominated in US dollars yet in 2008 Zimbabwe was trading (officially) only in Zimbabwe dollars. The delict should therefore be compensated in Zimbabwean currency. Our law stipulates that if a party who suffered damage under Zimbabwean dollars intends to sue in foreign currency, the declaration must state and C articulate the basis for that claim.Q

The point *in limine* was bitterly opposed by Mr *Moyo*. He said he was utterly surprised by the first defendant's conduct of ambushing him by telephoning him at 9 a.m. informing him of the intention to raise the point *in limine* at the trial due to commence an hour later. The matter went through all the throes D of pleadings as well as the pre-trial conference stage and the first day of its continuous roll set down on 11 June 2012, but the point *in limine* was never raised. By ambushing the plaintiff in this fashion, the procedure adopted is prejudicial to the plaintiff and is not in conformity with the rules, for every party must know in advance what to meet in court. He urged the court to dismiss the point *in limine* on that score. E

More importantly, so the argument went, if there was any merit in this sudden application, it would have been the second defendant's sole prerogative to take such exception since it is his conduct which is being interrogated, but he is no longer on the radar. The first defendant's real issue pertains simply to vicarious liability. The first defendant should have raised the point *in limine* F as an issue at the pre-trial conference and had it included in the minute of issues referred to trial.

Procedurally, properly construed, the point *in limine* raised is a plea in bar or exception whose specific rules to be followed are in Order 21 rr 137, 139, and 140. The first defendant should not take us back to a procedure it failed to follow in 2010. G

The alleged defect in the declaration is not a point of law but of fact, so the *Muchakata* case cited does not apply.

Also, the first defendant is confusing pleadings and evidence. The *Border Timbers* case referred to was one for absolution but *in casu* the first defendant does not know the kind of evidence the plaintiff is going to lead. Paragraph H

2012 (1) ZLR p535

Mutema J

A 4 of the declaration clearly states that the second defendant wrongfully and unlawfully pointed a firearm at the plaintiff and then discharged it thereby causing injuries to the plaintiff, which is an assault upon the body of the plaintiff. There was accordingly an intention to injure which can be implied: *Amler's Precedents of Pleadings* 5 ed p 216. Both the defendants in their plea accepted that the weapon was discharged and shot the plaintiff.

B Regarding the point relating to the currency claimed, it is not a matter which can be disposed of without hearing evidence. If the plaintiff is able to establish that he incurred damages in foreign currency (US$) he is still entitled to recover in that currency. Whether the court is going to accept or reject the annexure to the declaration showing how the damages were C computed is a matter of evidence. Also, the second head of the damages is for pain and suffering, past, present and future and evidence will show it despite the fact that the injuries were sustained in 2008. The third head of damages is for anticipated future medical expenses and operations and that will be incurred in the

current currency (US$). This can only be determined after hearing evidence, contrary to the contention that the act occurred in 2008. D He urged the court to dismiss the application whatever it is – exception or point *in limine* – for it is calculated to confound and embarrass the plaintiff.

I agree with Mr *Mpofu* that in an Aquilian action, a plaintiff must establish a wrongful act or omission as well as fault in the form of intention or negligence in addition to causation and patrimonial loss as stated by the E learned author Boberg *supra.* I also agree that on the authority of *Nyaguse supra* and the authorities cited therein that failure to specifically plead fault renders a declaration fatally defective as not disclosing a valid cause of action. However, that case was dealing with an application for an exception proper where-before the plaintiff's attention had been drawn to his failure to specifically plead fault in terms of Order 21 r 140(1) but the plaintiff had F not heeded the complaint. This is not the position *in casu.* In the case before me, the defendants pleaded to the claim as couched. They saw fit not to raise any complaint pursuant to r 140(1). The matter proceeded through a pre-trial conference where the parties agreed that what was being pleaded was the *lex Aquilia* and the real issue for determination was whether the first defendant was vicariously liable for the second defendant's wrongful and unlawful act G of discharging the firearm at the plaintiff (the second defendant's defence having been struck out), the injuries sustained by the plaintiff and the quantum of the damages if any. These two events constitute a handicap to the first defendant's so called point *in limine*: *Border Timbers supra.*

Over and above that, it must be borne in mind that, unlike mathematics, law H is not an exact science. In *Nyaguse supra,* it was held, regarding implied fault,

---

Mutema J

that where fault forms an essential ingredient of liability, as in most Aquilian A actions, fault on the part of the defendant must be specifically pleaded and proven in order to enable a reasonable inference of liability to be drawn from the proven facts. As pointed out above, that case is distinguishable from the instant, in that *in casu* the first defendant never invoked r 140(1) to have the defect, to which exception was sought, rectified and that the first defendant pleaded to the claim as couched and even went through the B pre-trial conference without any remorse. Where a trial is held, as was the case in *Border Timbers supra* or is intended to be held, as is the case in this matter, the defendant having pleaded without complaint and having agreed to the issues at the pre-trial stage, fault can be implied from the evidence led or to be adduced despite the plaintiff not having specifically pleaded it C in the declaration.

This appeals to both common sense and justice, especially where the plaintiff in the instant case will lead evidence that when the majority of the plot holders, including himself, stood up in order to proceed to the village head to have the issue resolved, the second defendant cocked his gun, retreated a bit and fired D indiscriminately. The plaintiff was then hit by shots discharged by the second defendant and he fell down. He then heard the second defendant shouting in Shona saying "*Aripi andapfura? Ndoda kumupedzisa*" ("Where is the one I shot? I want to finish him off") (paras 2.8 and 2.9 of the plaintiff's summary of evidence. Surely if such evidence is led and proved at trial, fault on the part of the second defendant can be implied or inferred, even though such E was not specifically pleaded in the declaration.

There was divergence as to whether the point *in limine* was of law or fact. No in-depth argument was presented pertaining thereto. However, even assuming that it was one of law, *Muchakata supra* would not apply because that case held that a point of law going to the root of the matter can be properly raised F at any time, even for the first time on appeal, if its consideration involved no unfairness to the party against whom it is directed. *In casu,* raising it at this stage, given the first defendant's conduct of failing to raise it before plea and at the pre-trial hearing, and giving the plaintiff only an hour's notice prior broaching it, will undoubtedly occasion untold prejudice to the plaintiff. In fact, to allow it would sound the death knell to the plaintiff's G claim. Invoking r 4C will certainly not be in the interests of justice, given the foregoing remiss conduct by the first defendant.

Regarding the issue of currency claimable, I am persuaded by Mr *Moyo's* argument that this is a matter to be cured by evidence to be led at the trial. In any case, some of the heads for the damages claimed relate to the current H

Mutema J

A and future costs so this cannot be the proper forum for the first defendant to raise such an argument.

In the result, the point raised by the first defendant *in limine* to have the plaintiff's claim dismissed for failure to specifically plead fault on the part of the second defendant in his declaration is found to be of no merit and is B hereby dismissed with costs. The parties are directed to liase with the registrar for a mutually convenient date for the resetting down of the matter for trial on the continuous roll.

Kantor & Immerman, plaintiff's legal practitioners

C *Gill Godlonton & Gerrans*, the first defendant's legal practitioners

© 2015 Juta and Company (Pty) Ltd.

Document 66 of 75

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2012/Volume 1/S v MADZOKERE & ORS 2012 (1) ZLR 538 (H)

S v MADZOKERE & ORS 2012 (1) ZLR 538 (H)

Citation	2012 (1) ZLR 538 (H)
Case No	Judgment No. HH-256-12
Court	High Court, Harare
Judge	Bhunu J & Assessors
Heard	5 June 2012; *CAV*
Judgment	19 June 2012
Counsel	*E Nyazamba* and *P Mpofu*, for the State Mrs *B Mtetwa*, *C Kwaramba* and *S Hwacha*, for the first to the twenty-sixth Accused *G Mtisi* and *T Zhuwarara*, for the twenty-seventh to twenty-ninth accused
Case Type	Bail application
Annotations	Link to case annotations

Flynote

Criminal procedure – *bail – admission to – person charged with murder of law enforcement officer – when may be granted bail – need to adduce evidence to show exceptional circumstances permit – evidence – what constitutes – defence outline not evidence for this purpose* D

Headnote

The applicants were on remand in custody, having been charged with the murder of a law enforcement agent. They were denied bail in terms of s 117(6) of the Criminal Procedure and Evidence Act [*Chapter 9:07*], which states that a person charged with such an offence shall be detained in custody until he is dealt with in accordance with the law, unless the E accused, having

been given a reasonable opportunity to do so, adduces evidence which satisfies the judge or magistrate that exceptional circumstances exist which in the interests of justice permit his release. The applicants had all filed their defence outlines. It was argued that the filing of the defence outlines amounted to the adducing of evidence.

Held, that for an application for bail to succeed there must be compliance F with the mandatory provisions of s 117(6). The applicants must adduce evidence establishing that there are special circumstances justifying their release on bail. Evidence is that which is used to determine or demonstrate the truth or otherwise of an assertion. In terms of s 66(6) of the Act, a defence outline constitutes no more than a mode of propounding a brief G summary of the facts upon which the accused relies in his defence. It does not constitute evidence of the facts outlined, as it is not a mode of proving any unknown or disputed facts.

Held, further, that the accused person's difficulty in this situation is, however, that in a bail application under s 117(6) the legislature has shifted the burden of proof onto the accused. He bears the onerous duty of adducing H

Bhunu J

A evidence establishing the existence of special circumstances justifying his release on bail to the satisfaction of the court. This is tantamount to asking the accused to prove his defence, thereby relieving the State of the burden of proof. In the event that the accused fails to prove the validity of his defence at the bail application stage, this will obviously have an adverse effect on the outcome of the trial. It would be easier for B the accused to succeed in the main trial than to get bail under s 117(6), where the odds are heavily stacked against the accused.

Cases referred to

A-G v Bennett 2011 (1) ZLR 396 (S)

C *S v Bennett* HH-79-10

S v Chimukoko & Ors HH-254-12

S v Madzokere & Ors HH-182-12

S v Mangoma 2011 (1) ZLR 617 (H)

S v Masera HH-50-04

S v Musakwa 1995 (1) ZLR 1 (S)

D *S v Tsvangirai & Ors* 2003 (2) ZLR 88 (H)

S v Tsvangirai 2004 (2) ZLR 210 (H)

Legislation considered

Criminal Procedure and Evidence Act [*Chapter 9:07*], ss 66(6) & 117(6)

Case information

E *E Nyazamba* and *P Mpofu*, for the State

Mrs *B Mtetwa, C Kwaramba* and *S Hwacha*, for the first to the twenty-sixth accused

G Mtisi and *T Zhuwarara*, for the twenty-seventh to twenty-ninth accused

Judgment

F **Bhunu J:** The 29 accused persons are in custody on allegations of murdering a law enforcement officer in the course of duty as defined in s 47 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*], alternatively, public violence as defined in s 36 of the Act. They are alleged to have killed a police officer on duty in the course of politically motivated violence. Their trial is currently under way but they have all been remanded in custody by G operation of law.

Section 117(6) of the Criminal Procedure and Evidence Act [*Chapter 9:07*]requires that an accused person alleged to have killed a law enforcement officer in the course of duty be detained in custody

until he or she has been dealt with in accordance with the law unless the accused, having been given H a reasonable opportunity to do so, adduces evidence which satisfies the judge

---

2012 (1) ZLR p540

Bhunu J

that exceptional circumstances exist which in the interest of justice permit A his or her release.

Clearly, the law maker, that is to say, Parliament, in its wisdom has placed a heavy onus on an accused alleged to have killed a law enforcement officer in the course of duty to establish the existence of special circumstances entitling him or her to bail. In a bid to afford the accused persons a chance B to discharge the heavy onus reposed upon them by law, I have previously twice held in abeyance the determination of this bail application in order to do justice according to law.

There has been, however, an unfortunate development in this trial, in that one of the defence team lawyers, Mr *Kwaramba,* instead of adducing the required evidence according to law, has now decided to play to the gallery C and the press in a bid to secure the release of his clients without complying with the law by demonising and attacking the dignity and integrity of this court and the judiciary of this country in general. He is quoted in an article in the *Daily News on Sunday* of June 10 at p 4 as follows:

> "Human rights lawyer Charles Kwaramba, who is representing the 29 MDC D activists said the law is not being applied fairly.
>
> > 'It just goes on to show that there is no equal application of the law. This is a classical example. Here we have police officers who are supposed to protect the people being accused of murdering a civilian for a dollar.
> >
> > 'On the other hand we have 29 civilians who have been in prison for over a year now, being accused of killing a cop. So far there is no evidence E that points at them, but the speed of arrests shows that the police wanted to arrest them because they are MDC. There were no investigations when the 29 were arrested.
> >
> > 'One wonders how the Shamva cops (got) $50 bail each in a murder case while the 29 activists are failing to get the same even when there is no evidence. F
>
> Kwaramba said the moment that a person is labelled MDC justice is politicised."

With respect, Mr *Kwaramba*'s remarks cannot reasonably be true. They are being made at a time when the very same police he is attacking have arrested ZANU PF activists in Mudzi for allegedly murdering an MDC member in politically motivated violence. They have since been denied bail by this very court. See *S v Chimukoko & Ors* HH-254-12. G

It is a well documented truth, and our court records and law reports are replete with MDC members charged with treason or murder, including its leader, who owe their lives to this very court that Mr *Kwaramba* has the audacity to publicly demonise and denounce as an enemy of the MDC. This is not to mention countless others charged with various offences, including fraud and H

2012 (1) ZLR p541

Bhunu J

A insulting the President, who also owe their freedom to the very judiciary that Mr *Kwaramba* seeks to demonise and portray as being partisan and biased against the MDC. See *S v Masera* HH-50-04; *S v Tsvangirai & Ors.* 2003 (2) ZLR 88 (H); *S v Tsvangirai* 2004 (2) ZLR 210; *S v Bennett* HH-79-10; *A-G v Bennett* 2011 (1) ZLR 396 (S); and *S v Mangoma* 2011 (1) ZLR 617 (H); to mention but a few.

B This court's mission is to dispense world class justice to all manner of people without fear or favour. Right now, as I speak, the MDC President is busy defending in the Supreme Court this court's landmark judgment issued in his favour against his arch rival the President of ZANU PF and Zimbabwe.

That puts to shame Mr *Kwaramba*'s ill-conceived, malicious remarks in C the press, bent on bringing the due administration of justice into disrepute.

Mr *Kwaramba* deliberately misrepresented the facts and the law to mislead gullible members of the public and the press when he launched that caustic and inflammatory but baseless attack on the bench and the judiciary in general. The simple answer to his insincere rhetoric question is that Parliament has D decreed that where a person is alleged to have killed a law enforcement officer and in this case a policeman, the court is prohibited from granting the accused bail until such time

he or she has adduced evidence to the court's satisfaction establishing the existence of special circumstances justifying his release. The same considerations do not apply to a person or police officer who is alleged to have killed any person other than in circumstances falling E under s 117(6) of the Act.

The Shamva police officers were not subject to the prohibition in s 117(6) simply because they were not alleged to have killed a law enforcement officer in the course of duty or any of the circumstances envisaged by s 117(6) of the Act. Had they been alleged to have killed a law enforcement officer, they F would certainly have been hit by the section.

Admittedly the law discriminates in this respect, but the problem if any, is not that of application or interpretation but promulgation of the law by Parliament. If Mr *Kwaramba* has any problem with s 117(6), he should lay the blame at the door of Parliament and not the courts or the judiciary. Every lawyer worth his salt knows that laws are crafted and made in Parliament G and not the courts. The courts simply have to interpret apply and enforce the law. It is not the business of the court to change the law in order to avoid hardship on the part of his clients, for to do so will be to act illegally.

In his demonisation of the judiciary, Mr *Kwaramba* was well aware that the Shamva case was different from this case. This explains why, in all his H lengthy addresses and submissions in open court, he never mentioned the

Shamva case or sought to draw any similarities between the two or any A other case because he knew that they were different and that different legal considerations applied.

In *S v Madzokere & Ors* HH-182-12 I took the trouble to draw his attention to s 117(6) and to explain its legal implications, to his apparent satisfaction, such that he abandoned his ill-conceived bid to appeal against my order B inviting him to comply with the legal requirements prescribed by law. Having failed to take refuge in the Supreme Court, he now seeks solace in the media and gullible members of the public, together with some obscure self-styled, shallow-minded, if not bogus, lawyers whom I have never encountered at the courts in my 31 years in the judiciary.

For him to then attack and denigrate this court on the basis of a case reference C and arguments he never advanced in open court so that they could be subjected to legal scrutiny smacks of dishonest, slanderous, contemptuous and unethical conduct on his part.

The court is, however, sworn to apply the law without fear or favour. No amount of demonization or vilification of the judiciary and the courts or D unethical and unprofessional conduct on the part of any legal practitioner can sway or derail this court's endeavour to administer justice impartially without fear or favour, according to the prevailing law of the land. Mr *Kwaramba* cannot avoid complying with the law by whipping up biased political support from the media and some biased obscure lawyers of questionable authenticity or by misleading members of the public as to the true position E and interpretation of the law.

Fortunately, the lead defence counsel Mrs *Mtetwa,* to her credit, has remained professionally ethical and focused on her core business of defending her clients to the best of her ability, without casting any aspersions on the court or her colleagues. Admittedly, she is rather aggressive, temperamental and F tenacious in her presentations, but she remains professional, ethical and dignified within the acceptable limits of the profession.

When I confronted all the legal practitioners involved in this case with the offending remarks of Mr *Kwaramba* in my chambers, she completely and earnestly dissociated herself from those remarks. She said that she had absolute confidence in the court's ability to dispense justice impartially, G having regard to precedent. I believe her.

