Document 1 of 60

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2012/Volume 2

Volume 2

Anueyiangu v Chief Immigration Officer & Ors	2012 (2) ZLR 1 (S)
S v Kurotwi & Anor	2012 (2) ZLR 11 (H)
Chadoka v Chombo NO & Ors	2012 (2) ZLR 15 (H)
S v Muromo & Ors	2012 (2) ZLR 24 (H)
Dombodzvuka v CMED (Pvt) Ltd	2012 (2) ZLR 32 (S)
Jones v Jones	2012 (2) ZLR 39 (H)
Nyoni & Ors v Bopse Land Developers (Pvt) Ltd & Ors	2012 (2) ZLR 45 (H)
S v David	2012 (2) ZLR 53 (H)
Kingdom Calls (Pvt) Ltd v Sunseeker (Pvt) Ltd	2012 (2) ZLR 56 (H)
ZETDC v Ruvinga (1)	2012 (2) ZLR 61 (H)
S v L S (A Juvenile)	2012 (2) ZLR 70 (H)
S v Mhako	2012 (2) ZLR 73 (H)
Guard-Alert (Pvt) Ltd v Mukwekwezeke & Anor	2012 (2) ZLR 83 (H)
Kutsanzira v Master of the High Court	2012 (2) ZLR 91 (H)
Industry Pension Fund v United Refineries Ltd & Anor	2012 (2) ZLR 98 (H)
Masuku v Delta Beverages	2012 (2) ZLR 112 (H)
Mashavidze v A-G & Anor	2012 (2) ZLR 120 (H)
S v Babbage	2012 (2) ZLR 125 (H)
Mining Industry Pension Fund v DAB Mktg (Pvt) Ltd	2012 (2) ZLR 132 (S)
Maranatha Ferrochrome v Nyemba	2012 (2) ZLR 145 (S)
Swimming Pool & Underwater Repair (Pvt) Ltd & Ors v Rushwaya & Anor	2012 (2) ZLR 151 (S)

Crempton Trading (Pvt) Ltd v Matekenya	2012 (2) ZLR 161 (H)
Portnet Holdings (Pvt) Ltd v Maliseni	2012 (2) ZLR 168 (H)
Nehowa v Barep Investments (Pvt) Ltd	2012 (2) ZLR 176 (H)
Voteti Trading (Pvt) Ltd v Hancock & Anor	2012 (2) ZLR 182 (H)
Karimatsenga v Tsvangirai & Anor	2012 (2) ZLR 195 (H)
Rukuni v Min of Finance & Anor	2012 (2) ZLR 205 (H)
S v Mazangwa	2012 (2) ZLR 219 (H)
Tsvangirai & Anor v Mutevedzi NO & Anor	2012 (2) ZLR 224 (H)
Katsande v Grant	2012 (2) ZLR 231 (H)
S v Chuma & Anor	2012 (2) ZLR 237 (H)
Misi v Zimbabwe National Army	2012 (2) ZLR 241 (H)
S v Tapera & Ors	2012 (2) ZLR 246 (H)
Sibanda & Anor v Ochieng & Ors	2012 (2) ZLR 254 (H)
Ruvinga v ZETDC (2)	2012 (2) ZLR 276 (H)
Sheena Flowers (Pvt) Ltd & Ors v Commissioner-General, Zimbabwe Revenue Authority	2012 (2) ZLR 280 (H)
MDC & Anor v Mudzumwe & Ors	2012 (2) ZLR 287 (S)
M M Pretorius (Pvt) Ltd & Ors v Mutyambizi	2012 (2) ZLR 295 (S)
Zimbabwe Commercial Farmers' Union v Gambara	2012 (2) ZLR 299 (H)
Sanangura v Econet Wireless (Pvt) Ltd & Ors	2012 (2) ZLR 304 (H)
The President v Bhebhe & Ors	2012 (2) ZLR 323 (H)
Mpofu v Tevestrand Investments (Pvt) Ltd & Ors	2012 (2) ZLR 329 (H)
Hamtex Investments (Pvt) Ltd v King	2012 (2) ZLR 334 (H)
Maguwu v Co-Ministers of Home Affairs & Ors	2012 (2) ZLR 346 (H)
Kwaramba v Bhunu NO	2012 (2) ZLR 358 (S)
S v Isaac	2012 (2) ZLR 369 (H)

Johanne v Clarion Insurance Company & Ors	2012 (2) ZLR 372 (H)
Transport Operators Association of Zimbabwe v Minister of Transport & Anor	2012 (2) ZLR 378 (H)
Whitby v Whitby	2012 (2) ZLR 386 (H)
Church of the Province of Central Africa v Diocesan Trustees, Harare Diocese	2012 (2) ZLR 392 (S)
Mugadzaweta v Co-Mins of Home Affairs & Ors	2012 (2) ZLR 423 (H)
S v Chigogo	2012 (2) ZLR 429 (S)
Mutarisi v United Family International Church	2012 (2) ZLR 434 (H)
S v Mazambani	2012 (2) ZLR 444 (H)
Prize Commercial Holdings (Pvt) Ltd v Goldberg & Ors	2012 (2) ZLR 452 (H)
Dawson & Anor v Nerry Investments (Pvt) Ltd	2012 (2) ZLR 467 (H)
Mapingure v Minister of Home Affairs & Ors	2012 (2) ZLR 472 (H)
Redan Petroleum (Pvt) Ltd v Bioline Petroleum (Pvt) Ltd & Ors	2012 (2) ZLR 483 (H)
S v Chizhange	2012 (2) ZLR 489 (H)

© 2015 Juta and Company (Pty) Ltd.

Document 2 of 60

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2012/Volume 2/ANUEYIANGU v CHIEF IMMIGRATION OFFICER & ORS 2012 (2) ZLR 1 (S)

ANUEYIANGU v CHIEF IMMIGRATION OFFICER & ORS 2012 (2) ZLR 1 (S)

Citation 2012 (2) ZLR 1 (S)

Case No Judgment No. S-15-13

Court Supreme Court, Harare

Judge Chidyausiku CJ, Ziyambi J A, Garwe JA, Gowora JA and Omerjee AJA

Heard 5 July 2012

Judgment 5 July 2012

Counsel *L Mazonde*, for the appellant
M Chimombe, for the respondents

Case Type Civil appeal

Annotations No case annotations to date

Flynote

Appeal – *court's powers on appeal – appeal against order involving judicial discretion – limits on appeal court's powers to substitute its own discretion*

Immigration – *prohibited person – detention of – when justified*

D **Practice and procedure** – *affidavit – answering affidavit – further affidavit following answering affidavit – when may be filed – court's discretion – need for court to have all facts before it – court entitled to admit further affidavit*

Headnote

"It is not enough that the appellate court considers that if it had been in the E position of the primary court, it would have taken a different course. It must appear that some error had bee made in exercising he discretion. If the primary court acts upon a wrong principle, if it does not take into account some relevant consideration, them its determination should be reviewed and the appellate court may exercise its own discretion, in F substitution, provided always it has the materials for so doing" *(dicta per* Gubbay CJ in *Barros & Anor* v *Chimphonda* 1999 (1) ZLR 58 (S) at 62G-63A followed.)

In an appeal from an urgent application before the High Court for his release from custody, the appellant, a Nigerian citizen, averred that he was in Zimbabwe in terms of an investor permit, issued in May 2007. In G answer thereto, the first respondent replied hat this permit had expired in 2008 and had not been renewed. He alleged that the appellant had been residing in the country in terms of a provisional restriction notice which had also expired. The first respondent also alleged that the appellant had

previously been deported from Zimbabwe in 2005 and 2009 and was, A therefore, a prohibited immigrant. It was for these reasons that the first respondent submitted that the appellant was lawfully detained pending the final finalization of further inquiries. In his answering affidavit, the appellant had persisted in seeking an order of release from custody and, in particular, denied being deported in either 2005 or 2009. B

Thereafter, he had filed his heads of argument to which the first respondent replied. Attached to his heads of argument, however, the first respondent had appended a further and supplementary affidavit which he sought to leave to file so as to counter some of the averments made by the appellant in his answering affidavit. He did, however, admit therein that the allegation of a deportation in 2009 was an error. Not withstanding the C appellant's opposition, the judge *a quo* had admitted this supplementary affidavit and ruled that, having been deported in 2005, the appellant had become a prohibited person. Accordingly, the judge had dismissed the appellant's application.