Turning to the merits of this application for bail, there is really not much to say. I have already made a determination that for the application to succeed there must be compliance with the mandatory provisions of s 117(6) of the Act. The applicants must adduce evidence establishing that there are special H

A circumstances justifying their release on bail. It is needless to say that no such evidence has been adduced to date.

Each accused person has now filed his or her defence outline. It is argued that the mere filing of the defence outlines amounts to the adducing of evidence. The *Dictionary of English Law* by Earl Jowitt (1959) defines "evidence" as:

> B "The means employed for the purpose of proving an unknown or disputed fact it is judicial or extra judicial. Judicial evidence is that which is used on trials or inquiries before courts, judges, commissioners etc."

The accused's defence outlines were filed in terms of s 66(6)(b). That section provides the purpose and import of a defence outline or summary of the defence case. It reads: C

> "(6) Where an accused has been committed for trial in terms of subsection (2) there shall be served upon him or her in addition to the indictment and notice of trial –
>
> (a) a document containing a list of witnesses it is proposed to call at the trial and a summary of the evidence which each witness will give, sufficient to inform the accused of all the material facts upon which the State relies; and D
>
> (b) a notice requesting the accused –
>
> (i) to give an outline of his or her defence, if any, to the charge; and
>
> (ii) to supply the names of any witnesses he or she proposes to call in his or her defence together
>
> (iii) with a summary of the evidence which each witness will give, sufficient E to inform the Attorney-General of all the material facts on which he or she relies in his or her defence; and informing the accused of the provisions of s 67(2)."

A defence outline, therefore, constitutes no more than a mode of propounding a brief summary of the facts upon which the accused relies in his defence. The defence outline does not constitute evidence of the facts outlined, in so F far as it is not a mode of proving any unknown or disputed facts.

For instance, most of the accused persons, in their defence outlines, sought to rely on the defence commonly known as an alibi. In simple terms, that defence means that the accused was not at the scene of crime at the material time when the offence was committed. Merely stating that one was at hospital, without G tendering evidence such as the relevant hospital cards or affidavit from the hospital authorities, can hardly amount to proof that one was at hospital at the time when the offence was committed. The defence's argument pales into absurdity, considering that it is being made at a time when the press is awash with stories of people pleading guilty to faking medical affidavits. Thus, if the accused want to succeed in their bail application they must prove to this H court the existence of special circumstances to the satisfaction of this court.

2012 (1) ZLR p544

Bhunu J

It is trite that in a trial, the State normally bears the onus of proving the A accused's guilty beyond reasonable doubt. In a case where the accused alleges that he was elsewhere at the time of the crime, the onus is on the State to disprove his alibi. See *S v Musakwa* 1995 (1) ZLR 1 (S).

The accused persons' difficulty in this case is, however, that in a bail application under s 117(6) the legislature has shifted the burden of proof onto B the accused. He bears the onerous duty of adducing evidence establishing the existence of special circumstances justifying his or her release on bail to the satisfaction of this court. This is tantamount to asking the accused to prove his defence, thereby relieving the State of the burden of proof. In the event that the accused fails to prove the validity of his defence at the bail application stage, this will obviously have an adverse effect on the outcome C of the trial.

The net effect of the legal matrix in this case is that it is easier for the accused to succeed in the main trial than to get bail under s 117(6) of the Act, where the odds are heavily stacked against the accused. Adducing evidence for the sake of getting bail, as is required by law, may actually jeopardise the D accused's chances of success in the main trial. This apparently explains why the defence has adopted the legal strategy of refusing to adduce evidence at this stage for the purpose of getting bail. The tragedy is, however, that the accused cannot get bail without adducing the required evidence according to law.

I must again give credit to Mrs *Mtetwa* for making an honest assessment E of the defence's legal options at this stage. Having realised the futility of wasting time trying to leap over apparently

insurmountable bail application hurdles, she has intelligently opted to soldier on with the main trial, thereby effectively abandoning the futile bail application.

On the contrary, I chide Mr *Kwaramba* who, apparently being well aware F that the defence has deliberately chosen a legal strategy of refraining from adducing the relevant evidence necessary for his clients' release on bail, first attempted to run to the Supreme Court, seeking to evade complying with peremptory legal requirements. When he hit a dead end he made an about turn and sought to attack the court and the judiciary in the press for G correctly interpreting the law. He appears to be well out of his depth and like a bad sportsperson attacks the referee in the vain hope of winning the game.

Everyone knows what happens when a player attacks the referee or umpire: he risks a red card. At this stage I am, however, content to issue a yellow card and let this be a stern warning against any further improper conduct or misbehaviour. It is the height of folly and tactless in the extreme for defence H

Bhunu J

A counsel to attack the court in the press while the trial is in progress. The adage that those who live in glass houses should not throw stones is apt.

Let me make it very clear at this juncture that this court is not a political entity but an independent adjudicating authority that owes no allegiance to anyone.

In conclusion, I must remark that I have taken this uncharacteristic step of B hitting back at the defence in order to protect the dignity and reputation of the court which is being maliciously tarnished

In the result, all the accused having failed to establish that there are any special circumstances entitling them to bail, it is accordingly ordered:

1. That the application be and is hereby dismissed. C
2. That the registrar be and is hereby directed to serve a copy of this judgment on the secretary of the Law Society.

Zimbabwe Lawyers for Human Rights, first to 27th applicants' legal practitioners

D *Musendekwa-Mutisi,* 28th and 29th applicant's legal practitioners

E *Attorney-General's office,* respondent's legal practitioners

---

© 2015 Juta and Company (Pty) Ltd.

Document 67 of 75

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2012/Volume 1/DEPUTY SHERIFF, HARARE v CONVIEW ENERGY (PVT) LTD & ANOR 2012 (1) ZLR 546 (H)

DEPUTY SHERIFF, HARARE v CONVIEW ENERGY (PVT) LTD & ANOR 2012 (1) ZLR 546 (H)

Citation	2012 (1) ZLR 546 (H)
Case No	Judgment No. HH-250-12
Court	High Court, Harare
Judge	Mathonsi J
Heard	12 June 2012; *CAV*

Judgment 20 June 2012

Counsel *K Musimwa*, for the applicant
Ms *F Gutsa*, for the claimant
S Bhebe, for the judgment creditor

Case Type Opposed application

Annotations No case annotations to date

Flynote

Practice and procedure – *interpleader proceedings – duty of party objecting to attachment of goods to file opposition, if any – failure to file opposition – effect – party barred – fact that party initiated proceedings by submitting* D *affidavit to deputy sheriff not giving right to appear at hearing*

Headnote

Following a judgment against the judgment debtors, a writ of execution directing the Deputy Sheriff to attach and take into execution movable property belonging to the judgment debtors, was issued. The Deputy Sheriff duly placed under attachment certain items of property, some E of which were claimed by the claimant. The claimant filed an affidavit, alleging that he was the owner of the items. The Deputy Sheriff instituted interpleader proceedings in terms of Order 30 of the High Court Rules 1971. The claimant did not file any notice of opposition or opposing affidavit, but was represented by counsel at the court hearing. There, while conceding that no opposing papers were filed, counsel argued that F the claimant was entitled to be heard as an interested party who had also submitted an affidavit to the applicant claiming the goods.

Held, that it happens with alarming frequency that people who find their goods being attached by the Deputy Sheriff merely submit an affidavit and documents to the Deputy Sheriff laying a claim to such goods, G then sit back and do nothing more. When the Deputy Sheriff institutes interpleader proceedings, they do not bother to file an opposition; they only surface on the day of hearing, oblivious to their failure to oppose the interpleader proceedings. The fact that a claimant has submitted an affidavit to the Deputy Sheriff claiming the goods placed under attachment without doing anything more does not confer upon such H

2012 (1) ZLR p547

Mathonsi J

A claimant the right to appear in court when no notice of opposition and opposing affidavit have been filed. Where a Deputy Sheriff has served a court application initiating interpleader proceedings, that application commands the respondents (the claimant and the judgment creditor) to file their opposition, if any. It also announces to them that, in the event of failure to do so within the time frame given, the matter will be set B down for hearing unopposed and an automatic bar comes into effect. *In casu*, due to its failure to file a notice of opposition and an opposing affidavit, the claimant was, in terms of r 233(3), automatically barred. Once either the claimant or the judgment creditor fails to file an opposition, the matter becomes unopposed for all intents and purposes and should C be set down for hearing on the unopposed roll.

Legislation considered

High Court Rules 1971 (RGN 1047 of 1971), rr 205A, 207, 208, 209, 232 & 233(3)

Case information

D *K Musimwa,* for the applicant

Ms *F Gutsa,* for the claimant

S Bhebe, for the judgment creditor

Judgment

Mathonsi J: The judgment creditor obtained judgment against Webster Ngwaru and Confuels (Pvt) Ltd in case No. HC 2122/10 on 1 December E 2010 in the sum of US$364 434 together with interest and costs of suit. In pursuance of that judgment, a writ of execution directing the applicant herein to attach and take into execution movable property belonging to the judgment debtors was issued. The applicant duly placed under attachment certain items of property, some of which have been claimed by the claimant.

F In laying a claim to the property, one Mhona Tapiwa Felix, whose designation and particulars are not given, deposed to an affidavit on 22 March 2011 alleging that the goods placed under attachment belong to the claimant. The said affidavit and annexures were submitted to the applicant, prompting him to institute interpleader proceedings in terms of Order 30 of the High Court G Rules 1971 ("the Rules").

In doing so, the applicant proceeded by court application in Form 29 of the Rules which calls upon the claimants to file notices of opposition in Form 29A, together with opposing affidavits. Although the court application was explicit as to what the claimants were required to do, the claimant (Conview Energy (Pvt) Ltd) did not file any notice of opposition and or opposing affidavit. H However, Ms *Gutsa* appeared at the hearing representing the claimant and,

---

while conceding that no opposing papers were filed, she took the view that A the claimant was entitled to be heard as an interested party who had also submitted an affidavit to the applicant claiming the goods. I must also add that the claimant's legal practitioners had, on 15 May 2012, more than a year after the claimant had been served with the applicant's heads of argument, purported to file their heads of argument in the matter.

The claimant was barred, in terms of r 233(3) of the Rules, by reason of B failure to file heads of argument timeously. Mr *Bhebhe* drew to my attention something which the claimant's legal practitioner had withheld from me, namely that the claimant had, on 9 February 2012, filed an application for condonation of the late filing of heads of argument. That application was not prosecuted, the claimant electing instead to smuggle such heads of argument C into the record without the leave of the court. In my view, the application for condonation of the late filing of heads of argument was as misplaced as it was an exercise in futility. In fact, it was the fruit of a flawed thought process. This is because the claimant could not possibly seek to file heads of argument in an application it did not oppose and in which it was already automatically barred in terms of r 233(3) of the Rules, which provides: D

> "A respondent who has failed to file a notice of opposition and opposing affidavit in terms of subrule (1) shall be barred."

This application is one of many coming before this court, with alarming frequency, in which people who find their goods being attached by the Deputy Sheriff merely submit an affidavit and documents to the Deputy Sheriff E laying a claim to such goods and sit back and do nothing more. When the Deputy Sheriff institutes interpleader proceedings, they do not bother to file opposition, only to surface on the day of hearing, oblivious to their failure to oppose the interpleader proceedings.

It is not easy to understand where this misconception emanates from. In the F first place, where a Deputy Sheriff has served a court application initiating interpleader proceedings in Form 29, that application commands the respondents (the claimant and the judgment creditor) to file the opposition. It also announces to them that, in the event of failure to do so within the time frame given, the matter would be set down for hearing unopposed. Clearly, therefore, the respondents are required to comply and failure to do G so results in the automatic bar coming into effect. The fact that a claimant submitted an affidavit to the Deputy Sheriff claiming the goods placed under attachment and did nothing more, does not confer upon such claimant the right to appear in court when no notice of opposition and opposing affidavit have been filed. One does not have to go beyond the provisions of Order 30 which deal with interpleader process to see the faultiness of this belief. H

A Rule 205A of the rules provides:

> "(1) Where any person alleges he holds any property or is under any liability in respect of which he is or expects to be sued by two or more persons making adverse claims in respect of the property or liability, he may deliver to the claimants a notice and an affidavit setting out the matters referred to in rules 207 and 208 respectively. B
>
> (2) In regard to conflicting claims with respect to property attached in execution, the Sheriff or Deputy Sheriff shall have the right of an applicant and an execution creditor shall have the rights of a claimant."

It is for this reason that, when the Deputy Sheriff is faced with conflicting claims from a person alleging ownership of goods he has attached and a judgment creditor unwilling to admit the claim, he is required to institute C an interpleader application which invites the antagonists to prove their claims. In my view, it is not enough for the claimant to submit a claim to the Deputy Sheriff. Such claimant must go further and file court papers proving its claim to the property. It is the court that adjudicates on such conflicting claims and not the Deputy Sheriff, who, in any event, is not a conduit for D the conveyance of the claimant's papers to the court.

I am unable to comprehend why it is only in respect of an interpleader court application that litigants suffer amnesia and fail to file opposition. Rules 207 and 208 state very clearly what the parties are required to do;

> **"207. Contents of notice**
>
> E The interpleader notice shall:
>
> (a) state the nature of the liability, property or claim which is the subject matter of the dispute.
>
> (b) call upon the claimants to deliver particulars of their claims in the form of a notice of opposition in terms of rule 223; and
>
> (c) state that the applicant is applying for the court's decision as to his liability F or the validity of the respective claims.
>
> **208 Affidavit by Applicant**
>
> There shall be delivered together with the interpleader notice an affidavit stating that the applicant –
>
> (a) claims no interest in the subject matter in dispute other than for charges and costs; G
>
> (b) does not collude with any of the claimants;
>
> (c) is willing to deal with or act in regard to the subject matter of the dispute as the court may direct."

As to the requirement for the filing of opposing papers, which is explicitly set out in r 207(b), r 209 puts the question beyond doubt by stating that Order H 32 shall apply to any application made in terms of Order 30. Order 32 r 232

Mathonsi J

makes it mandatory for the claimant, just like the judgment creditor, to file A a notice of opposition and opposing affidavit.

Therefore a claimant who has not filed a notice of opposition and opposing affidavit is barred and cannot have a right of audience unless the bar is lifted. As a corollary to that, considering that in such proceedings the Deputy Sheriff is a disinterested onlooker who claims no interest in the subject matter and B is willing to deal with the subject matter as directed by the court, once either the claimant or judgment creditor fails to file an opposition, the matter for all intents and purposes becomes unopposed. To that extent, either the Deputy Sheriff, or the party who has filed an opposition, should simply set the matter down on the unopposed roll and seek final relief. *In casu*, it was not necessary for the applicant and the judgment creditor to wait for more C than a year before finalising the matter when it was, in essence, unopposed.

Having come to the conclusion that the claimant is out of court by reason of failure to file opposition, it is not necessary for me to deal with the merits of the matter. However, having studied the papers, I cannot resist the urge to mention that, on the papers filed, the claimant has dismally failed to prove D ownership of the property placed under attachment. There is also the related issue that there is really no difference between Conview Energy (Pvt) Ltd and Confuels (Pvt) Ltd. In my view, what belongs to one belongs to the other.

I totally agree with Mr *Bhebhe* that Conview Energy (Pvt) Ltd, which was formed when the litigation between the parties was pending, was formed as E a vehicle to confound creditors.

That is the kind of behaviour which is now in vogue, where business people are quick to incur liability and then expend a lot of energy avoiding to pay debts. It must be discouraged by all means possible. For that reason, those that engage in such conduct must know that the courts will always express indignation to it and the outcome will be heavy on their pockets. An order F for punitive costs is therefore called for.

In the result I make the following order, that:

1. The claimant's claim to the goods placed under attachment in execution of a debt owed to the judgment creditor by Webster Ngwaru and Confuels (Pvt) Ltd is hereby dismissed. G
2. The said goods, as set out in the notices of seizure and attachment dated 22 March 2011 issued by the applicant, are declared executable.
3. The costs of this application shall be borne by the claimant at the legal practitioner and client scale. H

2012 (1) ZLR p551

Mathonsi J

A *Musimwa & Associates*, applicant's legal practioners

Chingeya & Mandizira, claimant's legal practitioners

B *Kantor & Immerman,* judgment creditor's legal practitioners

© 2015 Juta and Company (Pty) Ltd.

Document 68 of 75

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2012/Volume 1/PG INDUSTRIES (ZIMBABWE) LTD v MACHAWIRA 2012 (1) ZLR 552 (H)

PG INDUSTRIES (ZIMBABWE) LTD v MACHAWIRA 2012 (1) ZLR 552 (H)

2012 (1) ZLR p552

Citation	2012 (1) ZLR 552 (H)
Case No	Judgment No. HH-255-12
Court	High Court, Harare
Judge	Mathonsi J
Heard	6 June 2012; *CAV*
Judgment	20 June 2012
Counsel	Ms *F S Mamvura*, for the applicant Ms *N M Masunda*, for the respondent
Case Type	Civil application
Annotations	No case annotations to date

Flynote

Contract – *formation – offer and acceptance – need for acceptance to be unequivocal – consensus ad idem – parties must be of same mind for contract to exist – offeree recalculating purchase price – offeree thereby leaving negotiations open – no contract formed*

Court – *Labour Court – jurisdiction – sole jurisdiction of Labour Court in* D *labour matters – extent of such jurisdiction – jurisdiction not extending to matters where the sole point in issue is whether or not parties had reached an agreement*

Headnote

For a contract to come into being, the parties must be of the same mind and a E co-incidence of wills or a *consensus ad idem* must exist. In determining whether such a meeting of minds has occurred, a court is not equipped with a magical crystal ball but must find and the answer from the conduct of the parties. It is also trite that for a contract to exist there must be an offer made by one party which is accepted by the other. For an acceptance to conclude a contract, it must be unequivocal. A purported acceptance F in the form "Yes, but …" will not do, because by seeking to add to or subtract from the terms of the offer it does not create the necessary agreement but leaves the negotiations still open.