On appeal and during argument before the Supreme Court, it was submitted D on behalf of the appellant that the judge *a quo* had erred in admitting the supplementary affidavit because, in appending it to his heads of argument, the first respondent had failed to comply strictly with r 235 of the High Court Rules 1971, which requires that, after the answering affidavit has been filed, no further affidavit may be filed without the leave of the court or of a judge. It was also submitted that at the time E of the appellant's arrest in February 2012, the first respondent had no reasonable suspicion that the appellant was not lawfully in Zimbabwe. In answer to the first of these points, it was submitted on behalf of the first respondent that the appellant had been at

liberty to apply for leave to file further supplementary papers so as to deal with any matter rising F in first respondent's supplementary affidavit. He had not chosen to do so.

Held, that the judge *a quo* had discretion to admit the supplementary affidavit in question and, in the exercise of that discretion, had done so. The fact that there had been no strict compliance with r 235 was of no great importance because in terms of r 4C the judge was permitted to condone any departure from the Rules. G

Held, further, that in the absence of any suggestion that the judge *a quo* had acted upon any wrong principle or misdirected himself, there was no basis upon which the Supreme Court could interfere with the exercise of his discretion, which, in any event, would appear to have been the correct one. The court *a quo* was clearly alive to the need to balance the competing interests of justice, on the one hand, and the appellant, on the H

Garwe JA

A other. The court was of the view that it was important that all the facts be placed before it so that it could make an informed decision. Despite the suggestion made by the first respondent that the appellant was at liberty to also apply for leave to file a further supplementary affidavit, the appellant did not request to do so, although he clearly could have done so. Had the appellant made such a request and the request been B turned down, then the appellant would have been on firmer ground in attacking the manner in which the court *a quo* exercised its discretion.

Held, further, dismissing the appeal with costs, that on the facts of the case, the first respondent did have a reasonable suspicion that the appellant was not lawfully in Zimbabwe. He was clearly a prohibited person as C defined in s 14(1) of the Immigration Act [*Chapter 4:02*] and his arrest and subsequent detention could not be said to have been unlawful.

Case referred to

Barros & Anor v Chimphonda 1999 (1) ZLR 58 (S)

Legislation considered D

Civil Evidence Act [*Chapter 8:01*], s 12(2)

High Court Rules 1971 (RGN 1047 of 1971, ss 4C & 235

Immigration Act [*Chapter 4:02*], ss 8(1) & 14(1)

Case information

L Mazonde, for the appellant

E *M Chimombe,* for the respondents

Judgment

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

F The appellant, who is a Nigerian national, filed an urgent chamber application before the High Court seeking an order for his immediate release from detention at the instance of the respondents. After hearing the parties, the High Court dismissed the application with costs. Against that decision the appellant noted an appeal to this court.

The background to this matter is as follows. The appellant, a Nigerian G national residing in Zimbabwe, was arrested by immigration officials on 6 February 2012 in terms of s 8(1) of the Immigration Act [*Chapter 4:02*] ("the Immigration Act") which allows an immigration officer to arrest any person whom he suspects on reasonable grounds to have entered or to be in Zimbabwe in contravention of the Act and to detain such person for a H period not exceeding 14 days for purposes of making enquiries on the status

Garwe JA

of such person. Following such arrest, the appellant filed an urgent chamber A application with the High Court, in which he challenged the legality of his arrest and sought an order for his immediate release from detention.

In his papers before the High Court, the appellant averred that he was in Zimbabwe on the basis of an investor permit and that he was a shareholder of Ideal Clothing Manufacturing (Pvt) Ltd, a company incorporated according B to the laws of Zimbabwe. The appellant attached as an annexure a copy of an investor permit issued on 8 May 2007 by the Zimbabwe Investment Authority. In the circumstances, he submitted that no reasonable suspicion for his arrest and detention had been shown and consequently an order for his immediate release was justified.

In his opposing papers in the court *a quo*, the first respondent opposed the C application on the basis, firstly, that although the appellant had previously been issued with an investor permit, this had expired in 2008 and had not been renewed and secondly, that the appellant had been staying in the country on the basis of a provisional restriction notice which had also since expired. Since the appellant had no valid residence permit allowing him to D stay in the country he was therefore out of status. The first respondent further averred that it had also been discovered that the appellant had previously been deported twice from Zimbabwe in June 2005 and June 2009 and was therefore a prohibited immigrant. Given these circumstances, it was the first respondent's submission that the appellant had been lawfully arrested and E detained pending finalisation of further inquiries.

In his answering papers, the appellant accepted that his investor permit had indeed expired in 2008 and that he only renewed it on 14 February 2012 shortly after his arrest. He also admitted that the provisional restriction notice allowing him to stay in the country had expired on 20 January 2012 but stated that efforts to extend the same were frustrated by the respondents F who insisted they wanted to know the outcome of his application for a permanent residence permit before any further extension. He denied having been deported either in 2005 or 2009.

What happened thereafter is pertinent as one of the grounds of appeal is predicated thereon. The appellant filed his heads of argument on or about 22 G February 2012. The first respondent on the other hand filed his heads on 27 February 2012. In the heads the first respondent sought the leave of the court to file a supplementary affidavit in order to deal with some of the averments made by the appellant in the answering affidavit. The first respondent also filed with the court the supplementary affidavit in question and in his notice of filing indicated that the affidavit was in response to new issues raised H

A which required clarification by him. In the main, the first respondent sought to produce a record in the Immigration Deportation Book to confirm that the appellant had been deported in 2005 and that when he came back into the country he was allowed entry in error, as it was not appreciated then that he was a prohibited person.

B At the hearing of the application, the court *a quo* admitted the supplementary affidavit. Having done so the court then accepted that the appellant, having been deported from Zimbabwe on 15 June 2005, had become a prohibited person. The court also found that the appellant had not been in possession of any legal document such as would allow him to remain in the country. In the circumstances, the court found that the arrest of the appellant and his C subsequent detention had been lawful. Consequently, the court dismissed the application with costs. It is against that order that the appellant appealed to this court.

In his notice of appeal, the appellant attacked the decision of the court *a quo* on several grounds, some of which are not clear. The grounds are: C

"1. The court *a quo* erred in allowing first respondent in filing supplementary affidavit (*sic*) which first respondent filed and issued on the 27th day of February 2012 before getting leave of the court to file the same on the 29th day of February 2012 which was the date of the hearing. This is contrary to the rules of the court *a quo*.

2. The court *a quo* further erred in allowing first respondent to file heads of E argument which were mainly premised on supplementary affidavit which were improperly filed by first respondent.

3. The first respondent (*sic*) erred in condoning the improper filing of supplementary affidavit by first respondent which affidavit raised completely new grounds.

4. The court *a quo* erred in dismissing appellant's application despite the fact F that first respondent lied to the court *a quo* that appellant was living on the strength of an expired investor permit which he

never bothered to renew.

5. The court *a quo* in dismissing appellant's application despite the fact that first respondent further lied to the court that appellant was arrested and detained because his provisional restriction notice expired and was out of status when Annexure "c" to first respondent's notice of opposition shows G that appellant was arrested on allegations of re-entering the country after having been deported. It therefore follows that first respondent never advised appellant of the charge of being out of status as required at law.
6. The court *a quo* erred in dismissing appellant's application despite the fact that first respondent's failed to produce evidence to substantiate the allegation that appellant was indeed interviewed and he admitted to the allegations of H having once been deported.

2012 (2) ZLR p6

Garwe JA

7. The court *a quo* further erred in dismissing appellant's application despite the A fact that first respondent lied to the court *a quo* that appellant was deported in June 2009 from Zimbabwe when there was overwhelming evidence that appellant was in Zimbabwe in 2009.
8. The court *a quo* erred in dismissing appellant's application despite the sudden change made by first respondent in the supplementary affidavit that he made a mistake in saying June 2009 instead he wanted to say 2005. (*sic*) B With respect, a supplementary affidavit can not be allowed to raise new grounds at law.
9. The court *a quo* erred in dismissing appellant's application despite the fact that first respondent lied to the court *a quo* that appellant had no legal standing to apply for a permanent residence permit despite the fact that first respondent made appellant to pay statutory fees for the same. C
10. The court *a quo* erred in dismissing appellant's application despite the fact that first respondent acknowledge (*sic*) in his paragraph 8 of the notice of opposition that they forced appellant to append his thumb to notification papers against the will of appellant. In essence, evidence gathered illegally for purposes of lawful process (*sic*) is inadmissible.
11. The court *a quo* erred in making a finding that applicant lied under oath and D stated or written (*sic*) that he had only entered Zimbabwe for the first time in 2006. This is a clear misdirection on the part of the court *a quo* given that applicant clearly stated in the affidavit that he first came to Zimbabwe in 2006 as an investor and not as an ordinary visitor. With respect, it is a matter of fact that applicant first came to Zimbabwe in 2006 as an investor.
12. The court *a quo* further erred both at law and facts (sic) when it relied on a photocopied immigration record that showed that applicant was deported E twice from Zimbabwe in 2005 and 2009 without being shown an original copy of the same. In essence, the photocopied immigration record shows 2005 and 2009 but first respondent did not sufficiently explain to the court *a quo* what led to the inclusion of 2009 as the year that applicant was also deported. With respect, no reasonable court applying its mind could rely on a photocopied record without having to demand sight of the original F one.
13. The court *a quo* further erred in making a finding that applicant's lawyer could not produce legal proof that applicant was never deported in 2005 when applicant's lawyer submitted that the passport used by the applicant had since been submitted to Nigerian authorities upon expiration and the same has since been retrieved from the same which clearly shows that G applicant was never deported on 15 June 2005."

The above grounds of appeal are repetitive in some instances and vague in others. They have not been set forth clearly and concisely and generally are inelegantly worded. This notwithstanding, it seems to me that the issues raised are quite narrow and that this appeal can be disposed of on a consideration of just two issues. These are firstly whether the court *a quo* properly admitted H

2012 (2) ZLR p7

Garwe JA

A the first respondent's supplementary affidavit which contained damning evidence against the appellant and, secondly, whether at the time of his arrest on 6 February 2012 the respondent had reasonable suspicion that the appellant was not lawfully in Zimbabwe. Put another way, the second issue is whether as at the date of his arrest on 6 February 2012 the appellant was B legally entitled to remain in Zimbabwe.

The first issue relates to the decision of the court *a quo* to admit the supplementary affidavit. In his heads of argument before this court, the appellant submitted that the first respondent did not, as required by the Rules, seek the leave of the court first before filing the supplementary affidavit. He

simply attached the supplementary affidavit to his heads of argument C and then referred to the contents thereof in order to answer legal argument raised by the appellant in his heads of argument. He further submitted that by attaching a copy of the immigration deportation record bearing the appellant's picture, the supplementary affidavit was raising new grounds justifying the detention of the appellant.

D It is correct that in terms of r 235 of the Rules of the High Court, once an answering affidavit has been filed, no further affidavits may be filed without the leave of the court or a judge. Perusal of the supplementary affidavit in question reveals that both in the notice of filing and in para 2 thereof the first respondent requested the court to allow him to file the supplementary affidavit E on the basis that the appellant had introduced a new matter in his answering affidavit and was persisting in his denial that he had previously been deported. He explained that the additional facts sought to be placed before the court had not been included in the opposing affidavit because the investigations had not been concluded and consolidated at the time. The affidavit also sought to clarify the position on the deportation of the appellant and to confirm that F he had been deported only once in June 2005 and that the reference in the opposing affidavit to 2009 as well was an error occasioned by the fact that the figure "5" in the year 2005 reflected in the records appeared like a "9". The first respondent also pointed out that the appellant was at liberty to also apply for leave of the court to file further supplementary papers to deal with G the issues raised in the supplementary affidavit.

It is common cause the appellant did not request for an opportunity to file his own supplementary affidavit to clarify the situation. In particular, he remained silent on the issue whether or not he had been deported in the year 2005.

In admitting the first respondent's supplementary affidavit the court *a quo* H remarked at p 3-4 of the judgment:

2012 (2) ZLR p8

Garwe JA

> "... Mr *Nyandoro* was at pains urging the court to disregard the first respondent's A supplementary affidavit in opposition of the application. The first respondent's intention therein was to rectify an earlier statement that the applicant had been deported twice before and to state that the correct position was in fact that he had been deported only once in the past. The effect of acceding to Mr *Nyandoro's* submission would be for the first respondent's case to be that the applicant had returned to Zimbabwe after having previously been deported from Zimbabwe B on two occasions and not once only. It was not stated what prejudice would be occasioned to the applicant by this correction of facts. It would appear that it could only occasion fairness, if at all, to the applicant, but certainly not prejudice. Either way, the applicant still faces the hurdle of the statutory onus placed on him to satisfy the first respondent that he is not a prohibited person."

One must be alive to the fact that the court had a discretion to admit C the supplementary affidavit in question. The court, in the exercise of its discretion, admitted the supplementary affidavit. The fact that there was no strict compliance with r 235 was really not that important for the reason that in terms of r 4C a court or judge is allowed to condone any departure from any provision of the Rules.

The circumstances in which an appellate court can interfere with the exercise D of a judicial discretion have been the subject of many a decision in this jurisdiction. Those circumstances are very narrow. As stated by Gubbay CJ in *Barros & Anor v Chimphonda* 1999 (1) ZLR 58 (S) at 62G-63A:

> "It is not enough that the appellate court considers that if it had been in the position of the primary court, it would have taken a different course. It must appear that some error has been made in exercising the discretion. If the primary E court acts upon a wrong principle, if it does not take into account some relevant consideration, then its determination should be reviewed and the appellate court may exercise its own discretion in substitution, provided always it has the materials for doing so."

In the present matter, the court *a quo* is accused of "erring" in admitting the supplementary affidavit. Nowhere is the suggestion made that the court F acted upon a wrong principle or that it has misdirected itself in any of the instances highlighted in *Barros & Anor v Chimphonda (supra*). No basis has been shown to justify interference by this court with the exercise of discretion by the court *a quo.*

In any event, even on the facts, the court *a quo* cannot be criticized for G admitting the supplementary affidavit. The court *a quo* was clearly alive to the need to balance the competing interests of justice on the one hand and the appellant on the other. The court was of the view that it

was important that all the facts be placed before it so that it could make an informed decision. Despite the suggestion made by the first respondent that the appellant was at liberty to also apply for leave to file a further supplementary affidavit, the H

Garwe JA

A appellant did not request to do so. Clearly the appellant could have done so. Had the appellant made the request and such request been turned down then the appellant would have been on firmer ground in attacking the manner in which the court *a quo* exercised its discretion.

I am satisfied that the court *a quo* did not misdirect itself and that there is B no basis upon which this court can interfere with the decision by the court *a quo* to admit the supplementary affidavit filed by the first respondent. The appeal on this basis must therefore fail.