The respondent held a senior position in the employ of the applicant. She resigned from her employment by letter in the course of which she G sought to purchase the applicant's vehicle which had been assigned to her during the course of her employment. In response thereto, the applicant offered to sell her the vehicle at a price which accorded with a formula set out in its offer letter. The respondent purported to accept this offer of sale of the vehicle but at the same time, she performed her own calculations as to the sale price, which resulted in a sum which H

Mathonsi J

A she duly paid. This sum, however, differed substantially from the sale figure as stated by the applicant in its letter. The applicant thereupon withdrew its offer, refunded the sum which the respondent had paid it in respect of the vehicle and demanded that she surrender the vehicle forthwith. Upon her failure to return the vehicle, the applicant sought and obtained a provisional order directing her to return it. Thereafter, B she contested the confirmation of the provisional order in the course of which she took a point *in limine* that, in terms of s 89(6) of the Labour Act [*Chapter 28:01*], the High Court had no jurisdiction in the matter because it involved a dispute arising out of an employment contract which, in terms of that provision, fell within the exclusive purview of C the Labour Court.

Held, that in so far as the point *in limine* was concerned, that dispute between the parties related to a sale agreement involving a motor vehicle wherein the applicant alleged that there never was an agreement while the respondent alleged to the contrary. It was, therefore, not one of the matters in which the Labour Court enjoyed exclusivity.

D *Held*, further, that the provisional order must be confirmed. The applicant had made an offer to sell the vehicle based upon its calculations and which it set out in its letter to respondent. In her written response thereto, she gave no unequivocal acceptance. In fact, she did not accept the offer at all. She said she had recalculated the price, which then left the E negotiations wide open and did not result in a coincidence of wills or a contract of purchase and sale. Until such time that an agreement was reached, the applicant was entitled to the motor vehicle.

Cases referred to

DHL International (Pvt) Ltd v Madzikanda 2010 (1) ZLR 201 (H)

F *Levy v Banket Hldgs (Pvt) Ltd* 1956 R & N 98 (FS)

Moyo v Gwindingwi NO & Anor 2011 (2) ZLR 368 (H)

Samudzimu v Dairiboard Hldgs Ltd 2010 (2) ZLR 357 (H)

Legislation considered

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

Case information

Ms *F S Mamvura*, for the applicant

Ms *N M Masunda*, for the respondent

Judgment

Mathonsi J: The applicant employed the respondent as its Group Audit H Manager. In that capacity she enjoyed the benefit of the use of a company

Mathonsi J

motor vehicle, a Mazda Familia, registration number AAM 7769 ("the A vehicle"). The vehicle remained the property of the applicant.

By letter dated 30 June 2011, the respondent resigned from employment and proposed to purchase the motor vehicle and the laptop belonging to the applicant at the end of her employment contract. That letter reads in relevant parts as follows: B

> "Re : Resignation from Employment
>
> I would like to officially tender my resignation from the PG Industries Organisation. As per our discussion I would like to leave on the 31st of July but as I have an Audit Committee meeting on the 16th of August, I agree it is only fair for me to stay until the 16th of August 2011. I would therefore like to apply for a waiver of notice for the rest of the month of August and September. C
>
> I am also in possession of two company assets, *my company car which I have offered to buy as guided by the motor vehicle policy and your good office*, and my laptop which I'd also be prepared to buy if the company allows" (emphasis is mine).

The Group Chief Executive Officer of the applicant responded to the respondent's letter by letter of 10 August 2011 which reads in relevant part thus: D

> "We have taken due consideration to your request to purchase certain company assets allocated to you during your employment with us. We are pleased to inform you that, in terms of the PGIZ Motor Vehicle Policy, you may purchase the motor vehicle that is currently, in your possession for 10% of the market value less 10% or at Net Book Value, whichever is he (*sic*) lesser. *In your case, the average market value for the vehicle Mazda Familiar Registration Number* E *AAM 7769, is $3 500 while the depreciation net book value is $3 990.*
>
> Therefore in line with the new vehicle policy above, you may purchase the vehicle for $3 150. Please note that you are required to pay this purchase price in full at the time of your departure" (emphasis is mine).

It is important to note that when the respondent asked to purchase the vehicle she was willing to be guided not only by the motor vehicle policy but also F by the "good office" of the Group Chief Executive Officer of the applicant.

The applicant offered the vehicle to the respondent using a formula set out in the letter referred to above and specifically computed the purchase price as $3 150. Instead of accepting the offer made by the applicant as it was, the respondent re-calculated what she considered as the purchase price. Her letter G to the Group Chief Executive Officer dated 16 August 2001 reads as follows:

> "Re: Purchase of Mazda 323 Familia Registration Number AAM 7769
>
> Reference is made to your letter dated 10 August 2011, reference number HM/CM 10082011 regarding the above matter.
>
> With reference to para 2, lines 2 to 4 where you state: 'We are pleased to inform you that in terms of the PGIZ Motor Vehicle Policy, you may purchase the H

Mathonsi J

> A motor vehicle that is currently in your possession for 10% of the market value less 10% …', I have accepted this offer and have paid the sum in full into the PG Stanbic account number 0222020998050 as per your instruction in para 3 where you say the purchase price is to be paid in full at the time of my departure. Copies of deposit slip number 52214 and cash deposit advice number 1879264 are attached (p 2).
>
> B *I re-performed the calculation as per the vehicle policy stated above and my calculations where (sic) as shown below:*

Average market value (per your letter)	US$3 500
10% of market value	US$ 350

10 % of market value	US$ 350
Less 10%	US$ 35
Therefore total amount owing to PG	US$ 315

C I would like to process change of ownership of the vehicle and for that I need an affidavit from the company authorising the change as well as the vehicle registration book. Your assistance in this regard would be appreciated.

Yours sincerely

Gladys R C Machawira."

It is clear from the contents of this letter that it was not an unequivocal D acceptance of the offer made by the applicant. Instead, the respondent selected what she regarded as favourable to her, did her own calculations, which were different from those contained in the applicant's offer, and came up with her own figure of what she regarded as the purchase price of the motor vehicle. This way she came up with what amounted to almost the price of a piglet, $315, as the price of the motor vehicle, which amount she deposited into E the applicant's account.

This irked the applicant which promptly withdrew the offer, refunded the sum of $315 which had been paid by the respondent into its account, and demanded the immediate return of its motor vehicle. When the respondent failed to return the vehicle, the applicant filed an urgent application seeking F an order directing the respondent to surrender the vehicle. A provisional order was granted by this court on 23 August 2011, the interim relief of which directed the respondent to return the vehicle to the applicant.

It is confirmation of that provisional order which is being contested by the respondent, who argues that she exercised her option to purchase the vehicle in terms of the existing policy of the applicant. She has submitted a vehicle G policy document, which differs sharply from that produced by the applicant on the computation of the purchase price of the vehicle.

At the hearing of the matter, Ms *Masunda* for the respondent took a point *in limine* that this court possesses no jurisdiction over the matter because this is a dispute arising out of an employment contract, which falls within H the exclusive purview of the Labour Court in terms of s 89(6) of the Labour

---

Mathonsi J

Act [*Chapter 28*:*01*], which provides that no court other than the Labour A Court, shall have jurisdiction in the first instance to hear and determine any application, appeal or matter referred to in s 89(1).

That subsection sets out clearly those matters in which the Labour Court enjoys exclusive jurisdiction. They include the hearing of appeals in terms of that Act, matters referred by the Minister, referring a dispute to a labour B officer, appointing an arbitrator and exercising review powers as would be exercisable by the High Court.

It is now settled law that the exclusive jurisdiction of the Labour Court is limited to only those matters set out in s 89 (1) of the Labour Act. In all other matters, this court has jurisdiction: *DHL International (Pvt) Ltd v Madzikanda* C 201 (1) 0 ZLR 201 at 204 B-D; *Moyo v Gwindingwi NO & Anor* 2011 (2) ZLR 368 (H); *Samudzimu v Dairiboard Holdings Ltd* 2010 (2) ZLR 357 (H).

The dispute between the parties in the present case relates to a sale agreement involving a motor vehicle, wherein the applicant alleges that there was never an agreement while the respondent is pressing for the existence of such D agreement. It is therefore not one of the matters in which the Labour Court enjoys exclusivity. It is for that reason that I dismissed the point *in limine*.

Coming to the merits of the matter, the issue that falls for determination is whether at the time of the termination of the employment of the respondent, the parties entered into a purchase and sale agreement involving the Mazda E Familia motor vehicle, as would disentitle the applicant to an order for the return of that vehicle.

It is a well established principle of our law that for a contract to exist, the parties must be of the same mind, there must be a co-incidence of wills or *consensus ad idem*. In determining whether such meeting of the minds occurred, a court is not equipped with a magical crystal ball but must find F the answer from the conduct of the parties. As stated by Tredgold CJ in *Levy v Banket Holdings (Pvt) Ltd* 1956 R & N 98 (S) at 104-5:

> "In considering whether a contract is concluded between two parties, a court is not interested in the state of mind of the parties considered in abstract. It must decide the issue on the state of mind of the parties as manifested by word or deed. It is idle for a party to avow mental reservations or unspoken qualifications G if these are inconsistent with what is said or done."

It is also trite that for a contract to exist there must be an offer made by one party which is accepted by the other. For an acceptance to conclude a contract, it must be unequivocal. As stated by R H Christie *Business Law in Zimbabwe* 2 ed at p 39: H

Mathonsi J

> A "To be effective in creating a contract, acceptance must be so clear and unequivocal as to leave no reasonable doubt in the offeror's mind that his offer has been accepted: *Selected Mines & Marketing (Rhodesia) Ltd v Trees Asbestos Mining Co Ltd* 1952 SR 5. The reason for requiring a higher degree of certainty than the standard of proof on the preponderance of probability that is universally accepted in civil as opposed to criminal cases is that the offeror is entitled to B expect an answer on which he can immediately act, without interrupting his business while he weighs up conflicting probabilities in order to decide whether he has a contract or not. *A purported acceptance in the form 'Yes, but …' will not do, because by seeking to add to or subtract from the terms of the offer it does not create the necessary agreement but leaves the negotiations still open*" (emphasis is mine).

C *In casu*, the applicant made an offer to the respondent to sell the motor vehicle on terms spelt out in the letter of 10 August 2011. The respondent did not give an unequivocal acceptance. In fact she did not accept the offer at all. The moment she started saying "I have reperformed the calculation …", she was bringing herself under the ambit of what Christie christened "Yes, but …", which is unacceptable. That then left the negotiations very wide open D and did not result in a coincidence of wills or a contract of purchase and sale.

The respondent may have a case for what Ms *Masunda* argued as a pre-emptive right to purchase the motor vehicle, but that is not the subject of the present inquiry. It is therefore not even necessary for me to deal with the two conflicting sets of motor vehicle policy documents submitted by the E parties because, in my view, at the time the respondent left employment, the parties had not reached an agreement of sale involving the motor vehicle. Until such time that an agreement had been reached, the applicant was entitled to the motor vehicle.

I am therefore satisfied that a good case has been made for the confirmation F of the provisional order made on 23 August 2011.

On the issue of costs, it is true that the respondent's case has always been a bad one. However, it is the applicant which created the situation obtaining now, where the respondent was given an offer subject to two interpretations. She was therefore entitled to contest the matter. I do not agree that this is a G matter calling for punitive costs.

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

1. The provisional order made on 23 August 2011 is hereby confirmed.
2. The purported agreement of sale of the Mazda Familia registration number AAM 7769 between the applicant and the respondent is hereby H declared void *ab initio*.

Mathonsi J

3. The respondent shall bear the costs of the application on the ordinary A scale.

Mawere & Sibanda, applicant's legal practitioners

Scanlen & Holderness, respondent's legal practitioners B

© 2015 Juta and Company (Pty) Ltd.

Document 69 of 75

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2012/Volume 1/HANZI v ZIMBABWE NATIONAL ROAD ADMINISTRATION & ORS 2012 (1) ZLR 559 (H)

HANZI v ZIMBABWE NATIONAL ROAD ADMINISTRATION & ORS 2012 (1) ZLR 559 (H)

Citation	2012 (1) ZLR 559 (H)
Case No	Judgment No. HH-260-12
Court	High Court, Harare
Judge	Mutema J
Heard	12 June 2012; *CAV*
Judgment	20 June 2012
Counsel	*T Bhatasara*, with him *D Chimbga* and *B Chinowawa*, for the applicant *I Ndudzo*, with him *F Mutangamira* and *J Mutevedzi*, for the first respondent *C Chidzenga*, for the second and third respondents *A Zvoutete*, for the fourth respondent
Case Type	Urgent chamber application
Annotations	No case annotations to date

Flynote

Road traffic – *vehicle licensing – requirement for vehicle to be currently licensed – failure to hold current licence an offence under s 22 of Vehicle* D *Registration and Licensing Act [Chapter 13:14] – late payment penalty under s 36 for failure to pay renewal fee in time – such penalty payable to Road Authority but only after one month following expiry of previous licence – s 36 not relieving motorist of liability to pay fine under s 22 if vehicle not licensed*

Headnote

E The applicant was stopped by the police for driving a vehicle without a current licence, in contravention of s 22 of the Vehicle Registration and Licensing Act [*Chapter 13:14*]. The licence had expired at the end of the previous month, May 2012. She had not been able to renew the licence in time because of the lengthy queues that had resulted when F the authorities introduced a new licensing system. She further told the police that they could not legally make her pay a fine because s 36 of the Act provided a grace period of a month within which to regularise her situation and as such she had until the end of June to renew her licence without being fined. The head of the National Road Authority had made a media announcement that, because of the long queues, the Authority G had decided to extend the deadline in terms of which motorists could license their vehicles the end of June, although a few days later that announcement was rescinded. The applicant argued that the provisions of s 36 of the Act are peremptory and the correct interpretation of s 36 is that one can only be penalised for non-compliance after the last day H of the month following that in which the previous licence expired.

Mutema J

Held, that ss 22 and 36 of the Act are completely separate and unrelated. The A unequivocal meaning of s 36 of the Act is that: (a) a person who owns a motor vehicle is required to pay the appropriate renewal fee upon the expiry of the previous licence; (b) where the owner fails to renew the licence he shall be required to pay, over and above the appropriate fee, at the time of such renewal, a prescribed penalty for the late payment; B (c) the prescribed penalty for the late renewal of the licence shall not be charged if the renewal is done on or before the last day of the month following that in which the previous licence expired; and (d) the penalty for late payment shall only be charged after the last day of the month following that (month) in which the previous licence expired. The penalty is payable to the Road Fund and is enforced and collected by C the National Road Authority.

Held, further, that on the other hand, s 22(1) and (3) creates a mandatory requirement for every owner of a registered vehicle to have at all times a valid licence for his vehicle. The section creates a criminal offence for failure to have a valid vehicle licence and provides for the appropriate D fine. This statutory offence is clearly subject to enforcement by the law enforcement agents. There is absolutely no window for any grace period at all for non-compliance with the requirements of the section.

Cases referred to

Min of Home Affairs v Bickle & Ors 1983 (2) ZLR 400 (S) E

S v Davy 1988 (1) ZLR 386 (S)

Legislation considered

Vehicle Registration and Licensing Act [*Chapter 13:14*], ss 22 & 36 F

Case information

T Bhatasara, with him *D Chimbga* and *B Chinowawa*, for the applicant

I Ndudzo, with him *F Mutangamira* and *J Mutevedzi*, for the first respondent

C Chidzenga, for the second and third respondents

A Zvoutete, for the fourth respondent

Judgment

Mutema J: The applicant is a qualified legal practitioner. She practises G with Zimbabwe Lawyers for Human Rights. On 7 June 2012 she was driving her motor vehicle to a business meeting. She was stopped by the police at a roadblock. The motor vehicle had no current licence disc as required in terms of the Vehicle Registration and Licensing Act [*Chapter 13:14*] (the Act) the previous licence having expired on 31 May 2012. H

Mutema J

A She explained to the police her predicament that she had failed to renew the licence due to the long queues that were experienced at first respondent's licensing outlets and that she had arranged to renew the licence in Marondera. On a legal plane, she further told the police that they could not legally make her pay a fine because s 36 of the Act provided a grace period of a month within which to regularise her situation and, as suc,h she had until 30 June B 2012 without being fined. Her submissions did not find favour with the police details at the road block who insisted on her paying an admission of guilt fine. She contacted her legal practitioners of record who despatched lawyers to attend to her situation. However, the police details were undaunted by the arrival of her legal practitioners, stating that either she paid the fine or risked C arrest, with her motor vehicle being impounded, whilst the docket was being prepared. She then paid $10 admission of guilt fine for "no current vehicle license" under protest.

On the same day she filed the present application seeking a provisional order whose terms are couched in this vein:

> "TERMS OF THE FINAL ORDER SOUGHT D
>
> (a) A declarator that the first respondent's pronouncement on 4 June 2012 cancelling the extension be and is hereby declared *ultra vires* s 36 of the Vehicle Registration and Licensing Act.

(b) A declarator that the applicant's detention and fining by the second respondent's functionaries at Rhodesville Police station be and is hereby E declared unlawful.

(c) That the admission of guilt fine paid by the applicant be and is hereby set aside and accordingly the second respondent be and is hereby ordered to restitute the applicant US$10 paid as an admission of guilt fine.

(d) First respondent to pay the costs of this application.

TERMS OF THE INTERIM RELIEF GRANTED F

Pending the return date in this matter, the following interim relief be and is hereby granted:

(a) That, prior 30 June 2012, the second respondent be and is hereby interdicted from arresting and or fining any person whose vehicle licence expired on 31 May 2012.

(b) That, prior to 30 June, the first and second respondents be and is (*sic*) G hereby interdicted from acting on the threats to arrest, fine and/or impound the vehicles whose licences expired on 31 May 2012.

(c) That, prior to 30 June 2012, the fourth respondent be and is hereby barred from clamping, fining and or towing any vehicles whose vehicle licences expired on 31 May 2012.

(d) That the first respondent be and is hereby ordered to publicise this court H order to members of the public.".

Mutema J

According to the applicant, the nub of her grievance, apart from the arrest A and fine, stems from the following scenario as postulated by herself. Zinara introduced a new computerised vehicle licensing system, but its functionaries were overwhelmed by sheer numbers of vehicle owners, who failed to clear everyone by the cut off date of 31 May 2012. On 31 May 2012 Augustine Moyo, Zinara's head of Corporate Communications, announced on State television and national radio and in national newspapers that Zinara had B decided to extend the deadline in terms of which motorists could license their vehicles to 30 June 2012. The applicant attached *The Herald* newspaper article announcing the extension of the deadline. She said this extension was in accordance with the provisions of s 36 of the Act. This reaffirmed her legitimate expectation that Zinara would act in accordance with the law. It C also gave her reason to wallow in the comfort zone that she could drive her vehicle on public roads without the fear and apprehension of being fined by the second and fourth respondents' functionaries until after 30 June 2012.

However, her hopes were dashed when on 4 June 2012 Zinara, unilaterally and without warning, announced that the licensing extension granted motorists had been revoked. The said Augustine Moyo advised that, since the queues at D the licensing points had disappeared, the extension was no longer necessary. In an article which was flighted in *The Herald* newspaper on 6 June 2012, an apparently emotional Mr Moyo is reported to have encouraged the second respondent (the Commissioner-General of Police) to descend on motorists who did not have the requisite licence disc issued by Zinara. That same E article also quotes the second respondent's spokesperson, Superintendent Andrew Phiri, as saying that the police would arrest motorists for failure to display valid licence discs from 6 June 2012.

The applicant's contention was that, in her opinion, the provisions of s 36 of the Act are peremptory and cannot therefore be deviated from, as was done by Zinara and the second respondent's functionaries. She contended F that their actions are illegal because the correct interpretation of s 36 of the Act is that one can only be penalised for non-compliance after the last day of the month following that in which the previous licence expired. Logically, therefore, she can only be penalised for non-compliance after 30 June 2012. She further averred that Zinara's actions breached s 18(1)(a) of G the Constitution, which provides that every public officer has a duty towards every person in Zimbabwe to exercise his/her functions in accordance with the law and to observe and uphold the rule of law; Zinara and the second respondent's actions were not in tandem with s 3 of the Administrative Justice Act [*Chapter 10:28*],which provides that any administrative action which may affect the rights, interests or legitimate expectations of any person must H

Mutema J

A be done lawfully, reasonably and in a fair manner. Further, by threatening to arrest her, the second respondent's functionaries acted in violation of s 13 of the Constitution, as that is not

authorised by law, for s 22 of the Act simply provides that any person who fails to license a vehicle shall be guilty of an offence and liable to a fine not exceeding level three. Also the threat to arrest her is still alive, so, consequently, her freedom of movement has B therefore been impeded as she can longer drive her vehicle for fear of being arrested, which is a violation of rights granted to her in terms of s 22 of the Constitution.

In his *viva voce* submissions, Mr *Bhatasara* stated that the gravamen of the application relates to the interpretation that must be given to ss 22 and 36 C of the Act. He said that it appears that there is a conflict between the two, in which event the conflict must be interpreted generously. He relied for this proposition on *Minister of Home Affairs v Bickle & Ors* 1983 (2) ZLR 400 (S). He further submitted that the provision of the two sections are interdependent and not severable and to hold otherwise would lead to an absurdity. The only reasonable interpretation should be that no offence in D terms of s 22 is created during the time when the grace period is in operation.

He also averred that the applicant has established all the requirements for an interdict.

The application was vehemently opposed and attacked by Zinara from several fronts. The other respondents intimated that they associated themselves with E Zinara's submissions.

The first exercise to be performed is the distillation of the quintessence of the application. For the sake of brevity and clarity, this can be achieved by treating the material issues raised under individual separate headings as detailed hereunder.

F **Interpretation of sections 36 and 22 of the Act**

Section 36 of the Act provides:-

> "**36 Fixed penalty for late payment of fees**
>
> (1) Any person who, in respect of any vehicle owned by him, fails to pay the appropriate fee in respect of a licence or exemption certificate relating to G that vehicle *on or before the last day of the month* following that in which the previous licence or exemption certificate expired or pays an amount less than the correct amount payable shall pay to the registering officer for the *benefit of the Road Fund,* in addition to the appropriate fee, *a prescribed penalty for every month* or part of a month during which the fee is so unpaid or underpaid" (emphasis supplied).

H On the other hand, s 22 of the Act provides as follows:

Mutema J

> "(1) The A owner of every registered vehicle shall keep such vehicle licensed in terms of this Act.
>
> (2) ……
>
> (3) Any person who contravenes subsection (1) shall be guilty of an offence and liable to a fine not exceeding level three."

The wording of the two respective sections quoted above is clear and B unambiguous. In his book *Technique In Litigation* 4 ed at pp 12-13 Eric Morris offers this salutary advice to practitioners:

> "In every case, in every problem, in every point there will be found an essence, indeed a quintessence, hidden perhaps, dissipated perhaps, but nevertheless there for the seeking. The successful lawyer is he who can recognize this essence, can pursue it and can ultimately distil and capture it. In the process there will C be encountered false scents, so alluring that they may for a while be mistaken for the reality".

In the instant case, one can be justified in saying that an appreciation of the significance to distil the quintessence of the matter was blurred in the welter of controversial issues fuelled by misleading newspaper articles, coupled with sombre labyrinth of averment and denial in which the elusive D truth was lurking.

The unequivocal meaning of s 36 of the Act is this:

(i) A person who owns a motor vehicle is required to pay the appropriate renewal fee upon the expiry of the previous licence;

(ii) Where the owner fails to renew the licence he/she shall be required to E pay, over and above the appropriate fee, at the time of such renewal, a prescribed penalty for the late payment;

(iii) The prescribed penalty for the late renewal of the licence shall not be charged if the renewal is done on or before the last day of the month following that in which the previous licence expired; F

(iv) The penalty for late payment shall only be charged after the last day of the month following that (month) in which the previous licence expired.

It is as clear as day follows night that s 36 is not subject to any interpretation beyond the issue of the grace period of one month within which no penalty for the late payment of licence fees is charged and the period when such G penalty will start accruing. The penalty is payable to the Road Fund and is enforced and collected by Zinara.

On the other hand, it is also clear is that s 22(1) and (3) create a mandatory requirement for every owner of a registered vehicle to have at all times a valid licence for his/her vehicle. The section creates a criminal offence for failure to have a valid vehicle licence and provides for the appropriate fine. This H

2012 (1) ZLR p565

Mutema J

A statutory offence is clearly subject to enforcement by the law enforcement agents (police and the courts) in terms of the law. There is absolutely no window for any grace period of whatever nature for non-compliance with this offence.

There being absolutely no *nexus* between these two statutory provisions, it is B difficult to comprehend the basis of the applicant's argument that there exists a conflict between them or that they are not severable or are interdependent, thus brewing a ground for generous or integrated interpretation. There is absolutely no absurdity if both are separately interpreted. The statute has been on the books since 1970 with the two provisions being applied separately and simultaneously.

C The applicant and her legal practitioners simply failed to adopt a dispassionate approach to the whole saga, rushing to file the application a few hours following her arrest and fining. They failed to distil the quintessence of the matter, thereby getting lost in the labyrinth in which the truth was lurking.

Estoppel and *ultra vires*

D The applicant contended that the notices publicised by Zinara constitute representations regarding enforcement of the fine and that those representations also bind the second respondent in this regard. In other words, the second respondent's functionaries are estopped from arresting and fining those motorists whose vehicles do not have valid licences until after 30 June 2012. E In legal parlance, such motorists can plead mistake of law as their defence.

In *S v Davy* 1988 (1) ZLR 386 (S) at 400D-G, Gubbay CJ said:-

> "… 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 Bloom's* case 1977 (3) SA 513 (A) remains valid. Its strength has hardly been shaken. It is, F however, subject to the exception that where the accused acted upon incorrect advice as to the law, given by a Government official 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* 1973 (2) RLR 357 (A) at 377E-G. As stressed by Lewis AJP in *S v Bledig & Anor* 1974 (1) RLR 100 (A) at 109A:
>
> > G 'There is something in the nature of an estoppel present when the State prosecutes a person for a certain conduct when he has been induced by advice 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 H he should be entitled to an acquittal".

2012 (1) ZLR p566

Mutema J

Now, it behoves me to deal with the issue of whether Zinara, via its notices, A misled the applicant and or the general public regarding prosecution for not having valid vehicle licences as contended for by her.

Zinara's first notice (annexure "A") dated 30 May 2012 reads:

> "ZINARA
>
> Public Notice B

The Zimbabwe National Road Administration (ZINARA) would like to notify all our valued Motorists, Transporters, Companies and the Public that those requiring licences for their vehicles will not be charged any penalty for late payment until 30 June 2012.

All Motorists are therefore urged to take advantage of this extended licensing period.

To renew your licence visit ZINARA Head Offices and any designated ZIMPOST outlet countrywide.

Our call centre numbers:

Zinara Head Office: (04) 442 711-3

0778 650 987

0779 925 631

0778 650 985

Email address: zinarasupport@hotmail.com

Website: www.zinara.co.zw"

It is pertinent to note here that the notice alludes to non-charging of *any penalty for late payment* to those requiring licences for their vehicles until 30 June 2012, a restatement of the provision of s 36 referred to *supra*.

The applicant relied on the cutting from *The Herald* newspaper dated 31 May 2012, headlined:

"VEHICLE licensing deadline extended".

It talks about Zinara extending the vehicle licensing deadline to June 30 and the amount of penalty to be levied against those who fail to meet the deadline.

The second Zinara notice of 5 June 2012 was informing the public that the extended grace period of 30 June 2012 only applied to its internal administration, where it will not be charging penalties for late renewal of vehicle licences, but did not exonerate the motoring public from prosecution by the police. It urged motorists to license their vehicles to avoid inconveniences of the road and also to ensure protection of the public in cases of accidents.

The applicant relied on *The Herald* newspaper cutting dated 6 June 2012 headlined:

"Zinara deadline scrapped".

Mutema J

In it, it is reported that Zinara had "scrapped the June 30 vehicle licensing deadline extension hardly a week after granting the respite" and that the police will "issue tickets to all motorists without new vehicle licence discs starting on that date."

What can be gleaned from Zinara's two notices is that, in the first notice, it simply restated the provisions of s 36 of the Act relating to the grace period of a month regarding penalty for late payment of licence fees. The second notice constitutes a clarification of what the grace period stated in the first notice entailed.

Clearly, no one can be heard to argue that the first notice related to the offence created by s 22(1) and (3) of the Act. If anything, it is *The Herald* newspaper article which misinformed and misled the public by reporting that Zinara had extended the vehicle licensing deadline to June 30 due to long queues. It therefore cannot be said that the applicant's conduct of driving an unlicensed vehicle on 7 June 2012 was induced by advice from Zinara so as to ground estoppel against the police or to entitle her to avail herself with the defence of ignorance or mistake of law as enunciated in *Davy*'s case *supra* and the cases cited therein.

The Herald newspaper or its reporter, not being a responsible representative of the State or a government official who is primarily responsible for the administration of the Act, the exception to ignorance of the law not being a defence is of no application *in casu*. I am obliged to find that the applicant's contention in this regard is non-suited. In any event, Zinara is not primarily responsible for the administration of the Act in question. Had it given such a moratorium regarding s 22 of the Act that would have been *ultra vires* its powers.

The argument by applicant relating to legitimate expectation is also shot down by the same token *supra* concerning estoppel.

The relief sought

The requirements for an interdict are well known and do not warrant repetition here. Suffice it to say that in view of the aforegoing findings, the applicant has not managed to establish any of those requirements. She has G not proven any *prima facie* right or its infringement. If anything, it is her who infringed the law. There is no well grounded apprehension of harm on her part, unless, of course, she wishes to perpetuate her unlawful conduct. The court cannot sanction illegality. She has alternative satisfactory remedies, such as complying with s 22 of the Act or simply parking her vehicle until such time that she has complied with the law. The balance of convenience H is also not in her favour, it is in favour of the law.

2012 (1) ZLR p568

Mutema J

Where one is in breach of the law, one cannot allege infringement of A constitutional rights, let alone those of the Administrative Justice Act. Section 5(b) of the Act behoves the court, in deciding whether an administrative action is lawful, to have regard to whether or not the enactment under which the action has been taken authorises the action. Both Zinara and the second respondent are empowered by law to enforce the provisions of ss 36 and B 22, respectively, of the Act.

Also, the applicant seeks relief for herself and other unnamed people who have not given her any mandate to act on their behalf. That makes her a torchbearer or public busybody in contravention of the Class Actions Act [*Chapter 8:17*] whose provisions have not been followed. Paragraph (d) of the interim order sought also does not stipulate the forum in which the order C must be publicised, when and for how long.

In the event, the relief being sought is clearly incompetent.

I am left with one issue to advert to, *viz* that of costs. Zinara prayed for costs on the scale of legal practitioner and client on the basis that the applicant dragged it to court unnecessarily on account of her misapprehension of the D law without first seeking clarification of the correct position from it. L Rubin *Law of Costs in South Africa* Juta & Co (1949) at p 190 lists the principles which guide the courts in deciding whether or not to award costs on an attorney and client scale as follows:

1. dishonest conduct either in the transaction giving rise to the proceedings E or in the proceedings.
2. malicious conduct
3. vexatious proceedings
4. reckless proceedings
5. frivolous proceedings. F

From the above list, the one nearest to apply to the applicant perhaps is the second last, namely, reckless proceedings in that she simply rushed to court without clarifying the correct position with Zinara and or failure to research on the law. However, this is not a case warranting punitive costs. Costs on the ordinary scale would be in order. G

In the result, the application be and is hereby dismissed with costs.

Zimbabwe Lawyers for Human Rights, applicant's legal practitioners

Mutamangira and Associates, first respondent's legal practitioners

Civil Division of the Attorney General's Office, second & third respondents' legal practitioners H

© 2015 Juta and Company (Pty) Ltd.

Document 70 of 75

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2012/Volume 1/NYAMBI & ORS v MINISTER OF LOCAL GOVERNMENT & ANOR 2012 (1) ZLR 569 (H)

NYAMBI & ORS v MINISTER OF LOCAL GOVERNMENT & ANOR 2012 (1) ZLR 569 (H)

2012 (1) ZLR p569

Citation	2012 (1) ZLR 569 (H)
Case No	Judgment No. HH-324-12
Court	High Court, Harare
Judge	Zhou J
Heard	25 June 2012
Judgment	25 June 2012
Counsel	*A. Muchadehama*, with him *T Zhuwarara*, for the applicant *I Ndudzo*, with him *S Zvinavakobvu*, for the first respondent Second respondent in person
Case Type	Urgent chamber application
Annotations	No case annotations to date

Flynote

Local government – *urban council – councillor – suspension of by Minister of Local Government – investigation into grounds in which councillor suspended – when must be held*

D **Practice and procedure** – *interdict – interim interdict – requirements for – "right" for which protection is sought – existence of – a matter of substantive law – extent to which right is established a matter of evidence – court's general discretion even if right established*

Headnote

E The requirements for an interim interdict are well settled, being these:

(1) that the right which is sought to be protected is clear; or

(2) (a) if it is not clear, it is prima facie established, though open to some doubt; and (b) there is a well-grounded apprehension of irreparable harm if interim relief is not granted and the applicant ultimately succeeds in establishing his right; F

(3) that the balance of convenience favours the granting of interim relief; and

(4) the absence of any other satisfactory remedy.

Where a clear right is proved, then the applicant for an interdict need not show that he will suffer irreparable harm if the interdict is not granted. The applicant merely has to show that an injury has been committed or G that there is a reasonable apprehension that an injury will be committed. The words "clear" and "prima facie" in the context of interdicts relate to the degree of proof required to establish the right and should strictly not be used or interpreted to qualify "right" at all. The existence of a right is a matter of substantive law; whether that right is clearly or only H prima facie established is a matter of evidence.

Zhou J

The court has a general and overriding discretion whether to grant or refuse A an application for an interim interdict. That discretion exists even if the applicant has established all the requisites for the interim relief. The discretion must be exercised judicially, taking into account the circumstances of the case. Regarding the balance of convenience, the court is enjoined to weigh the prejudice to the applicant if the interim B interdict is refused against the prejudice to the respondent if it is granted.

The applicants, the mayor and two councillors of Chinhoyi Municipal Council, were suspended in December 2011 by the first respondent in terms of s 114(1) of the Urban Councils Act [*Chapter*

29:*15*]. Thereafter he commissioned an investigation into the conduct of the applicants, which investigation produced a report dated 13 February 2012. The C applicants were not given the report. On 3 April 2012 the applicants instituted a court application in which they challenged the lawfulness of their continued suspension and asked for reinstatement to their duties as councillors. The first respondent filed opposing papers on 23 April. On 15 June the first respondent invited the three applicants to attend before a board of inquiry, headed by the second respondent, to inquire into the D allegations upon which the suspensions were based. On 19 June the applicants filed the present application, in which they sought an interim interdict restraining the respondents from proceeding with the inquiry pending the determination of the earlier application.