Turning to the second issue that arises from the papers, that is, whether the respondents had reasonable suspicion to arrest and detain the appellant, it is clear from the papers that at the time of his arrest, the appellant was not C the holder of any permit such as would have allowed him to lawfully remain in the country. Although in his founding affidavit he stated that he had an investor permit and a provisional restriction notice, these had expired as at the date of his arrest. It is also clear that the appellant only acquired a new investor permit after his arrest on 14 February 2012. His provisional D restriction notice had expired on 28 January 2012. His previous residence permit had expired on 26 June 2011.

Most importantly, however, the respondents formed the impression that the appellant had previously been deported twice from Zimbabwe, although subsequent investigations revealed that he had been deported only once. The records from the Immigration Department clearly confirm, as found E by the court *a quo,* that the appellant had been deported from Zimbabwe in June 2005. He had thereafter managed to make his way back into Zimbabwe and in his application for a residence permit indicated that he first came to Zimbabwe in 2006 as an investor. He did not disclose the fact that he had been deported in June 2005.

F In his grounds of appeal the appellant attacked the court *a quo* for relying on the photocopies of immigration and prison records in coming to the conclusion that he had previously been deported. In my view, this submission is without merit. Section 12(2) of the Civil Evidence Act [*Chapter 8:01*] allows the admission of public documents which are proved to be true copies G or extracts or which purport to be signed and certified by a person who has custody of the originals. The immigration deportation record book was presented as a true copy of the original in the supplementary affidavit filed by Richard Tombandini, a principal immigration officer. The deportation register at the airport is also verified by Nyatwa Bunya, an immigration officer, in his affidavit. Further, in terms of s 40 of the Immigration Act, H any written statement under the hand of an immigration officer shall, in any

Garwe JA

proceedings under the Act or in any criminal proceedings arising from a A contravention of the Act be *prima facie* evidence of the facts stated therein. The photocopies of the immigration and prison records that were produced were therefore admissible.

The appellant was out of status at the date of his arrest and clearly was a prohibited person as defined in s 14(1) of the Act. In particular, s 14(1) B provides that any person who has entered or remained in Zimbabwe in contravention of the Act is a prohibited person. As found by the court *a quo,* his arrest and subsequent detention cannot, in these circumstances, be said to have been unlawful.

In the result, the court unanimously agreed that the appeal lacked merit and C the appeal was therefore dismissed with costs.

CHIDYAUSIKU CJ, ZIYAMBI JA, GOWORA JA and OMERJEE AJA concurred.

Hamunakwadi, Nyandoro & Nyambuya, appellant's legal practitioners D

Attorney Generals Office, firstrespondent's legal practitioners

* The court's decision was handed down on 7 July 2012 but its reasons were only made available in 2013; hence the judgment number. – *Editor*.

© 2015 Juta and Company (Pty) Ltd.

Document 3 of 60

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2012/Volume 2/S v KUROTWI & ANOR 2012 (2) ZLR 11 (H)

S v KUROTWI & ANOR 2012 (2) ZLR 11 (H)

Citation	2012 (2) ZLR 11 (H)
Case No	Judgment No. HH-285-12
Court	High Court, Harare
Judge	Bhunu J
Heard	2 July 2012; CAV
Judgment	6 July 2012
Counsel	*C Mutangadura*, with him *P Mpofu*, for the State *Mrs B Mtetwa*, for the first accused *L Uriri*, for the second accused
Case Type	Criminal trial
Annotations	No case annotations to date

Flynote

Criminal procedure – *trial – inspection in loco – purpose of – inspection necessary outside borders of Zimbabwe – court not thereby conducting trial outside borders*

Headnote

D The accused were charged with defrauding the Zimbabwe Government of a large sum of money, it being alleged that they perpetrated a series of fraudulent misrepresentations culminating in the signing of an inappropriate shareholder agreement to the loss and prejudice of the Government. Part of the *modus operandi* involved the crafting and E presentation of a due diligence report based on a visit to South Africa. It was alleged by the State (and denied by the accused) that the due diligence exercise purportedly conducted in South Africa was a sham and fictitious, calculated to mislead the Government into concluding a shareholder agreement. In a bid to discharge the onus on it, the State applied for an inspection *in loco* to be conducted in South Africa. The F application was opposed on various grounds: it was argued that it was unnecessary, unduly expensive and time wasting for the court to travel to South Africa when evidence could easily be led from witnesses to establish what the State was seeking to prove. The defence also argued that holding an inspection *in loco* in South Africa amounted to holding G a trial in a foreign land, the court's jurisdiction being limited to the territorial boundaries of Zimbabwe.

Held, that an inspection *in loco* is no more than the observation of evidence at the place where that evidence may be found. Such observation of the evidence does not convert into a trial of the issues before the court. The purpose of an inspection *in loco* is for the court to observe and H experience real evidence that cannot be brought to court as an exhibit.

Bhunu J

By applying for the court to go for an inspection *in loco*, the State was A merely inviting the court to go and view or look at the place in South Africa where certain events were said to have taken place. The State was not inviting the court to go and conduct a trial in South Africa.

Cases cited B

Electrical & Furniture Trading Co (Pvt) Ltd v M & N Technical Svcs (Zimbabwe) (Pvt) Ltd 1988 (2) ZLR 265 (H)

Tito & Ors v *Waddell & Ors* [1975] 3 All ER 997 (ChD)

Case information

C *Mutangadura*, with him *P Mpofu,* for the State

Mrs *B Mtetwa,* for the first accused C

L Uriri, for the second accused

Judgment

Bhunu J: The two accused persons are charged with fraud as defined in s 136 of the Criminal Law (Codification and Reform) Act [*Chapter 09:23*]. It is alleged that on various occasions during the period extending from 29 D March 2009 to 14 August 2009 they defrauded the government of Zimbabwe of two billion United States dollars.

The accused persons are alleged to have perpetrated a series of fraudulent misrepresentations culminating in the signing of an inappropriate shareholder agreement to the loss and prejudice of the complainant. Part of the *modus operandi* involved the crafting and presentation of a due diligence report E based on a visit to South Africa by the ZMDC Board Select Committee accompanied by its board secretary during the period extending from 4 to 6 August 2009.

The State now alleges that the alleged due diligence exercise purportedly conducted in South Africa was a sham and fictitious, calculated to mislead F the complainant into concluding a shareholder agreement. Both accused persons admit that the due diligence exercise was carried out during the period under review but deny that it was fictitious or a sham calculated to mislead as alleged by the State.

The crisp issue for determination is, therefore, whether or not the due diligence G exercise was fictitious or a sham, as alleged by the State. The matter to a large extent falls to be determined on the authenticity or otherwise of the due diligence exercise. As usual the onus is on the State to prove what it alleges beyond reasonable doubt. In a bid to discharge that onus the State has now applied for an inspection *in loco* to be conducted in South Africa. The application is opposed on various grounds. The defence contends that it is H

Bhunu J

A not necessary and unduly expensive and time-wasting for the court to travel all the way to South Africa when evidence can easily be led from witnesses to establish what the State seeks to prove, because it is admitted that the due diligence exercise was conducted. What is in dispute is the substance or authenticity of that exercise.

B They also argue that holding the inspection *in loco* in South Africa in fact amounts to holding a trial in a foreign land beyond the jurisdiction of this court, which is limited to the territorial boundaries of Zimbabwe.

In resolving this issue, it is incumbent upon the court to define the concept and purpose of an inspection *in loco*. In my view, an inspection *in loco* is exactly what it says, in the literal sense. The

noun "inspection" is derived C from the verb "inspect", which means, according to the *Collins Dictionary*, to "look carefully at, view closely and critically or to examine formally or officially". The word comes from the Latin word *inspicere* which means to look. Its synonyms are given as to "scrutinize, investigate or study".