Held, that in terms of s 114(3), as read with (4),of the Urban Councils Act E the Minister is required to hold a thorough investigation as soon as practicable and, in any event, within 45 days into whether the grounds on which a councillor has been suspended are established as facts. This had not been done *in casu*. The applicants had a right to this investigation. If the interim interdict was not granted and they ultimately succeeded in the earlier application, then the order in that case would be a *brutum* F *fulmen*. Regarding the balance of convenience, the respondents would not be prejudiced by the granting of the interim interdict. It took them more than six months to institute the impugned inquiry. A temporary stay of the proceedings of the inquiry would not cause any worse delay than had already experienced. In the circumstances, the balance of G convenience favoured the granting of the interim relief.

Cases referred to

Bamford v Minister of Community Development 1981 (3) SA 1054 (C)

Cambridge Plan AG v Moor 1987 (4) SA 821 (D)

Econet (Pvt) Ltd v Min of Information 1997 (1) ZLR 342 (H) H

Zhou J

A *Francis v Roberts* 1972 (2) RLR 238 (A)

Gründling v Beyers & Ors 1967 (2) SA 131 (W)

Hix Networking Technologies v System Publishers (Pty) Ltd & Anor 1997 (1) SA 391 (A)

Knox D'Arcy Ltd and Others v Jamieson and Others 1996 (4) SA 348 (A)

B *Nyika Investments (Pvt) Ltd v ZIMASCO Hldgs (Pvt) Ltd* 2001 (1) ZLR 212 (H)

Olympic Passenger Service (Pty) Ltd v Ramlagan 1957 (2) SA 382 (D)

Watson v Gilson Entprs & Ors 1997 (2) ZLR 318 (H)

Legislation considered

C Urban Councils Act [*Chapter 29:15*], s 114

Case information

A. Muchadehama, with him *T Zhuwarara*, for the applicant

I Ndudzo, with him *S Zvinavakobvu*, for the first respondent

Second respondent in person

Judgment

D **Zhou J:** The three applicants instituted the instant chamber application on an urgent basis seeking in the interim an interdict restraining the respondents from proceeding with an inquiry which commenced on 20 June, 2012, pending the determination of case no. HC 3768/12. The matter was initially set down for hearing on 22 June 2012 at 1000 hours. On that day Mr Ndudzo, who had E just filed opposing papers that same morning, advised that he represented only the first respondent, although he had filed a notice of opposition stating that he was representing both respondents. For

that reason, I directed that the second respondent be served with a notice of set down. The matter was accordingly postponed to today. Having heard argument, I gave this ex tempore judgment.

F The three applicants are councillors in the Municipality of Chinhoyi. The second applicant is the Mayor and the first applicant is the Deputy Mayor. In December 2011 the applicants were suspended by the first respondent in terms of s 114(1) of the Urban Councils Act [*Chapter 29:15*]. Thereafter, the first respondent commissioned an investigation into the conduct of the applicants, which investigation produced a report dated 13 February 2012. G The applicants were not given the report. However, nothing turns on that aspect, as the report was intended for use by the first respondent.

On 3 April 2012 the applicants instituted a court application, under case no. HC 3768/12, in which they are challenging the lawfulness of their continued suspension. They also ask for reinstatement to their duties as councillors. H The first respondent's opposing papers in that matter were filed on 23 April,

---

Zhou J

2012. By letters dated 11 June 2012 the first respondent invited the three A applicants to attend before a board of inquiry on 20 June 2012. The second respondent is the chairman of the board of inquiry. The board of inquiry was constituted by the first respondent to inquire into the allegations upon which the suspensions referred to above were based. The letters were delivered to the applicants on 15 June 2012. On 19 June 2012 the applicants filed the present B application. A copy of the application was given to the second respondent by the applicants' legal practitioner, Mr *Zhuwarara,* on 20 June 2012 at the time of the hearing. There is a dispute as to whether the application was served before or after the proceedings had commenced. It is not necessary for me to determine that dispute, for two reasons. Firstly, the issue is not necessary for the purposes of the relief being sought. Secondly, it would, in any event, C not be possible to determine that dispute on the papers.

What is being sought in this application is an interim interdict. The requirements for such relief to be granted are settled. These are:

(1) that the right which is sought to be protected is clear; or

(2) that (a) if it is not clear, it is *prima facie* established, though open to some D doubt; and (b) there is a well-grounded apprehension of irreparable harm if interim relief is not granted and the applicant ultimately succeeds in establishing his right;

(3) that the balance of convenience favours the granting of interim relief; and E

(4) the absence of any other satisfactory remedy.

See *Econet (Pvt) Ltd v Minister of Information* 1997 (1) ZLR 342 (H) at 344G-345B; *Watson v Gilson Enterprises & Ors* 1997 (2) ZLR 318 (H) at 331D-E; *Nyika Investments (Pvt) Ltd v ZIMASCO Holdings (Pvt) Ltd & Ors* 2001 (1) ZLR 212 (H) at 213G-214B. F

Where a clear right is proved, then the applicant for an interim interdict need not show that he or she will suffer irreparable harm if the interdict is not granted. The applicant merely has to show that an injury has been committed or that there is a reasonable apprehension that an injury will be committed. See *Nyika Investments (Pvt) Ltd supra* at 214B-D.

Section 114 of the Urban Councils Act [*Chapter 29:15*] provides as follows: G

"**114 Suspension and dismissal of councillors**

(1) Subject to this section, if the Minister has reasonable grounds for suspecting that a councillor –

(a) has contravened any provision of the Prevention of Corruption Act [*Chapter 9:16*]; or H

Zhou J

(b) has A contravened section *one hundred and seven*; section *one hundred and eight* or section *one hundred and nine*; or

(c) has committed any offence involving dishonesty in connection with the funds or other property of B the council; or

(d) has been responsible –

(i) through serious negligence, for the loss of any funds or property of the council; or

(ii) for gross mismanagement of the funds, property or affairs of the council; whether or not the councillor's responsibility is shared with other councillors or with any employees of the council;

or C

(e) has not relinquished office after his seat became vacant in terms of this Act;

the Minister may, by written notice to the councillor and the council concerned, suspend the councillor from exercising all or any of his functions as a councillor in terms of this Act or any other enactment.

(2) Any allowance that is payable to councillors in terms of this Act shall continue to be paid to a councillor who has been suspended in terms of subsection (1) D for so long as he remains a councillor, unless the Minister, by notice in writing to the council concerned, directs otherwise.

(3) As soon as is practicable after he has suspended a councillor in terms of subs (1), and in any event within forty-five days, the Minister shall cause a thorough investigation to be conducted with all reasonable dispatch to determine whether or not the councillor has been guilty of any act, omission or conduct referred to E in that subsection.

(4) If, following investigation, the Minister is satisfied that the grounds of suspicion on the basis of which he suspended a councillor in terms of subsection (1) have been established as fact, he may, by written notice to the council and the councillor concerned, dismiss the councillor, and the councillor's seat shall thereupon become vacant. F

(5) A person who has been dismissed in terms of subsection (3) shall be disqualified from nomination or election as a councillor for a period of five years."

(Section substituted by s 38 of Act 21 of 1997).

It is clear from the wording of subs (4) that the investigation referred to in G subs (3) is the process or mechanism by which the grounds of suspicion must be established as a fact if they are to ground a dismissal. The investigation must be conducted within forty-five days. That requirement was not complied with by the first respondent. In fact, the inquiry being chaired by the second respondent was constituted in an attempt to establish whether the grounds of suspicion upon which the applicants were suspended were proved "as a fact". H I am not persuaded by the contention by Mr Ndudzo that the investigation

---

2012 (1) ZLR p574

Zhou J

pursuant to which the report of 13 April 2012 was produced is the one A envisaged by s 114(3) and (4). The Minister would not have constituted the board of inquiry presided over by the second respondent if the guilt of the applicants had already been established. He would have simply acted upon the report in accordance with the provisions of subs (4).

In any event, the period of forty-five days had lapsed when the report was B produced on 13 February 2012. I do not accept the submission by the respondents that weekends and public holidays are to be excluded when determining the period of forty-five days.

The authorities show that the words "clear" and "*prima facie*" in the context of interdicts relate to the degree of proof required to establish the right and should strictly not be used or interpreted to qualify 'right' at all. C The existence of a right is a matter of substantive law; whether that right is clearly or only *prima facie* established is a matter of evidence. See B Prest *Interlocutory Interdicts* p 47; Erasmus *Superior Court Practice* pp E8-6A. The applicants have shown that the provisions of s 114(3) give them the right to be investigated "as soon as is practicable" and, in any event, within forty- D five days after being suspended from performing their duties as councillors. That is the right which they seek to enforce through case no. HC 3768/12. That right is clearly established. But even if the right was only *prima facie* established but open to some doubt, there is, in my view, a well-grounded apprehension of irreparable harm to the applicants if the interim relief is not granted and they ultimately succeed in establishing the right. The respondents E proceeded to invite the applicants to attend the inquiry although they were served with the application in case no. HC 3768/12. If the relief being sought in this application is not granted and they ultimately succeed in that case then the order in that case will be a *brutum fulmen*. That is the undesirable consequence which an interim interdict is meant to avoid. F

The respondents have already shown that, unless they are interdicted by an order of this court, they will proceed with the inquiry. According to the second respondent the hearing of evidence in respect of the second applicant was completed albeit no determination has been made yet. If the inquiry is not stopped the cause in case No. HC 3768/12 will be defeated in the sense that it would have been overtaken by events. G

Regarding the balance of convenience, the court is enjoined to weigh the prejudice to the applicant if the interim interdict is refused against the prejudice to the respondent if it is granted: *Knox D'Arcy Ltd and Others v Jamieson and Others* 1996 (4) SA 348 (A) at 361D-F; *Cambridge Plan AG v Moor* 1987 (4) SA 821 (D) at 847H-848G; *Bamford v Minister of Community Development* 1981 (3) SA 1054 (C) H

2012 (1) ZLR p575

Zhou J

A at 1060E-F. The respondents will not be prejudiced by the granting of the interim interdict. It took the respondents more than six months to institute the impugned inquiry. A temporary stay of the proceedings of the inquiry will not cause any worse delay than has already been experienced. In the circumstances, the balance of convenience favours the granting of the interim relief.

B I do not believe that the applicants have an alternative satisfactory remedy to the relief being sought. The submission by Mr *Ndudzo* that the applicants could challenge the proceedings of the inquiry by review application after they have been completed is not a satisfactory remedy. The issue which is pending in case no. HC 3768/12 is whether the respondents are entitled to C keep the applicants on suspension and to proceed with the investigation of the allegations against them after the period of forty-five days has lapsed. If the inquiry continues then the determination of that issue becomes an academic exercise.

This court has a general and overriding discretion whether to grant or refuse D an application for an interim interdict. That discretion exists even if the applicant has established all the requisites for the interim relief: *Francis v Roberts* 1972 (2) RLR 238 (A) at 248F; *Watson v Gilson Enterprises & Ors supra* at 331E; *Hix Networking Technologies v System Publishers (Pty) Ltd* 1997 (1) SA 391 (C) at 399A. The discretion must, of course, be exercised judicially, taking into account the circumstances of the case: E *Olympic Passenger Service (Pty) Ltd v Ramlagan* 1957 (2) SA 382 (D) at 383E; *Gründling v Beyers & Ors* 1967 (2) SA 131 (W) at 155C.

Taking into account the respective prejudice which the parties would suffer as a consequence of the granting of or refusal to grant the interdict, the balance of convenience, the absence of an alternative adequate remedy, and the applicants' prospects of success in case no. HC 3768/12, I would exercise F my discretion in favour of the granting of the interim relief. Accordingly, the provisional order is granted in terms of the amended draft order, in the following terms:

A. TERMS OF FINAL ORDER SOUGHT

That you show cause to this Honourable Court why a final order should not G be made in the following terms:

1 The respondents are interdicted from conducting an inquiry into allegations of misconduct on which the applicants were suspended pending determination of case number HC 3768/12.

2 The costs of this application shall be paid by the respondents jointly and H severally the one paying the other to be absolved.

2012 (1) ZLR p576

Zhou J

B.INTERIM RELIEF GRANTED A

Pending determination of this matter, the applicants are granted the following relief –

- The respondents shall forthwith suspend the inquiry which was commenced against the applicants on 20 June 2012. B

C. SERVICE OF PROVISIONAL ORDER

The applicants' legal practitioners are hereby granted leave to serve this provisional order on the respondents.

Zimbabwe Lawyers for Human Rights, applicants' legal practitioners

Mutamangira & Associates, first respondent's legal practitioners C

© 2015 Juta and Company (Pty) Ltd.

Document 71 of 75

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2012/Volume 1/CHIKOMBA RURAL DISTRICT COUNCIL v PASIPANODYA 2012 (1) ZLR 577 (S)

CHIKOMBA RURAL DISTRICT COUNCIL v PASIPANODYA 2012 (1) ZLR 577 (S)

Citation	2012 (1) ZLR 577 (S)
Case No	Judgment No. S-26-12
Court	Supreme Court, Harare
Judge	Garwe JA, Gowora JA and Omerjee AJA
Heard	29 May 2012; *CAV*
Judgment	26 June 2012
Counsel	*D C Kufaruwenga*, for the appellant *P Mabundu*, for the respondent
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Employment – *disciplinary proceedings – code of conduct – employer having its own registered code of conduct – any disciplinary proceedings not conducted in terms of that code invalid – employer not entitled to conduct proceedings under National Employment Code of Conduct* D *where registered code of conduct exists – contractual agreement to the contrary invalid*

Headnote

The appellant company dismissed the respondent after conducting disciplinary proceedings against him. The proceedings were conducted in terms of the E Labour (National Employment Code of Conduct) Regulations (SI 15 of 2006), although the appellant had its own code of conduct. In terms of the respondent's contract of employment, his conduct at the workplace was to be "regulated through the Staff Code of Conduct and the Labour Act [*Chapter 28:01*] as well as other related Statutory Instruments". The Labour Court set aside the dismissal on the grounds that the disciplinary F proceedings should have been held under the appellant's employment code of conduct and ordered the respondent's reinstatement. The only issue on appeal was whether at law, the appellant, which had a registered code of conduct, was entitled to discipline the respondent using the National Employment Code of Conduct.

G Held, that under s 12B of the Labour Act, an employee is unfairly dismissed if his dismissal is not in terms of an employment code of conduct or, in the absence of such a code, in terms of the model code made under s 101(9). This model code, contained in the Regulations referred to above, stipulates that the National Employment Code of conduct can only be invoked where there is no registered code of conduct. Since the H appellant had a registered code of conduct, the termination of a contract

Garwe JA

of employment of any of its employees had to be in terms of its code A of conduct and not the National Employment Code of Conduct. Any contractual agreement to the contrary would be against the law and a termination of employment based on such agreement would be null and void. B

Legislation considered

Labour Act [*Chapter 28:01*], *s*s 12B & 101(9)

Labour (National Employment Code of Conduct) Regulations, 2006 (SI 15 of 2006), ss 4 & 5

Case information

D C Kufaruwenga, for the appellant C

P Mabundu, for the respondent

Judgment

Garwe JA: This is an appeal against the decision of the Labour Court setting aside the suspension and dismissal from employment of the respondent by the appellant and re-instating the respondent to his former position without loss of salary and benefits. D

The background to this matter is as follows. The respondent was employed by the appellant as its Chief Executive Officer. In terms of the contract of employment signed by the two parties, the respondent's conduct at the workplace was to be "regulated through the Staff Code of Conduct and the Labour Relations Act [*Chapter 28:01*] as well as other related Statutory E Instruments". It was further agreed that all disciplinary and appeals procedures were to "be handled in conformity with SI 371 of 1985 and/or according to the code of conduct of the organisation".

In December 2006, the respondent was suspended from employment without benefits in terms of s 4 of the Labour (National Employment Code of Conduct) F Regulations SI 15 of 2006 ("the National Employment Code of Conduct") and also in terms of the Labour Relations (Employment Codes of Conduct) Regulations SI 379 of 1990 and further in terms of the Chikomba Rural District Council Code of Conduct. In due course, the respondent appeared before a disciplinary committee facing eight charges of misconduct as defined in s 4 G of the National Employment Code of Conduct. He was found guilty of six of the eight charges and was dismissed from employment. Dissatisfied, the respondent lodged an application for review in the Labour Court. Essentially, he sought an order setting aside the decision of the disciplinary committee on the basis that the appellant should have conducted the disciplinary proceedings in terms of its code of conduct and not the National Employment Code of H

Garwe JA

A Conduct. The Labour Court accepted this submission and consequently made the order that is the subject of this appeal.

The appellant, in its grounds of appeal, has attacked the decision of the Labour Court on several bases. These are:

1. That the court erred at law in concluding that the appellant's use of the B procedure provided for in the National Employment Code of Conduct was fatal to the disciplinary proceedings conducted against the respondent.
2. That the court misdirected itself in failing to appreciate that the contract of employment signed by the appellant and the respondent allowed the appellant to use either its code of conduct or the National Employment C Code of Conduct in conducting disciplinary proceedings against the respondent.
3. That the court erred in disregarding the provisions of the contract of employment signed by the parties in terms of which both parties expressly agreed that the appellant's code of conduct, the Labour Relations Act [*Chapter 28.10*] and other related statutory instruments were to govern D labour disputes between the parties.
4. That the court adopted an over fastidious approach in interpreting the National Employment Code of Conduct and in the process resolved a labour dispute on the basis of a legal technicality despite the overwhelming evidence which pointed to the respondent's guilt.

E The above grounds raise one issue only and that is whether at law, the appellant, which had a registered code of conduct, was entitled to discipline the respondent using the National Employment Code of Conduct.

The starting point is s 12B of the Labour Act [*Chapter 28:01*] ("the Act"). That section provides in relevant part as follows: F

> "12. An employee is unfairly dismissed –
>
> (a) if, subject to subsection (3), the employer fails to show that he dismissed the employee in terms of an employment code; or
>
> (b) *in the absence of an employment code, the employer shall comply with the model code made in terms of section 101(9)*" (emphasis added).

The Labour (National Employment Code of Conduct) Regulations, 2006 ("the G Regulations") were made in terms of s 101(9) of the Act. Those regulations also provide in s 5 as follows:

> **"5. Termination of contract of employment**
>
> No employer shall terminate a contract of employment with an employee unless –
>
> (a) the *termination is done in terms of an employment code which is registered* H *in terms of section 101(1) of the Act; or*

Garwe JA

> (b) *in the absence of the registered code of conduct mentioned in (a), the* A *termination in terms of the National Employment Code of Conduct provided for under these regulations; or*
>
> (c) ...
>
> (d) ..." (emphasis added).

Section 101 of the Act provides that a registered employment code shall be B binding in respect of the industry, undertaking or workplace to which it relates.

It is the appellant's contention before this court, as it was in the court *a quo*, that the appellant was entitled to use either the Regulations made under the Act or its code of conduct or both, as this was specifically agreed upon in the contract of employment signed by both parties.

There can be no doubt, regard being had to the provisions in the Act and C the Regulations to which reference has been made, that the submission by the appellant that it was entitled to use either the Act or the Regulations or both is not tenable. Both the Act and the Regulations are clear that the National Employment Code of conduct, contained in those regulations, can only be invoked where there is no registered code of conduct. Since it is D common cause that the appellant does have a registered code of conduct, the termination of a contract of employment of any of its employees had to be in terms of its code of conduct and not the National Employment Code of Conduct. The appellant therefore erred in terminating the respondent's employment in terms of the National Employment Code of Conduct.

The submission that the appellant was entitled to use the National Employment E Code of Conduct because the parties had agreed that the code could be used is equally without merit. Clearly any agreement entered into between the parties had to comply with the specific provisions of both the Act and Regulations. Any agreement to the contrary would be against the law and a termination of employment based on such agreement would be null and void. F That statutory provisions override the common law goes without saying.

I am satisfied that the court *a quo* was correct in coming to the conclusion that the suspension and dismissal of the respondent by the appellant was null and void. The appeal must therefore fail.

The appeal is accordingly dismissed with costs. G

GOWORA JA and OMERJEE AJA concurred.

Dzimba, Jaravaza & Associates, appellant's legal practitioners

Maganga & Co, respondent's legal practitioners H

© 2015 Juta and Company (Pty) Ltd.

Document 72 of 75

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2012/Volume 1/DECIMAL INVESTMENTS (PVT) LTD v ARUNDEL VILLAGE (PVT) LTD & ANOR 2012 (1) ZLR 581 (H)

DECIMAL INVESTMENTS (PVT) LTD v ARUNDEL VILLAGE (PVT) LTD & ANOR 2012 (1) ZLR 581 (H)

Citation	2012 (1) ZLR 581 (H)
Case No	Judgment No. HH-262-12
Court	High Court, Harare
Judge	Mathonsi J
Heard	13 June 2012; *CAV*
Judgment	27 June 2012
Counsel	*R M Mushoriwa*, for the applicant *S Takundwa*, for the first respondent Second respondent in default
Case Type	Opposed application
Annotations	Link to case annotations

Flynote

Administrative law – *review – grounds for – audi alteram partem rule – breach of – tribunal rejecting one party's submissions in favour of those of party's opponent – not a breach of rule*

D **Arbitration** – *award – setting aside of – grounds – award contrary to public policy – allegation that reasoning or conclusion outrageous in its defiance of logic – what must be shown*

Headnote

A rent dispute arose between the applicant and the first respondent and E was referred to arbitration in terms of the lease agreement. The second respondent was appointed as arbitrator. Following submissions made by both the applicant and the first respondent, the arbitrator issued an award in terms of which he set the rentals for the leased premises. The applicant was not happy with that award and made an application in terms of article 34(2) of the schedule to the Arbitration Act [*Chapter 7:15*] F for the setting aside of the arbitral award on the basis that it offended the public policy of Zimbabwe, in that there was a breach of the audi alteram partem rule because, although it was given an opportunity to be heard, its submissions were rejected by the arbitrator in favour of those of the first respondent. Secondly, it argued that the arbitrator was G biased, as well as having an interest in the cause, given that he was an estate agent himself and therefore benefited from high rentals in the form of commission. Finally, it argued that the size of the rent increase awarded by the arbitrator was so unconscionable as to induce a sense of shock and that the increase benefited elitist estate agents and militated against legitimate businesses, forcing them to overprice their goods and H services. For that reason it was against public policy.

Mathonsi J

Held, that a tribunal does not breach the *audi alteram partem* rule by rejecting A the story of one party in favour of that of its opponent. The rule connotes that both parties must be heard before a decision is taken. Where, in considering the submissions of the parties the tribunal favours those of one of the parties for reasons that it gives, there is full compliance with the rule. To hold otherwise would lead to an absurdity. Even if the arbitrator's conclusion is wrong, that does not equate to a breach of B the *audi alteram partem* rule and does not entitle the court to interfere with the award.

Held, further, that the claim that the arbitrator had an interest in the cause was not proved. The arbitrator was appointed for his expertise as a valuer. It could not be said that a valuer has an interest in the cause merely C because he gets more commission from high rentals, without showing how this would benefit him.

Held, further, that the court does not exercise an appeal power and cannot either uphold or set aside or decline to recognise and enforce an award by having regard to what it considers should have been the correct decision. Where, however, the reasoning or conclusion in an award goes beyond D mere faultiness or incorrectness and constitutes a palpable inequity that is so far reaching and outrageous in its defiance of logic or accepted moral standards that a sensible and fair minded person would consider that the conception of justice in Zimbabwe would be intolerably hurt by the award, then it would be contrary to public policy to uphold it. E In this case, the arbitrator made an award which took into account the perceptions of the market at the time and the ability of other tenants to pay. It could not be said that such an award resulted in the concept of justice in this country being "intolerably hurt".

Cases cited F

Delta Ops (Pvt) Ltd v Origen Corp (Pvt) Ltd 2007 (2) ZLR 81 (S)

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

Trinity Eng (Pvt) Ltd v CBZ 2000 (2) ZLR 385 (H)

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

Legislation considered

Arbitration Act [*Chapter 7:15*], art 34(2)(b) & (5)

Case information

R M Mushoriwa, for the applicant

S Takundwa, for the first respondent

Second respondent in default H

2012 (1) ZLR p583

Mathonsi J

Judgment

A **Mathonsi J:** The applicant is a tenant occupying premises known as Ground Floor, Building 3 at Arundel Office Park, Mount Pleasant. Harare by virtue of a lease agreement entered into with the respondent. When a rent dispute arose between the parties, it was referred to arbitration in terms of clause 34 of the written lease agreement of the parties, through the President of the Real Estate Association of Zimbabwe, who appointed the B second respondent as arbitrator.

Clause 34 of the lease agreement provides in relevant part as follows:

"34.5 The Arbitrator shall be entitled, in his sole and absolute discretion;

34.5.1. to decide whether any party or any other person who might be of assistance to the Arbitrator shall be invited or permitted to give evidence C or make oral submissions;

34.5.2. to decide the extent to which or the topics on which such person shall give such evidence or make such submissions

34.5.3. to make his own enquiries into any aspect of the dispute and to rely upon the results thereof; and D

34.5.4. *to rely upon his own expertise and judgment in reaching his decision*.

34.6 …

34.7 …

34.8 *The decision of the Arbitrator shall be final and binding upon the parties hereto* and either party shall be entitled to have the decision E registered with the High Court of Zimbabwe as an order of that court" (emphasis is mine).

Following submissions made by both the applicant and the first respondent, the second respondent issued an arbitral award in terms of which he set the rentals for the leased premises at US$15 per square metre for January to June 2011 and US$20 per square metre for July to December 2011. The applicant F was not happy with that award and it made this application in terms of article 34(2) of the First Schedule to the Arbitration Act [*Chapter 7:15*] for the setting aside of the arbitral award on the basis that it offends public policy.

Article 34(2)(b) of the model law in the Arbitration Act provides: G

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

(a) …

(b) the High Court finds that –

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

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

H Article 34(5) goes on to say:

Mathonsi J

"For the avoidance of doubt, and without limiting the generality of A 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." B

In its founding affidavit deposed to by its company secretary, Lawrence Bhebhe, the applicant argued that the award was in conflict with the public policy of Zimbabwe in that there was a breach of the *audi alteram partem* rule because, although it was given an opportunity to be heard, its submissions were rejected by the arbitrator in favour of those of the first respondent.

It is further argued that not only was the second respondent biased, he also C had an interest in the cause, given that he is an estate agent himself and therefore benefits from high rentals in the form of commission.

Finally, the applicant argued that it was also contrary to public policy to increase rentals by such a large margin which brings back memories of hyper-inflation during the Zimbabwe dollar era. D

The second respondent submitted an opposing affidavit in which he stated at para 3 thus:

"It is clear from the lease agreement that I was being so appointed as a valuer on account of my knowledge and experience in the real estate business. I was coming in as an independent person, a valuer as demanded by clause 34.2 of E the lease agreement between the parties".

The second respondent pointed out that he approached the matter impartially desirous of resolving the dispute, and for that reason he passed on whatever information he obtained from one party to the other for comments. He stated at para 16 to 19 as follows –

"16. All the parties indicated an interest in a site visit and discussions at the site F revealed the similarity of the premises in terms of location, construction, finishes, services and facilities management.

17. I invited and received submissions on comparables from the parties. This is apparent from my determination which is again attached to the application

18. In the result I made a rental determination based on the comparables and reasonableness of the submissions of the parties. The counter offer by the G applicant was below what he had submitted as established comparables. This was so despite the admission by Old Mutual Properties that their rentals were below the market.

19. Regarding the issues of conflict with the public policy of the country and rules of natural justice cited as reasons for setting aside the award, I insist that the award and the process leading up to it were not against public H

Mathonsi J

> A policy. The applicant is asking this court to determine what is a reasonable rent, which is not the mandate given to it in terms of the Arbitration Act. However it would be of interest to note that the majority occupants of the same premises in terms of location, construction, finishes, services and facilities agreed to pay more per square metre and only the applicant disagreed for personal reasons of affordability rather than open market B rent."

In his address to the court, Mr *Mushoriwa,* for the applicant, strongly argued that the second respondent violated a cardinal principle of natural justice, the *audi alteram partem* rule which requires a tribunal to hear the other side in that, while he gave the applicant the opportunity to make submissions, everything submitted by the applicant, including samples of comparable C rentals, was summarily and unjustifiably dismissed.

I do not agree. The applicant was accorded a right to make submissions. The arbitral award shows that the arbitrator considered the submissions by both parties and came to the conclusion that the applicant's own submissions did not find favour with him especially as it not only relied on Old Mutual D Properties rates, which were below the market rate, but also because the applicant offered to pay rent which was even below the Old Mutual Properties rates it relied upon.

A tribunal does not infringe upon the *audi alteram partem* rule by rejecting the story of one party in favour of that of its opponent. The rule connotes that E both parties must be heard before a decision is taken. Where, in considering the submissions of the parties, the tribunal favours those of one of the parties for reasons that it gives, in my view there is full compliance with the rule. To hold otherwise would lead to an absurdity. The arbitrator explained why he rejected the applicant's submissions, namely that the applicant relied on F below market rates.

That conclusion may have been wrong, but that does not equate to a breach of the *audi alteram partem* rule. It certainly does not entitle this court to interfere with the award.

Mr *Mushoriwa* submitted further that the second respondent was biased because he failed to consider the applicant's submissions and that the G decision was not based on fairness and justice. The fallacy of that argument is self-evident. Apart from the fact that it is apparent from the award that the second respondent considered and rejected the applicant's submissions, nothing has been put forward as being indicative of lack of fairness and justice. Proceedings, and indeed an award, cannot be unfair merely because H the outcome is not favourable to the applicant.

2012 (1) ZLR p586

Mathonsi J

The claim that the second respondent had an interest in the cause has also A not been proved. I agree with the second respondent that he was appointed for his expertise. The applicant cannot say that a valuer has an interest in the cause merely because he gets more commission from high rentals without showing how this would benefit the second respondent. It is one of many gratuitous and liberal accusations that have not been substantiated.

I find myself in total agreement with the pronouncement of Gillespie J in B *Trinity Engineering (Pvt) Ltd v Commercial Bank of Zimbabwe Ltd* 2000 (2) ZLR 385 (H) at 387C-D where he said:-

> "No such allegation of bias can be supported. The allegation really amounts to no more that the argument 'because he found against me, and because he was critical of me even in pejorative terms, he must be biased'. That sort of argument C is not convincing – rather than justify an inference of bias it does little more than demonstrate its own circularity. In order for there to be any justification in the inference drawn, it would have to be shown that the decision was so outrageous that it could only be explained on the assumption of bias. Anything else amounts to no more than saying, 'he is biased against me but his adverse decision is admittedly correct'". D

The mere fact that a finding is made against one party does not cause a reasonable litigant to apprehend bias.

It was further argued on behalf of the applicant that the size of the rent increase awarded by the second respondent is unconscionable as to induce a sense of shock and that the increase benefits elitist estate agents and militates against E legitimate businesses, forcing them to overprice their goods and services. For that reason it is against public policy. I agree with Mr *Takundwa* for the respondent that the *locus classicus* on the subject is *ZESA v Maposa* 1999 (2) ZLR 452 (S) where at 466E-G Gubbay CJ said:

"Under article 34 or 36, the court does not exercise an appeal power and either uphold or set aside or decline to recognise and enforce an award by having regard F to what it considers should have been the correct decision. Where, however, the reasoning or conclusion in an award goes beyond mere faultiness or incorrectness and constitutes a palpable inequity that is so far reaching and outrageous in its defiance of logic or accepted moral standards that a sensible and fair minded person would consider that the conception of justice in Zimbabwe would be intolerably hurt by the award, then it would be contrary to public policy to G uphold it.

The same consequence applies where the arbitrator has not applied his mind to the question or has totally misunderstood the issue and the resultant injustice reaches the point mentioned above".

See also *Delta Operations (Pvt) Ltd v Origen Corp (Pvt) Ltd* 2007 (2) ZLR 81 (S) at 85C-D. H

2012 (1) ZLR p587

Mathonsi J

A Can it be said that the award qualifies to be against public policy applying the law set out above? I do not think so. We have a situation where the contestants placed before the arbitrator evidence that comparable rentals for upmarket premises like the one in dispute ranged between US$9 per square metre and US$20 per square metre. The applicant was rooting for an increase of 2.5 B per cent, arguing that the average rentals in its comparable properties was US$10.50 per square metre.

The arbitrator entertained the submissions of the parties, conducted a site visit, established that the majority of tenants at the premises accepted more than US$15 per square metre as reasonable rental and, relying "upon his own expertise and judgment" and "in his sole and absolute discretion" given C to him by clause 34 of the lease agreement between the parties, made an award. I agree with Mr *Takundwa* that the award is not of such earthshaking magnitude as to be classified as intolerable.

It should be appreciated that the limited grounds for attacking an arbitral award are meant to ensure international uniformity in the application of the model D law contained in the Arbitration Act. That law is of international origin and is intended to govern both domestic and international arbitrations: *Pamire & Ors v Dumbutshena NO & Anor* 2001 (1) ZLR 123 (H) at 125E. I therefore do not agree with Mr *Mushoriwa* that the award should be looked at having regard to the memories of hyperinflation during the Zimbabwe dollar era.

E What we have is an award which took into account the perceptions of the market at the time and the ability of other tenants to pay. It cannot be said that such an award results in the conception of justice in this country being "intolerably hurt".

I therefore come to the inescapable conclusion that the application is without F merit and cannot succeed.

The first respondent has asked for costs on the legal practitioner and client scale on the basis that the application is *mala fide*. It has not explained why the application is *mala fide*. I do not agree that the applicant should be visited with punitive costs because, although its submissions were emotive and full G of fury, there was substance in the arguments which however fell short of meeting the requirements of the law.

In the result, the application is dismissed with costs on the ordinary scale.

Mawere & Sibanda, applicant's legal practitioners

H *S Takundwa & Co*, respondent's legal practitioners

© 2015 Juta and Company (Pty) Ltd.

Document 73 of 75

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2012/Volume 1/GOLD DRIVEN INVESTMENTS (PVT) LTD v MATIPANO NO 2012 (1) ZLR 588 (H)

GOLD DRIVEN INVESTMENTS (PVT) LTD v MATIPANO NO 2012 (1) ZLR 588 (H)

Citation	2012 (1) ZLR 588 (H)
Case No	Judgment No. HH-266-12
Court	High Court, Harare
Judge	Kudya J
Heard	20 June 2012; *CAV*
Judgment	27 June 2012
Counsel	*C Muchenga*, for the applicant Mrs *J B Wood*, for the respondent
Case Type	Opposed application
Annotations	No case annotations to date

Flynote

Enrichment – *unjust enrichment – deputy sheriff exacting fees under wrong* C *statutory instrument – fees payable under correct instrument less than those levied – payer entitled to recover excess*

Practice and procedure – *execution – sale – Sheriff – commission due to – when such commission accrues* D

Headnote

The deputy sheriff had levied fees and commission under the wrong statutory instrument. The statutory instrument under which the fees and commission were calculated had been repealed and replaced, and the correct fees would have been less than those paid. The applicant sought the recovery of the excess. The deputy sheriff argued that the applicant would only E have been entitled to recover if it had protested before payment.