Thus, by applying for the court to go for an inspection *in loco*, the State D is merely inviting the court to go and view or look at the place in South Africa where certain events are said to have taken place. By so doing, I do not understand the State to be inviting the court to go and conduct a trial in South Africa. If that were the case it would certainly have asked the court to go for a trial *in loco* in South Africa, which is not the case here.

E The issue as to whether or not this court has the jurisdiction to conduct an inspection *in loco* beyond the territorial boundaries of Zimbabwe was considered and answered in the affirmative by this court in *Electrical & Furniture Trading Co (Pvt) Ltd* v *M & N Technical Services (Zimbabwe) (Pvt) Ltd* 1988 (2) ZLR 265 (H). In that case Blackie J, after surveying a F number of case authorities and ventilating the law, had occasion to remark at p 273F-G (albeit *obiter*) that:

> "I respectfully agree with the conclusions reached by the learned judge, as to both the meaning of 'any place' and the evidential effect of what is seen in an inspection *in loco.* If I am able to go outside Zimbabwe to obtain evidence through my eyes, I see no reason why I should not do so through my ears."

G I am in total agreement with the learned judge's analysis of the law in this respect. In other words, an inspection *in loco* is no more than the observation of evidence at the place where that evidence may be found. Such observation of the evidence does not convert into a trial of the issues before the court.

The purpose and value of an inspection *in loco* was succinctly put when the H learned judge quoted the remarks of Megarry J in the English case of *Tito*

2012 (2) ZLR p14

Bhunu J

& Ors v *Waddell & Ors* [1975] 3 All ER 997 (ChD) at 1002. In that case A the learned judge observed that:

> "Denning LJ put the matter succinctly in an earlier case, *Goold* v *Evans & Co*, when he said: 'Speaking for myself, I think a view is part of the evidence, just as much as an exhibit… What a judge perceives on a view is itself evidence, in the same way as what he sees and hears in the courtroom. Just as a portable object may be brought into court and, being made an exhibit, become real evidence, B so if the judge duly views a place or object which cannot be brought into court that place or object provides real evidence through the medium of the judge's eyes, ears, touch, tongue or, as in one recent case before me nose."

Thus the purpose of an inspection *in loco* is for the court to observe and experience real evidence that cannot be brought to court as an exhibit. In this case, the State alleges that the fraud was perpetrated through the conduct C of a fake or fraudulent due diligent exercise allegedly carried out in South Africa. It is therefore necessary to visit the places to ascertain the authenticity of the disputed due diligence exercise.

The places allegedly visited during the course of the supposedly fictitious due diligence exercise cannot, however, be brought to court so, in the words of D State counsel Mr *Mutangadura,* "if the mountain cannot go to Mohammed, then Mohammed must go to the mountain". In other words, if those places cannot come to court, then the court must go to those places for the better carrying on of its functions.

Once the court has determined that it is necessary for it to go for an inspection *in loco*, it does not concern itself with the logistical and administrative issues E which are within the domain of the State which has called for the inspection *in loco*. It is for the State to make the necessary arrangements to facilitate the inspection *in loco*.

It is accordingly ordered that the application for an inspection *in loco* to be conducted in South Africa be and is hereby granted. F

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

Mtetwa & Nyambirai, firstdefendant's legal practitioners

Kantor & Immerman, second defendant's legal practitioners G

© 2015 Juta and Company (Pty) Ltd.

Document 4 of 60

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2012/Volume 2/CHADOKA v CHOMBO NO & ORS 2012 (2) ZLR 15 (H)

CHADOKA v CHOMBO NO & ORS 2012 (2) ZLR 15 (H)

Citation	2012 (2) ZLR 15 (H)
Case No	Judgment No. HH-287-12
Court	High Court, Harare
Judge	Mutema J
Heard	12 March 2012;16 March 2012;19 March 2012; *CAV*
Judgment	11 July 2012
Counsel	*M Mavhunga*, for the plaintiff *S Maphosa*, for the first and second defendants *T C Masawi*, for the third and fourth defendants
Case Type	Civil trial
Annotations	No case annotations to date

Flynote

Costs – *legal practitioner and client scale – when should be awarded – lay client – legally represented – proceedings reckless, frivolous and vexatious – costs on higher scale awarded*

D **Customary law** – *traditional leaders – appointment of – customary succession – unfettered discretion residing in President with regard to appointment of chiefs – President not obliged to follow customary principles of succession – headmen and village heads – nomination by chief – chief only required to nominate "suitable" person – no requirement to follow customary principles of succession – appointment by Minister or* E *Secretary – Minister or Secretary obliged to appoint person nominated by chief unless there are good reasons to the contrary*

Headnote

Historically, the African history of customary tree of succession, whether it be of a chief or headman, has always been oral tradition. Due to F incessant feuding, coupled with the concomitant difficulty – often an insurmountable hurdle – of proving it, most dynasties/families have of late seen the light and decided to keep updated written customary trees of succession. Given that the Mashona people have a complicated system of collateral customary succession and that their family trees are mostly by way of oral tradition, hence difficult to prove, they would be G well advised to always compile written family trees of succession to avoid the pitfalls associated with oral history that is passed from one generation to the next. With the dynamism of present day society, the oral traditions of yore with respect to customary principles of succession have since been obscured and blurred by current trends of doing things. H Also, those who aspire to become traditional leaders are well advised

to acquaint themselves with the relevant provisions of the Traditional Leaders Act [*Chapter 29*:*17*].

In the appointment of a chief, the President has an unfettered discretion and is required to only give due consideration to the prevailing customary principles of succession, if any, applicable to the community concerned. In the appointment of a headman and village head, the chief has an unfettered discretion as to whom he should nominate for appointment as a headman or village head, so long as that, person is suitable. "Suitable" means "suited to or for, well fitted for the purpose." The chief is not required to follow any principles of succession in selecting a headman. He is merely required to select a suitable person. The fact that there might be a more suitable person eligible for the position does not mean that the candidate he has selected is not suitable. The chief is not even required to hold meetings in the area to ascertain the views or wishes of the community. Once a person is nominated by the chief, the Minister is required to appoint that person as headman unless, in his opinion, there are good reasons to the contrary. The same principles apply *mutatis mutandis* to the nomination of a village head and that person's appointment by the Secretary.

Costs on the higher scale may be awarded when, by reason of special considerations arising either from the circumstances which gave rise to the action or from the conduct of the losing party, the court considers it just to ensure that the successful party will not be out of pocket. Where the plaintiff is a lay person but is represented by counsel who not only is presumed to know the law but who ought to have engaged on the necessary research, thereby preventing reckless, frivolous and vexatious proceedings, an award of costs on the higher scale would be justified.

Cases cited

Mahembe v Matambo 2003 (1) ZLR 148 (H)

Muwuungani v Min of Native Affairs 1957 R & N 298 (FS)

Nechavava v Min of Local Govt & Anor HH-125-93

Nel v Waterberg Landbouwers Ko-operatieve Vereeniging 1946 AD 597

Ruzane v Paradzayi & Anor 1991 (1) ZLR 273 (S)

Legislation referred to

Traditional Leaders Act [*Chapter 29:17*], ss 3(2), 8(2) & 11(2)

Case information

M Mavhunga, for the plaintiff

S Maphosa, for the first and second defendants

Mutema J

T C Masawi, for the third and fourth defendants

Judgment

Mutema J: This matter has its dispute steeped in oral African customary principles of succession concerned with the nomination and appointment of the fourth defendant as headman Mubaiwa, which the plaintiff is challenging, arguing that he is the rightful candidate to be declared headman of the Mubaiwa people.

As to be expected when it comes to oral tradition, the witnesses' evidence was lengthy. To regurgitate the evidence as it was narrated will confuse even the most avid reader. For the sake of clarity and brevity, it is sought to merely highlight the salient aspects of each witnesses' evidence.