Held, that the commission due to the Deputy Sheriff when he attaches property following a writ of execution accrues on the date on which the events listed in item 8(1) of the Third Schedule to the High Court (Fees and Allowances) Rules 2000 (SI 82 of 2000) occur. That being the case, F the Schedule enacted in 2011 applied, not the 2009 version, which had been replaced in its entirety.

Held, further, that the right of recovery requires neither mistake nor compulsion. The simple fact that the fees and commission were exacted unlawfully was enough to require their repayment. The applicant was entitled to a refund of the excess amount. It would be unconscionable G for the deputy sheriff to insist on keeping an amount that was wrongfully and unlawfully levied.

Cases referred to

Bailey NO v Deputy Sheriff, *Harare* 2003 (1) ZLR 104 (H)

Ellis NO v CoT 1994 (1) ZLR 423 (S) H

Kudya J

A *Murphy v Dir of C & E* 1992 (1) ZLR 28 (H)

National Railways of Zimbabwe v Coghlan, Welsh & Guest 1984 (2) ZLR 224 (H)

Pymor Investments (Pvt) Ltd v Frank Pantony (Pvt) Ltd 1996 (2) ZLR 357 (H)

Legislation considered

High Court Rules 1971 (RGN 1047 of 1971), rr 327(1) & 457(3)

B High Court (Fees and Allowances) Rules 2000 (SI 82 of 2000), Third Schedule, item 8(1)

Case information

C Muchenga, for the applicant

Mrs *J B Wood*, for the respondent

Judgment

C **Kudya J:** On 9 February 2012, the applicant filed the present application seeking a declarator and other consequential relief. The application was opposed by the respondent on 12 February 2012. In the opposition, the respondent raised two preliminary points.

The facts that gave rise to the application are these. On 9 March 2011, the D Metropolitan bank, the judgment creditor, obtained provisional sentence against the applicant in the sum of US$2 322 089.52 in case No HC 1201/11. On 13 April 2011, the judgment creditor issued a warrant of execution against the applicant and on the following day, the respondent attached 634 600 tonnes of tobacco. On 29 April 2011, the respondent conducted a sale in execution. The proceeds were inadequate to clear the whole debt. E On 3 May the respondent attached more tobacco stocks that were scheduled for sale by public auction on 20 May 2011. A day before the sale, the legal practitioners for the judgment creditor wrote to the respondent requesting him to cancel the sale. On 3 June, the judgment creditor's legal practitioners notified the applicant's legal practitioners of the outstanding amount due F from the applicant, amongst which were the respondent's fees in the sum of US$226 297.25. The applicant was given until 7 June 2011 to pay up or risk the sale of its tobacco and other assets. The fees were not paid by the deadline, as on 8 June the respondent instructed the auctioneer to dispose of the tobacco for the recovery of his fees. The sale was advertised for 17 June. The fees were paid and the auction was cancelled.

G The respondent's fees were calculated under the Third Schedule to the High Court (Fees and Allowances) Rules 2000 (SI 82 of 2000) as set out in SI 35 of 2009. That schedule was replaced by the High Court (Fees and Allowances) (Amendment) Rules SI 57 of 2011 on 13 May 2011 *. The applicant challenges

---

Kudya J

the fees charged on the basis that they were charged under a repealed law A instead of the new law. The further challenge that the respondent could not charge commission on a sale by private treaty was abandoned by Mr *Muchenga*, for the applicant, in his oral submissions.

The respondent's first preliminary point was that the applicant did not aver a cause of action against the respondent. The second was that it did not exhaust B its domestic remedies before coming to court.

The first preliminary issue raised by the respondent has no merit. In *Murphy v Director of Customs and Excise* 1992 (1) ZLR 28 (H) at 33D-E Smith J cited with approval *Abrahamse & Sons v SA Railways and Harbours* 1933 CPD 626 that:

> "The proper legal meaning of the expression 'cause of action' is the entire set C of facts which gives rise to an enforceable claim and includes every fact which is material to be proved to entitle a plaintiff to succeed in his claim. It includes all that a plaintiff must set out in his declaration in order to disclose a cause of action. Such cause of action does not 'arise' or 'accrue' until the occurrence of the last of such facts and consequently the last of such facts is sometimes loosely spoken of as the cause of action." D

In the present application, the applicant averred that the respondent used the wrong piece of legislation to claim commission purportedly due to it. The cause of action was the unjust enrichment of the respondent by the payment of a claim that it was not legally entitled to receive. In fact, para 10 of the respondent's heads concisely summarises the applicant's cause of action thus: E

> "The applicant contends that the fee charged was not wholly due."

It is clear that the applicant raised a cause of action that the respondent properly understood in its founding affidavit.

The second preliminary point was that this court had no jurisdiction to determine the issue. The respondent contended that the duty to determine the legality of charging commission under the repealed statutory instrument F lay, in terms of r 457(3) of the Rules of the High Court, with the Sheriff. In my view, the objection is not on the correctness of the sum charged under the tariff. Rather, the objection is on the choice of law under which the commission was charged. The applicant raises a question of law rather than a question of fact. It does not appear to me that the sheriff is empowered to G determine the question of law that is raised by the applicant. See *Bailey NO v Deputy Sheriff Harare* 2003 (1) ZLR 104 (H) at 106A-B.

Rule 457(3) states:

> "(3) Necessary charges and allowances for all work necessarily done for which no provision is contained in such tariff, and every question arising under and relative to the tariff, shall be determined by the Sheriff". H

Kudya J

A I hold that it does not grant the Sheriff the right to determine the legal issue in the first instance or at all. It only empowers the Sheriff to fix charges and allowances for necessary work that is not covered in the tariff and determine the accuracy of the amounts charged by the deputy sheriff.

The second preliminary point fails.

B **The merits**

As I understand it, the issue for determination is the law under which the Deputy Sheriff was entitled to charge his commission. The applicant contended that the applicable law was the Third Schedule to the High Court (Fees and Allowances) Rules 2000 (SI 82 of 2000), as substituted by SI 57 of 2011, which came into effect on 13 May 2011, while the respondent contended that C it was the Schedule as enacted by SI 35 of 2009. The basis for the applicant's contention was that the date on which the commission accrued was the date of suspension of the attachment, while the respondent contended that it was the date of attachment.

If the date on which commission accrued was the date of attachment, then the D respondent levied the correct amount. However, if the commission accrued on the date of suspension, then he overcharged the applicant. SI 57 of 2011 repealed and replaced the previous version of the Schedule (that enacted by SI 35 of 2009) in its entirety. Item 8(1) of the Third Schedule deals with the fees due to the Deputy Sheriff on execution. It states: E

> "In respect of execution –
>
> (a) When a writ is paid on presentation, three *per centum* of the amount of the writ, with a minimum of US$10;
>
> (b) When a writ is withdrawn by the judgment creditor or judgment debtor's estate is placed under sequestration or liquidation before any movable property has been attached a fee of US10; F
>
> (c) When the writ is withdrawn or suspended by the judgment creditor or the judgment debtor's estate is placed under sequestration or liquidation after G movable property has been attached but before sale, three *per centum* of the value of the property attached, but such value shall not exceed the amount directed to be recovered.
>
> (d) When a writ is paid by the judgment debtor to the Deputy Sheriff after movable property has been attached but before sale, three *per centum* of the amount so paid.
>
> (e) After the sale in execution, three *per centum* of the net amount recovered or, if the Deputy Sheriff acted as auctioneer, seven per centum of that amount.

Item 8(1)(a) to (e) lists all the situations in which the Deputy Sheriff claims his commission. In my view, his commission accrues on the date on which H each event listed in (a) to (e) above takes place. It does not accrue before or

Kudya J

after such happening. In the present matter, the date on which the Deputy A Sheriff was entitled to his commission was 19 May 2011, the date on which the judgment creditor requested him to withdraw the sale of the goods he had attached. The commission did not accrue to him on the date

of attachment. The respondent's contention that the commission accrued on attachment is not supported by r 327(1) of the rules of court. That rule reads:

> "(1) A writ of execution may, on payment of the fees incurred, be withdrawn or B suspended at any time by notice to the sheriff or his deputy by the party who has sued out such writ".

The phrase "on payment of the fees incurred" refers to all the fees due to the Deputy Sheriff on the date of withdrawal or suspension of the writ. The fees are listed in the Third Schedule to the High Court (Fees and Allowances) C Rules, as amended. They include all necessary charges associated with the attachment and removal, including those contemplated by item 8(1) of the Third Schedule. Thus the commission incurred on withdrawal should be paid before the withdrawal on the date of withdrawal. In any event, the rules do not provide for payment of the commission due on withdrawal on the date of attachment. D

I hold that the respondent levied fees under the wrong statutory instrument.

The issue that flows from this finding is whether the applicant is entitled to a refund. Mrs *Wood,* for the respondent, submitted under the authority of *National Railways of Zimbabwe v Coghlan, Welsh & Guest* 1984 (2) ZLR 224 (H) and *Pymor Investments (Pvt) Ltd v Frank Pantony (Pvt) Ltd* 1996 (2) ZLR 357 (H) E that the applicant was not entitled to a refund.

The *National Railways of Zimbabwe* case involved an application for taxation of costs after the applicant had already made a direct payment to the respondent. Korsah J (as he then was) held that the applicant had waived his right to taxation by paying without protest. In the *Pymor Investments* F case, Chinhengo J held that the applicant had protested before payment and granted it the relief sought. He, however, laid out the two bases such protest could take, at 368E-F thus:

> "In my view, the position in our law is that moneys paid under protest can be recovered under two conditions either:
>
> (a) if such payment is made involuntarily and under pressure brought to bear G on the payer; and
>
> (b) even if no pressure is brought to bear on the payer, if the payer makes it clear that the money is paid on condition that if it is found not to be due the payer will claim it back.
>
> and in either case the payer expressly protests or makes an unequivocal statement of objection." H

Kudya J

A The above decisions contradict the view adopted by the Supreme Court in *Ellis NO v Commissioner of Taxes* 1994 (1) ZLR 423 (S) at 439B-H and especially at 439F-H where Gubbay CJ stated:

> "I strongly support the opinion of Lord Goff *supra* at 760h that:
>
> > 'In the end, logic appears to demand that the right of recovery should require neither mistake nor compulsion, and that the simple fact that the tax was B exacted unlawfully should *prima facie* be enough to require its repayment.
> >
> > Put differently, recovery is grounded on the unlawfulness and nullity of the demand and not on any mistaken belief of the payer.'"

The respondent correctly contended that the applicant did not plead duress or mistake. In fact, in a letter accompanying payment, it indicated that the payment was in full and final settlement. Be that as it may, the respondent's C case is that the demand for payment under a repealed statute was unlawful. That view is buttressed by *Ellis NO supra* at 441A where the learned Chief Justice said:

> "The Commissioner's obligation to refund the capital gains tax so received arose from his action in making an unlawful and *ultra vires* demand under the notice D of assessment".

I am satisfied that the respondent made an unlawful demand for commission under repealed regulations. The payment cannot stand. The respondent is entitled to a refund of the excess amount. It is unconscionable for the respondent to insist on keeping an amount that it wrongfully and unlawfully levied. Costs must follow the result.

E Accordingly:

1. It is declared that the commission levied by the respondent in terms of SI 35 of 2009 in case No HC 1201/11 in respect of goods attached on 3 May 2011 is unlawful.
2. The respondent is ordered to levy his commission on the writ of execution F against the said goods in terms of item 8(1)(c) of the Third Schedule to High Court (Fees and Allowances) Rules, as amended by SI 57 of 2011.

3. It is ordered that the respondent shall refund to the applicant all sums of money paid in excess of the amounts due to him under item 8(1)(c). G

4. The respondent shall pay the applicant's costs.

Musemburi and Muchenga, applicant's legal practitioners

H *B Dhlakama Attorneys,* respondent's legal practitioners

* And again by SI 109 of 2012 on 15 June 2012. – *Editor.*

© 2015 Juta and Company (Pty) Ltd.

Document 74 of 75

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2012/Volume 1/TSVANGIRAI NO v MUGABE NO & ORS 2012 (1) ZLR 594 (H)

TSVANGIRAI NO v MUGABE NO & ORS 2012 (1) ZLR 594 (H)

Citation	2012 (1) ZLR 594 (H)
Case No	Judgment No. HH-273-12
Court	High Court, Harare
Judge	Chiweshe JP
Heard	24 May 2012; 11 June 2012; *CAV*
Judgment	27 June 2012
Counsel	*T Mpofu*, for the applicant *T Hussein*, for the respondents
Case Type	Civil application
Annotations	No case annotations to date

Flynote

Practice and procedure – *parties – President – action against – whether leave of court required – no restriction provided President cited in official capacity and not by name*

Headnote

The Prime Minister brought an action against the President, in his official D capacity, to challenge the legality of the appointment of various Provincial Governors (who were the other respondents) as being ultra vires. The respondents took a point in limine that, in terms of r 18 of the High Court Rules 1971, the leave of the court was required to bring an action E against the President.

Held, that r 18 of the High Court Rules is intended to afford the President and judges protection against frivolous actions that may be brought against them. This application per se was neither

frivolous nor vexatious; it was of national significance. It must be heard on the merits, notwithstanding the provisions of r 18, a course permissible under r 4C, which allows the F court to direct, authorise or condone a departure from any provision of the High Court Rules, where it is satisfied that the departure is required in the interests of justice. In any event, s 4 of the State Liabilities Act [*Chapter 8:14*] provides an absolute right to bring proceedings against the President in his official capacity, provided he is cited in his official G capacity and not by name. That is the sole restriction. Had the legislature intended that the institution of any such action or process be preceded by the grant of leave from the High Court or Supreme Court, it surely would have said so. Certainly, there is no justification for reading such a requirement into the section. Nothing in r 18 of the High Court Rules could be understood to override either s 4 of the State Liabilities Act H

Chiweshe JP

A or any other provision of the Constitution, which exhibits a contrary intention.

Cases referred to

Gluck v The Governor 1947 SR 143

B *National Constitutional Assembly v The President & Ors* 2005 (2) ZLR 310 (H)

Zimbabwe Lawyers for Human Rights & Anor v The President 2000 (1) ZLR 274 (S)

Legislation considered

C Constitution of Zimbabwe 1980, s 31K

High Court Rules 1971 (RGN 1047 of 1971), rr 4C & 18

State Liabilities Act [*Chapter 8:14*], s 4

Case information

T Mpofu, for the applicant

D *T Hussein,* for the respondents

Judgment

Chiweshe JP: In this application the applicant seeks a declarator nullifying the appointment of second to tenth respondents as provincial governors on the grounds that such appointments are *ultra vires* and or in contravention of the Constitution of Zimbabwe. The applicant also seeks such consequential E declarations as may become necessary in the event that this court nullifies the appointments.

The respondents have raised a point *in limine*, namely, that in filing this application the applicant has not complied with the provisions of r 18 of the High Court Rules which reads:

> "No summons or other civil process of the court may be sued out against the F President or against any of the judges of the High Court without the leave of the court granted on court application being made for that purpose."

The respondents have argued that the provisions of r 18 are peremptory citing, in support of that contention, *National Constitutional Assembly v The President & Ors* 2005 (2) ZLR 310 (H). At p 314A Guvava J ruled as follows:

> G "No court application was made for such leave in this matter as required by this rule. In my view the first respondent has thus been improperly cited as no leave from this court was granted for the President to be sued. Accordingly, the application against the first respondent is dismissed on that basis."

The learned judge nonetheless proceeded to deal with the application in so far as it related to the rest of the respondents. It must be pointed that in that H case the respondents had *inter alia* opposed the application on the grounds

Chiweshe JP

that it was frivolous and vexatious, a fact alluded to by the learned judge A when considering the question of costs. She had this to say at p 317C:

> "This application was in my view clearly misguided, as there was no legal basis for bringing such an application."

In the instant case the respondents have not argued that the application *per se* is frivolous and vexatious. In my view, this application is of national B significance. For that reason I believe that it must be heard on the merits notwithstanding the provisions of r 18. I am inclined to invoke the provisions of r 4C which read:

> "The court or a judge may, in relation to a particular case before it or him, as the case may be –
>
> (a) direct, authorise or condone a departure from any provision of these rules, C 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 interest 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." D

This rule, argue the respondents, was inserted to cater for minor departures from the Rules such as a failure to comply with a form in the Rules or a failure to file documents on a certain date. Rule 4C was not enacted to confer on this court the power to ignore a Rule entirely. In my view, however, the wording of the provisions of r 4C suggests a much wider construction than the E respondents would admit. The rule empowers the court to "direct, authorise or condone a departure from *any* provision of these rules, *including* any extension of any period specified therein …" (my emphasis).

Rule 18 is intended to afford the President and judges protection against frivolous actions that may be brought against them. The respondents have not argued that the present application is frivolous or vexatious, save for F aspersions to that effect in their heads of argument. No argument has been mounted as to why the present application should be considered frivolous or vexatious. On the contrary, the respondents are yet to file their papers on the merits of this application. In the absence of such submissions on the merits the respondents cannot raise and sustain an argument rooted on frivolity. G

In my view, procedural expediency requires that where r 18 has not been complied with but on the papers filed it can be shown *prima facie* that the applicant has presented an arguable case, devoid of frivolity or vexation, the court exercises the discretion conferred on it in terms of s 4C. In other words, if the question "Would a reasonable court adjudicating an application for leave to sue out process in terms of r18 have granted the application?" is H

Chiweshe JP

A answered in the affirmative, the court may, in my view, properly exercise the discretion conferred on it in terms of r 4C and condone the failure to abide by r 18 in the first place. The alternative procedure would be to dismiss the application for failure to comply with that rule. The applicant would then be at liberty to apply for leave to sue out process, which leave would then be granted, allowing him to issue process on the merits of the matter. This B alternative is circuitous and unnecessary in the present case. I am satisfied that it is in the interests of justice that I condone this omission on the part of the applicant. I am also satisfied that no prejudice would be suffered by either party if the court were to adopt that course of action.