[The learned judge the outlined the witnesses' evidence, and continued:]

I intend to resolve the dispute by analysing it under two heads, *viz.* the customary tree of succession and the Traditional Leaders Act [*Chapter 29*:*17*] ("the Act").

The Customary Tree of Succession

D Historically, the African history of customary tree of succession, whether it be of a chief or headman, has always been oral tradition. Due to incessant feuding, coupled with the concommitant difficulty – often an insurmountable hurdle – of proving it, most dynasties/families have of late seen the light and decided to keep updated written customary trees of succession.

E In the instant matter, the plaintiff and his witnesses were content to simply rely on oral tradition passed on from one generation to the next regarding the Mubaiwa headmanship. In the process, none of them could present a coherent genealogical history of the Mubaiwa headmanship succession tree.

To begin with, the plaintiff himself confessed, both in his evidence in chief and under cross-examination, that he knows little about the family F history of the Mubaiwa people. His narration of the Mubaiwa headmanship differs materially from that of his witness Rwavi. For instance, the plaintiff stated that his grandfather Chakanetsa Chawasemwa begot four sons, *viz.* Munzverenguni, Chawasemwa Chakanetsa, Chidenge and Chipango. Rwavi's evidence was that it was Ndoro who begot four sons, *viz.* Munzverenguni, G Chakanetsa, Chidenge and Chipango. Isaac Chigodora Zisamhi, the plaintiff's other witness, refrained from delving into the Mubaiwa tree of succession. The plaintiff was content to simply aver that, although he may not know the Mubaiwa succession tree, the fact remains that the headmanship is his. Without any basis whatsoever, he dismissed documentary evidence tendered by the fourth defendant extracted from the National Archives, alleging that H these documents were doctored by the fourth defendant. What the plaintiff

seemed not to appreciate is that courts of law base their findings on evidence A and not on mere allegations, let alone those that are unsubstantiated.

I found the plaintiff and Rwavi to be people who are brazen and economic with the truth, even in the face of tangible documentary evidence. They both denied that Munyanyi engaged Sawyer & Mkushi legal practitioners protesting Engelbert's installation as headman ahead of himself a "father" B to Engelbert, yet exh 8, a letter dated 31 May, 1976 addressed to the Wedza District Commissioner who received it on 13 June 1976, is unassailable. The plaintiff lied that when Engelbert was installed headman in 1973 he is the one who sat on the reed mat and paid the "*nhurura*" beast signifying that he was the next in line for the headmanship after Engelbert's tenure. He was asked how he could have done so ahead of his elder brothers and he said all his C elder brothers were dead. This was revealed to be false and he apologised. He also alleged that Munyanyi was not present at this ceremony because he was dead, yet exh 8 does not support his lie. He fared badly, giving conflicting versions, sometimes saying Munyanyi never protested against Engelbert's installation because it was Munyanyi himself who, due to old age, handed D over the entitlement to Engelbert or that he in fact attended Munyanyi's funeral before Engelbert's installation.

Both the plaintiff and Rwavi exhibited ignorance of the Mubaiwa genealogy, saying Ndoro was the founding father, that Ndoro and Zongoro were one person and that Tazviwana was founding father of the Mubaiwa headmanship and that Mushunje was the first headman Mubaiwa or that Munzverengwi and E Chakanetsa Chawasemwa never became headman Mubaiwa, yet they initially alleged that these two were the ones who earned the headmanship through their bravery at the Wedza Mountain. The fourth defendant's version of the Mubaiwa genealogy rings better than the plaintiff's and it is corroborated by documents kept at the National Archives. F

It is not enough for the plaintiff to simply proffer a bare allegation that the fourth defendant doctored the documentary evidence that he tendered in court. The allegation that the fourth defendant bribed the third defendant with a beast and goat to induce his nomination is not supported by any evidence or probability. I do not believe that a bribe of that nature would be paid at such G a public gathering. The fourth defendant's explanation pertaining to why those beasts were paid is credible – never mind that the third defendant had said the "insult" had been made before he was acting chief. This must have ben a memory lapse due to old age. Even assuming that the third defendant had been insulted before he became acting Chief Svosve, if he insisted that the fourth defendant should first pay him for that insult, one could not fault H

A the fourth defendant and alleged that he paid a bribe. Chiefs are sometimes wont to do that and subjects will not question the decisions.

Exhibits 3 and 4 show that Wenyika (of Chipango house) was appointed acting headman Mubaiwa. This goes to show that the Chipango house has always alternated the headmanship with the Munzverengwi house, if account B is taken of the fact that Regis Taderera (also of the Chipango house) was succeeded by Engelbert (of the Munzverengwi house). The bare allegation by the plaintiff that Wenyika wrested the headmanship with the connivance of Mashawani is difficult to swallow. A mere district commissioner's messenger during the colonial era could not surely manage to perform that alleged feat. Exhibit 9 shows the Mubaiwa headmanship succession tree showing how C the two houses had always been alternating in assuming that post.

There was also an allegation by the plaintiff that the third defendant never held any succession meeting before nominating the fourth defendant. The third defendant said he did convene the meetings and this was corroborated by the plaintiff's first witness, Rwavi, who said such meetings were convened D and the fourth defendant only attended the third meeting. Linked to this allegation was the contention by the plaintiff that the fourth defendant's nomination and appointment were uncustomary, because Englbert's "*kurova guva*" ceremony had not yet been held. This averment is of no moment if account is had of s 8(3) of the Act, which limits an acting headman's tenure E to a maximum of two years, after which a substantive headman must be appointed. *In casu* Isaac Chigodora Zisanhi (the plaintiff's second witness) acted as headman Mubaiwa for more than the statutory two year period, so there was nothing unprocedural in the third defendant's nomination and the first defendant's appointment of the fourth defendant as the next headman Mubaiwa even before the "*kurova guva*" ceremony had been conducted. F This statutory cap was put in place to plug abuse of a headman remaining in an acting capacity in perpetuity by failing to conduct the "*kurova guv*a" ceremony timeously within two years.

The Traditional Leaders Act

This is the Act which governs the appointment of headmen in this country. G Section 8(2) of the Act provides as follows:

> **"8 Appointment of Headman**
>
> (1) …
>
> (2) Before appointing any person as headman in terms of subsection (1), the Minister shall invite the chief concerned to nominate a *suitable* person for such H appointment and, unless in the *opinion* of the Minister there are good reasons

---

Mutema J

> to the contrary, the Minister shall appoint as headman *any person* so nominated A by the chief" (emphasis supplied).

Section 3 provides:

> **"3 Appointment of Chiefs**
>
> (1) …
>
> (2) In appointing a chief in terms of subsection (1), the President– B
>
> (a) shall give *due consideration to*–
>
> (i) the *prevailing customary principles of succession*, if any, applicable to the community over which the chief is to preside; and
>
> (ii) the administrative needs of the communities in the area concerned in the interests of good governance" (emphasis supplied). C

And in respect of village heads, s 11(2) of the Act provides:

> "(2) Before appointing any person as village head in terms of subs (1), the Secretary shall invite the headman concerned to nominate a person for appointment and, unless in the opinion of the Secretary there are good reasons to the contrary, the Secretary shall appoint as village head *any person* so nominated by the headman" (emphasis supplied). D

From the foregoing statutory provisions, the intention of the legislature can only be gleaned via the literal rule of statutory interpretation, for the words used are so clear and unambiguous that they admit of no other meaning on what needs to be considered in the appointment of aforementioned

traditional leaders. In the appointment of a chief, the President has an unfettered discretion E and is required to only give due consideration to the prevailing customary principles of succession, if any, applicable to the community concerned. In the appointment of a headman and village head, the Minister and Secretary, respectively, although not having the same unfettered discretion, are not required to give due consideration to the prevailing customary principles of succession. F

This foregoing interpretation is supported by the following case law:

In *Ruzane* v *Paradzai & Anor* 1991 (1) ZLR 273 (S) the appellant's counsel had submitted that the chief's appointment was in direct conflict with the views of the people on whose recommendation the appointment was based. G At p 280F-H Manyarara JA said:

> "I am quite unable to follow the logic of the submission. Section 3(2) of the Chiefs and Headmen Act 1982 provides that the President, in appointing a chief, 'should give due consideration to the customary principles of succession, if any, applicable to the community over which chief is to preside.' The clear meaning of this provision is that the President is required to 'give due consideration to the customary principles of succession,' not to follow them in making his choice." H

Mutema J

A The learned judge of appeal went on to quote Palley's *The Constitutional History and Law of Southern Rhodesia* at p 476 dealing with the principle under the African Affairs Act [*Chapter 228*] which the Chiefs and Headman Act repealed and substituted:

> "The Chiefs are Government officials, appointed in terms of s 4 and 17 of the African Affairs Act by the Governor. They hold office during pleasure, and B contingent upon good behaviour and general fitness. Although chiefs are envisaged as hereditary holders of the office, it is only official recognition that carried with it the title of Chief. In practice the Governor frequently appoints the person holding traditional title to the chieftainship, but this is not always done …"

See also *Muwuungani* v *Minister of Native Affairs* 1957 R & N 298 (FS) at C 300E which reads thus:

> "On a straightforward reading of this, the operative section of the Act, the Governor is entitled to exercise an unfettered judgment in the creation, amalgamation or subdivision of tribes. Section 10 of the African Affairs Act obviously implies that he shall have regard to native opinion and D native customary succession, as investigated by the Chief Native Commissioner. But, once the investigation has been made, he is free to act as he thinks best in the interests of good government of the natives."

Also, in *Nechavava* v *Minister of Local Government & Anor* HH-125-93 the court interpreted the provisions of ss 3 and 8 of the repealed Chiefs and E Headmen Act 1982, which were the same as the current ss 3 and 8 of the Traditional Leaders Act, at pp 6-7 as follows:

> "I agree with Mr *Mapfungautsi* that *s 8 of the Act gives the Chief an unfettered discretion as to whom he should nominate for appointment as a headman*, so long as that person is suitable. Suitable, according to the Oxford English Dictionary, means 'suited to or for, well fitted for the purpose.' *Once a person* F *is nominated by the chief the Minister is required to appoint that person as headman* unless in his opinion there are good reasons to the contrary. *Whereas s 3(2) of the Act provides that in appointing a chief due consideration must be given to the customary principles of succession, there is no similar requirement in s 8. It follows, therefore, that the chief is not required to follow any principles of succession in selecting a headman. He is merely required to select a suitable person.* The fact that there might be a more suitable person eligible for the position G does not mean that the candidate he has selected is not suitable. *The chief is not even required to hold meetings in the area to ascertain the views or wishes of the community.* If he fails to do so, however, the Minister may consider that there are good reasons for not appointing the person so nominated. In the case of headman Nechavava, however, the evidence establishes that chief Nyashanu did hold four meetings in the area to ascertain the wishes of the community. The H fact that members of the Chigweremba family boycotted the meetings cannot

---

Mutema J

> affect the issue. *There is no evidence that the second respondent was not a* A *suitable person.*
>
> In terms of s 8(2) of the Act, the first respondent was required to appoint the second respondent as headman unless he considered that there were good reasons why the second respondent should not be appointed. The first respondent could have refused if he felt that the applicant should have been appointed as he had acted in the position for 15 years without any complaints or that the second B respondent was not eligible because he came from the Mupudzi family and not the Chigwerembe family. He did not consider that there was any good reason for refusing to accept the nomination by Chief Nyashanu. *That discretion lies with the first respondent and not with the High Court*. Even if the court were satisfied that the

applicant was the most suitable candidate, it could not tell the Minister that there were good reasons for not appointing the second respondent" C (emphasis supplied).

It goes without question therefore that both statute and case law on the subject are in congruence that the Minister has an obligation to appoint a suitable person who has been nominated as headman by the chief. The chief has unfettered discretion in nominating the suitable person for such D appointment. *In casu*, there was no shred of evidence adduced showing that the fourth defendant was not a suitable person to hold the post of headman Mubaiwa. Out of an abundance of caution, perhaps, the chief went out of his way to convene three meetings prior to his nominating the fourth defendant as suitable. Although not a requirement, this means that the fourth defendant's nomination and subsequent appointment as headman Mubaiwa was done E pursuant to the traditional customs and principles of succession as he was the one next in line to succeed as *per* the succession tree compiled by the Mubaiwa elders in 1972 which was produced as exh 9. In view of what the Act prescribes, following the customary principles of succession was just an over-kill. F

In closing, it behoves me to utter the following strictures. Given that the Mashona people have a complicated system of collateral customary succession and that their family trees are mostly by way of oral tradition, hence difficult to prove, they would be well admonished, to always compile written family trees of succession to avoid the pitfalls associated with oral history that is G passed from one generation to the next. With the dynamism of present day society, the oral tradition of yore with respect to customary principles of succession has since been obscured and blurred by current trends of doing things. Also, those who bear the thought of aspiring to become traditional leaders are well advised to acquaint themselves with the relevant provisions of the Traditional Leaders Act [*Chapter 29*:*17*]. H

2012 (2) ZLR p23

Mutema J

A In praying for dismissal of the plaintiff's case, all the defendants urged the court to award them costs on a legal practitioner-client scale. The justification for the prayer of costs on that high scale was that the plaintiff ought to have taken the simple step of checking and verifying records with the National Archives on payment of $1 per day and would have spared all concerned valuable time and money.

B The leading judicial authority on costs is *Nel v Waterberg Landbouwers Ko-operatieve Vereeniging* 1946 AD 597 at 607 where Tindall JA (as he then was) said:

> "The true explanation of awards of attorney and client costs not authorized by statute seems to be that, by reason of special considerations arising either from the circumstances which gave rise to the action or conduct of the losing party, C the court in a particular case considers it just, by means of such an order, to ensure more effectively than it can do by means of a judgment for party and party costs that the successful party will not be out of pocket in respect of the expense caused to him by the litigation."

See also *Mahembe* v *Matambo* 2003 (1) ZLR 148 (H); and L Rubin *Law of* D *Costs in South Africa* (Juta & Co 1949) p 190.

The plaintiff is a lay person who can respectfully be described as not being sophisticated. But sight must not be lost of the fact that he engaged counsel, who is not only presumed to know the law, but ought to have embarked upon the necessary research at the relevant institutions. Had that been done, these reckless, vexatious and frivolous proceedings would not have put the E defendants out of pocket in respect of the expense occasioned to them by the litigation. Under cross-examination, the plaintiff conceded that he had no case against the first and, second defendants and apologised for joining them in this suit. He said he sued them only because he wanted them to know what the fourth defendant had done to him. But you do not tell a person what you want the person to know by suing that person. At least regarding F the first two defendants, the proceedings were also malicious.

In the result, I make the following order:

(a) that the plaintiff's claim be and is hereby dismissed; and

(b) that the plaintiff shall pay the defendants' costs on the scale of legal G practitioner and client.

Mavhunga & Sigauke, plaintiff's legal practitioners

Attorney General's *Office*, first and second defendants' legal practitioners

H *Masawi & Partners*, third and fourth defendants' legal practitioners

© 2015 Juta and Company (Pty) Ltd.