The mischief sought to be suppressed by the provisions of r 18 was aptly C stated in *Gluck vs The Governor* 1947 SR 143 at 146 where it was stated as follows:

> :… it may be assumed that the rule was not intended to deny a hearing to anyone who has a substantial cause of action. It was simply intended to avoid the possibility that the Governor might be harassed by frivolous or vexatious claims or unnecessarily made the nominal defendant in matters which could D equally well be ventilated in some other way."

This position was confirmed by the Supreme Court in *Zimbabwe Lawyers for Human Rights & Anor v President of the Republic of Zimbabwe* 2000 (1) ZLR 274 (S).

In the instant application, it is clear to me that on paper the applicant has a E substantial cause of action. The application involves the interpretation of constitutional provisions of significance to the governance of the country under the Global Political Agreement. Both parties agree that the matter is of immense public interest. Such an application cannot be relegated to the dustbin of frivolity and vexation. The relief sought can only be obtained by citing the office of the President. The executive

decisions complained of were F taken by that office. It would be folly to cite any other office or authority to the exclusion of the President.

In any event, in the *ZLHR* case *supra*, the Supreme Court, at pp 278 and 279, held that s 4 of the State Liabilities Act [*Chapter 8:14*] permits the citation of the President or any other officer in any action or other proceedings in his G official capacity. For that reason, the Supreme Court held that

> "Section 4 permits of an absolute right to bring proceedings against the President in his official capacity provided he is cited by his official capacity and not by name. *That is the sole restriction*. Had the legislature intended that the institution of any such action or process be preceded by the grant of leave from the High Court or Supreme Court, it surely would have said so. Certainly there is no justification for reading such a requirement into the section. Needless to state, H anything in r 18 of the High Court Rules cannot be understood to override either

Chiweshe JP

> s 4 of the State Liabilities Act, or any other provision of the Constitution, which A exhibits a contrary intention." (my own emphasis).

I am inclined to agree with Mr *Mpofu* for the applicant that indeed r 18 no longer has any place in our legal system. It has been superseded by superior legislation, a fact confirmed by the highest court of the land. Yet it is trite that the office of the President should not be harassed by frivolous or vexatious B proceedings. This court has inherent jurisdiction to determine, without the aid or hindrance of r 18, whether any process issued against the office of the President is frivolous or vexatious and whether it ought to be dismissed on that basis.

The issue of the applicability of r 18 has thus been settled by the Supreme Court in the *ZLHR* case *supra*. Four issues were settled in that case. C

(1) The President can be sued in his official capacity.

(2) The purpose of r 18 is to prevent the President (and judges) from being harassed by frivolous or vexatious claims.

(3) Rule 18 was not created to preclude persons with substantial causes of action from instituting legal proceedings against the President. D

(4) Rule 18 is inconsistent with the provisions of s 31K of the Constitution and s 4 of the State Liabilities Act [*Chapter 8:14*] which permit proceedings to be instituted against the President in his official capacity.

In conclusion, it is evident that the objection *in limine* raised by the respondents cannot be sustained because, assuming r 18 is still part of our E law, this court has the discretion in terms of r 4C to depart from its provisions in the interests of justice. However, the Supreme Court has ruled that r 18 falls foul of constitutional and statutory provisions. For this reason the rule automatically falls away. I would respectfully bring the attention of the Rules Committee to this fact. F

It was for these reasons that I dismissed the application and ordered as follows:

IT IS ORDERED THAT:

1. The point *in limine* raised by the respondents be and is hereby dismissed.
2. The respondents be and are hereby granted leave to file and serve their opposing papers within 10 days from the date of this order. Thereafter G the parties shall proceed in terms of the Rules of Court.
3. The matter shall be heard on the merits on 10 July 2012 at 1000 hours.
4. Costs to be costs in the cause.
5. Reasons shall be contained in the main judgment. H

Chiweshe JP

A *Dube, Manikai & Hwacha,* applicant's legal practitioners

B Hussein Ranchhod & Co, respondents' legal practitioners

© 2015 Juta and Company (Pty) Ltd.

Document 75 of 75

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2012/Volume 1/MEDICAL INVESTMENTS LTD v DAKA NO & ANOR 2012 (1) ZLR 600 (H)

MEDICAL INVESTMENTS LTD v DAKA NO & ANOR 2012 (1) ZLR 600 (H)

Citation	2012 (1) ZLR 600 (H)
Case No	Judgment No. HH-279-12
Court	High Court, Harare
Judge	Kudya J
Heard	29 June 2012
Judgment	29 June 2012
Counsel	*T Nyamasoka*, for the applicant *H I Chitima*, for the second respondent No appearance for the first respondent
Case Type	Civil application
Annotations	No case annotations to date

Flynote

Costs – *taxation – review – when taxing master's decision may be interfered* C *with on review – whether strict compliance with r 314(2) of the High Court Rules is necessary before court may consider grievance*

Practice and procedure – *judgment – execution – court order requiring defendant to hand over certain property and authorizing deputy sheriff to seize such property – writ of execution not necessary to allow deputy* D *sheriff to seize property*

Practice and procedure – *rules of court – departure from rules – rules not to be considered peremptory – need for strong grounds to exist before departure from rules can be justified*

Headnote

The applicant sought a review of the taxing officer's decision in which she E declined to consider the costs incurred by the deputy sheriff in effecting an order of execution. The High Court had granted judgment in favour of the applicant against the second respondent requiring her to hand over a certain motor vehicle, failing which the deputy sheriff was empowered to seize the vehicle. The deputy sheriff made five abortive visits to the F second respondent's premises in order to seize the vehicle, which was later handed over by the second respondent herself. She disputed the sum charged by the deputy sheriff for his visits. The taxing officer agreed with the second respondent that the attempts at execution by the deputy sheriff infringed r 322 of the High Court Rules, in that they were not G carried out under a writ of execution. The second respondent, in answer to the current application, argued that the applicant had not complied with r 314(2) of the Rules, which requires that "the court application shall specify the items forming the subject of the grievance".

Held, that the court has power to interfere with or alter a taxing master's ruling on two grounds: (a) on the application of common law rights on H

Kudya J

A review, which involve a finding that he was grossly unreasonable or erred on a point of principle or law. In such a situation, the court would be at large and entitled to substitute its opinion for that of the taxing master. However, even when such grounds for interference exist it need not follow that the taxing master's decision must necessarily be set aside or altered; and (b) even if there is no common law ground for interference, B the court has a duty to interfere if satisfied that the taxing master was clearly wrong in regard to some item.

Held, further, that the wording of the High Court's order did not require that a writ of execution be raised before the deputy sheriff could execute. The court had the authority under r 4C to depart from r 322. The wording of C the order indicated that it did so. It specifically empowered the deputy sheriff to dispossess the second respondent of the motor vehicle. Had the court wanted the applicant to execute through a writ, it would not have empowered him to seize the vehicle in the order.

Held, further, that the effect of r 4C of the High Court Rules, 1971, is that none of the rules set out therein should be regarded as strictly peremptory. D Rule 4C permits a departure from the Rules where the court or the judge is satisfied that such departure is required in the interests of justice. However, the Rules are there to regulate the practice and procedure of the High Court and strong grounds would have to be advanced to persuade a court or judge to act outside them.

E *Held*, further, that the disallowed fees of the deputy sheriff could very well have been necessary execution costs properly incurred in giving effect to the court order. The taxing master was legally bound by the court order to consider them in terms of r 307.

Cases considered

F *Cone Textiles (Pvt) Ltd v Pettigrew (Pvt) Ltd & Anor* 1984 (1) ZLR 274 (S)

Shoko & Ors v Min of Local Govt & Anor 2007 (1) ZLR 111 (H)

Watson v Gilson Entprs (Pvt) Ltd 1998 (1) ZLR 381 (S)

Wilmot v Zimbabwe Owner Driver Organisation (Pvt) Ltd 1996 (2) ZLR 415 (S)

G *Zimbank Ltd v Trust Finance Ltd & Anor* 2006 (2) ZLR 404 (H)

Zimbabwe Open University v Mazambwe 2009 (1) ZLR 101 (H

Legislation considered

High Court Rules 1971 (RGN 1047 of 1971), rr 307, 314 & 322

Case information

H *T Nyamasoka,* for the applicant

Kudya J

H I Chitima, for the second respondent A

No appearance for the first respondent

Judgment

Kudya J: This is an application for the review of the taxing officer's decision of 24 September 2010 in which she declined to consider the applicant's costs incurred by the deputy sheriff in effecting an order of this court.

On 10 February 2010, after contest, Makarau JP, as she then was, granted B an order in favour of the applicant against the second respondent. The order was appealed on 17 February. It was struck off by the Supreme Court on 6 July. On that date the applicant's legal practitioners instructed the Deputy Sheriff, Norton to execute the order. The Deputy Sheriff attempted on five occasions, that is, once on 6 July, once on 7 July, once on 8 July and twice C on 14 July 2010 to execute the court order without success. His fees in his returns of service amount to US$715.

On 7 July 2010 the second respondent applied for condonation of late filing of an appeal. That application was dismissed on 2 August 2010. On 3 August, she handed over the vehicle to the applicant's legal practitioners. The second D respondent paid part of the applicant's costs and disputed US$715 incurred by the deputy sheriff. The applicant submitted the bill of costs to the taxing officer, the first respondent. The first respondent agreed with the second respondent that the attempts at execution by the deputy sheriff infringed Order 40 r 322 in that they were not carried out under a writ of execution; hence the present application. E

The second respondent raised two preliminary issues against the application. The first was that it did not comply with r 314 of the rules of court. The rule states:

> "(1) A party aggrieved by the decision of a taxing officer may apply to court within four weeks after the taxation to review such taxation. The application shall be by court application to the taxing officer and to the opposite party, if F such opposite party was present at the taxation or if the court decides that such opposite party should be represented.
>
> (2) The court application shall specify the items forming the subject of the grievance."

The applicant conceded that the face of the application did not strictly comply G with r 314 (2). It averred that the items forming the subject of the grievance were however spelt out in the founding affidavit. It relied on the sentiments of Mavangira J in *Zimbank Ltd v Trust Finance Ltd & Anor* 2006 (2) ZLR 404 (H) at 408F for the submission that the failure to set out the items on the face of the application was not fatal to the application. It is correct that the founding affidavit itemizes the returns of service that the second respondent H

Kudya J

A refused to pay for and the first respondent declined to consider and award.

Again, notwithstanding the views of Hlatshwayo J in *Zimbabwe Open University v Mazombwe* 2009 (1) ZLR 101 (H) at 105C, it seems to me that, in regards to the interpretation of r 314, the views of the Supreme Court in *Cone Textiles (Pvt) Ltd v C Pettigrew (Pvt) Ltd & Anor* 1984 (1) ZLR 274 (S) B at 278G-279B are not only binding but correct. Goldin AJA stated:

> "In my view, the correct position is, therefore, that the court has power to interfere with or alter a taxing master's ruling on two grounds. Firstly, on the application of common law rights on review which involve a finding that he was grossly unreasonable or erred on a point of principle or law. In such a situation the court would be at large and entitled to substitute its opinion for that of the taxing master. It should not be overlooked that even when such grounds for interference C exist it need not follow that the taxing master's decision must necessarily be set aside or altered. He may have arrived at the correct decision for a wrong or even improper reason.
>
> Secondly, regardless of the absence of any common law ground for interference, the court has a duty to interfere if satisfied that the taxing master was clearly wrong in regard to some item. In such a case the court will substitute its own D opinion for that of the taxing master even if it is a matter involving degree.
>
> It is emphasised, however, that the court must be satisfied that the taxing master was clearly wrong and not merely that in his place it would have come to a different decision."

The common law ground for review on the face of the present application is sufficient to bring it before this court for review without the need to conform E with the strict requirements of r 314(2.)

The first preliminary point fails.

The second preliminary point was based on the failure by the applicant to attach the decision of the first respondent. It does not appear to me necessary to do so in this matter where the issue revolves around the interpretation of F the law. In any event, the second respondent concedes i

n paras 5 and 6 of her written heads that:

> "5 The first respondent then dismissed that part of the applicant's legal practitioners' bill of costs which purported to include the costs of the deputy sheriff in collecting the motor vehicle. G
>
> 6. The applicant then instituted an application for review of the decision by the first respondent in which she denied the deputy sheriff's costs."

In the founding affidavit, the applicant averred that the first respondent refused to consider the deputy sheriff's fees on the ground that he acted outside the provisions of r 322. In her opposing affidavit the second respondent averred that the first respondent "was entitled to disallow the said deputy sheriff's H costs on the basis that he acted illegally, without a writ of execution as

Kudya J

required by law." She did not specifically deny the averment made by the A applicant. The first respondent did not oppose the application.

The second preliminary point fails.

The order of Makarau JP reads:

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

The issue taken on taxation arises from r 322. It reads:

> "The process for the execution of any judgment for the payment of money, for the C delivery up of goods or premises, or for ejectment, shall be by writ of execution signed by the registrar and addressed to the sheriff D or his deputy, in accordance with one or other of Forms Nos. 34 to 41."

The second respondent submitted that the fees of the deputy sheriff arising from his attempts to dispossess the second respondent of the motor vehicle without a writ of execution signed by the registrar and addressed to the sheriff or his deputy were void. Mr *Chitima*, for the second respondent, relied on the phrase "any judgment for the payment of money, for delivery of goods" and the peremptory word "shall" found in r 322.

The High Court has absolute power over its own rules. This power is captured E and crystallized in r 4C of the rules of court. In *Wilmot v Zimbabwe Owner Driver Organisation (Pvt) Ltd* 1996 (2) ZLR 415 (S) at 419C-D Gubbay CJ stated:

> "Of course, it was open to the court a *quo* to have had recourse to r 4C(a). This permits a departure from any provision of the Rules where the court or judge is satisfied that the departure is required in the interests of justice. None of the F provisions of the Rules are strictly peremptory. See *Sumbereru v Chirunda* 1992 (1) ZLR 240 (H) at 243B; *Makaruse v Hide & Skin Collectors (Pvt) Ltd* S-140-96."

The learned Chief Justice expressed the same sentiments in *Watson v Gilson Enterprises (Pvt) Ltd* 1998 (1) ZLR 381 (S) at 387G where he said: G

> "The provisions of the Rules are not strictly peremptory. But as they are there to regulate the practice and procedure of the High Court, in general, strong grounds have to be advanced to persuade the court or judge to act outside them. See *Sumbereru v Chirunda* 1992 (1) ZLR 240 (H) at 243B, *Makaruse v Hide & Skin Collectors (Pvt) Ltd* 1996 (2) ZLR 60 (S) at 65D-E; *Wilmot v Zimbabwe Owner Driver Organisation (Pvt) Ltd* 1996 (2) ZLR 415 (S) at 419C-D." H

Kudya J

A Lastly, though she declined to make a definitive finding on the aspect, Makarau JP in *Shoko & Ors v Minister of Local Government & Anor* 2007 (1) ZLR 111 (H) at 114C stated that:

> "The option appeared to me more attractive as r 4C does not seem to require that an application be made before the court can condone a departure from the rules."

B In the present matter, the wording of the order of 10 February 2010 did not require that a writ of execution be raised before the deputy sheriff could execute. The court had the authority to depart from r 322. The wording of the order indicates that it did so. It specifically empowered the deputy sheriff to dispossess the second respondent of the motor vehicle. Had the court wanted C the applicant to execute through a writ, it would not have empowered him to seize the vehicle in the order. Rather, it would simply have granted the order to surrender on service of the order and left it to the applicant to seek a writ to enforce it once she failed to do so voluntarily.

The five visits were necessary to give effect to the order. It was clear from D subsequent events that the second respondent deliberately removed herself from the reach of the deputy sheriff. Her erstwhile legal practitioners were complicit in this regard as is apparent from the last paragraph of their letter of complaint of 8 July 2010 in which they wrote:

> "We shall also seek the relief of a stay pending the determination of our client's application for condonation of the late noting of an appeal, which application E has been served on (*sic)* your offices."

The disallowed fees of the deputy sheriff, in terms of r 457 (5) and clause 1 of the High Court (Rules and Allowances) Rules SI 35 of 2009 before they were repealed by SI 57 of 2011 could very well be necessary execution costs properly incurred in giving effect to the court order. The first respondent was legally bound by the court order to consider them in terms of r 307. The F first respondent declined to exercise her discretion by acting upon a wrong principle. Her decision cannot stand. I agree with Mr *Nyamasoka,* for the applicant, that the matter should be remitted to the first respondent for her to consider the correctness of the amounts levied by the deputy sheriff captured in the bill of costs of 24 September 2010.

G Costs must follow the result.

Accordingly, it is ordered that:

1. The decision of the first respondent of 24 September 2010 refusing to tax applicant's bill of costs is set aside.
2. The matter is remitted to the first respondent for determination of items H 5, 6 and 7 in the bill of costs of 24 September 2010.

2012 (1) ZLR p606

Kudya J

3. The second respondent shall pay the applicant's costs on the ordinary A scale.

Atherstone & Cook, applicant's legal practitioners

Kawonde & Co, second respondent's legal practitioners B

© 2015 Juta and Company (Pty) Ltd.