Document 5 of 60

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2012/Volume 2/S v MUROMO & ORS 2012 (2) ZLR 24 (H)

S v MUROMO & ORS 2012 (2) ZLR 24 (H)

Citation	2012 (2) ZLR 24 (H)
Case No	Judgment No. HH-286-12
Court	High Court, Harare
Judge	Mathonsi J
Heard	11 July 2012
Judgment	11 July 2012
Counsel	Details not supplied
Case Type	Criminal review
Annotations	No case annotations to date

Flynote

Criminal procedure – *charge – prosecutor's duty to prefer appropriate charge – charging accused with culpable homicide when murder was clearly the appropriate charge – a dereliction of duty on part of prosecutor*

Criminal procedure – *trial – stopping of – lesser charge brought when facts showed that more serious charge appropriate – duty of magistrate to* D *stop trial and refer matter to Attorney-General*

Legal practitioner – *prosecutor – dominus litis – limits to – lesser charge brought when facts showed that more serious charge appropriate – court's power and duty to ensure that trial proceeds on appropriate charge*

Legal practitioner – *prosecutor – duty – to ensure that correct charges are* E *brought against offenders – bringing lesser charge when serious one appropriate – failure of duty on part of prosecutor*

Headnote

The accused were charged with and convicted of culpable homicide in the magistrates court and sentenced to terms of imprisonment. The trial F took place over ten years after the killings took place. The killings were politically motivated and the beatings which lead to the deaths of the victims were committed right under the noses of police officers. One of the victims actually ran from his assailants to hide behind a police officer. This did not deter the assailants from dragging him from there G and severely assaulting him inflicting fatal injuries. When the assailants were working on their second victim, a hapless young woman whose braids they had pulled off her head, and they were assaulting her with logs even on her private parts, police officers arrived. The assailants were even urinating in her month. This did not stop the savagery as they went further to dump her lifeless body at her homestead. H

Mathonsi J

A *Held*, that it was amazing that, armed with these facts, the prosecution decided to prefer lesser charges of culpable homicide when it should have charged the accused persons with murder. Although the prosecutor is *dominus litis*, he has a responsibility, delegated to him by the Attorney-General, to discharge a public function of prosecuting offenders. In doing so, the prosecutor must ensure that the correct charges are preferred against B offenders. He fails in his duty if, for some unknown reason, he trivialises the offences by opting for lesser charges where serious ones should be levelled against the offender.

Held, further, that the magistrate, as the trier of facts with the objective of doing justice between man and man, should not have allowed the C prosecutor to abuse his prosecutorial mandate in this way. A magistrate has a responsibility to ensure that suitable charges are preferred against accused persons who appear before him. He must prevent the prosecutor from proceeding on a lesser charge where justice clearly requires that a more serious charge be preferred. Here, the magistrate should have realised that the facts pointed to a charge of murder and that prosecution D on charges of culpable homicide was a sheer dereliction of duty on the part of the prosecution. He should have stopped the trial in terms of s 54 of the Magistrates Court Act [*Chapter 7:10*] and referred the matter to the Attorney-General.

Held, further, that the result was that the offences committed were trivialised and the outcome offended all sense of justice.

Cases referred to E

S v Sabawu 1999 (2) ZLR 314 (H)

S v Thebe 2006 (1) ZLR 208 (H)

Judgment

Mathonsi J: The impunity of a cabal of 13 political zealots, the complicity F of law enforcement agents, the lamentable misuse of the prosecutorial authority bestowed on public prosecutors and the lack of interest shown by the trial court, all rolled together, is the epitome of all that should not happen in our criminal justice delivery system. This matter is a living example of an injustice allowed to take root because of a serious dereliction of duty by those tasked with the protection of law abiding citizens of this country and G the punishment of offenders without fear or favour.

A group of political activists were camped at a secondary school in rural Gokwe in December 2001 conducting all night political activities during which people were forced to attend and sing throughout the night. The group would target perceived political opponents and severely assault them for belonging H to a political party opposed to theirs. This way Rambisai Nyikadzinashe, a

---

Mathonsi J

woman from Tasiyana village under Chief Jiri in Gokwe South and Shepherd A Tigere of Dera Village under Chief Nemangwe in Gokwe South, who had been employed as a bus conductor by Mavesere Bus Service, were severely assaulted by this group on 23 December 2001, sustaining injuries from which they later died.

Although the assaults were perpetrated in broad daylight by named assailants B in the full view of police officers, only the two accused persons were prosecuted, more than 10 years after the commission of the offences. The rest of the assailants are said to be still at large. No explanation is given for failure to bring them to trial and why it took so long to prosecute the matter.

As if that was not enough, it is unbelievable that the prosecution elected C to prefer charges of culpable homicide when even the facts relied upon by the prosecution suggested that more serious charges of murder should have been preferred.

The two accused persons were arraigned before a regional magistrate at Gokwe on 14 May 2012 facing two counts of culpable homicide. According to the charge sheet, in count 1 it is alleged that on 23 December 2001 at D Manoti Business Centre Gokwe South, they unlawfully assaulted Rambisai Nyikadzinashe, using whips, chains, knife, sticks and logs all over the body and on her private parts, thereby inflicting injuries from which she died on 24 December 2001.

In count 2, it is alleged that they unlawfully assaulted Shepherd Tigere, using E whips, chains, knife, sticks and logs all over the body, thereby inflicting injuries from which he died on 3 January 2002 at Chitungwiza Hospital.

The State outline presented to the trial court reads as follows:

"COUNT ONE

1. The deceased is Rambisai Nyikadzinashe of village Tasiyana Chief Jiri F Gokwe South and at the time she met her death, she was staying at Manoti Centre Gokwe South.
2. Accused number one, James Muromo, is a male adult residing at village Mudhando Chief Mkoka Gokwe South.
3. Accused number two, Zebron Matarirano, [is] a male adult residing at G village Matarirano Chief Mkoka Gokwe South.
4. On 23 December 2001 the two accused persons in the company of other co-accused persons who are still at large proceeded to the now deceased Rambisai Nyikadzinashe's homestead and they force-marched her to a secluded place. They accused the now deceased of supporting the Movement of the Democratic Change (*sic*) and as such ordered her to surrender all items in her possession belonging to that party. H

Mathonsi J

5. The A now deceased denied any link with the party and the accused started assaulting the deceased. James Muromo and another co-accused persons (*sic*) pulled deceased's legs apart while Zebron Matarirano assaulted her with sticks on her private parts and all over her body.
6. The deceased was assaulted up to the time she fell unconscious, the accused person and co-accused carried her back to her homestead where they dumped B her in the kitchen hut.
7. The following morning two local persons, namely, Chiedza Zungunde and Chiedza Chigombe, were sent by accused and co-accused to check whether deceased was still alive. The deceased was found dead.
8. Matter was then reported to the police who attended the scene. C
9. Accused acted unlawfully.

COUNT TWO

1. The deceased is Shepherd Tigere of village Dera Chief Nemangwe Gokwe South and at the time he met his death he was employed by Mavesere bus company as a conductor.
2. The accused persons are as per count one above. D
3. On the same date as in count one above, a Mavesere bus in which the deceased was part of the crew arrived at Manoti Business Centre. All people that were in the bus were ordered to disembark. The accused persons and co-accused who are still at large quizzed the deceased accusing him of being in love with Rambisai Nyikadzinashe and also being a member of Movement of Democratic Change (*sic*). E
4. The accused persons and co-accused who are still at large started assaulting the deceased with fists. The deceased was manhandled and force-marched to a secluded place where the accused and co-accused who are still at large took turns to assault him with sticks and chains, the deceased was assaulted up to the stage where he became unconscious.
5. The deceased was ferried by the accused persons to the bus. The bus driver F was ordered to drive the bus to Kana Mission Hospital.
6. The deceased was rushed to Gokwe Hospital where he was further transferred to Chitungwiza Hospital, the deceased passed away on 3 January 2002.
7. A post mortem was carried out on the body of the deceased and the post mortem report may be produced before court as an exhibit. G
8. Accused person acted unlawfully."

These are very serious allegations and the facts relied upon by the prosecution suggest that the deceased persons were subjected to gang attacks with an assortment of weapons ranging from sticks to chains. The assault on Rambisai was also directed to her private parts after her legs were pulled apart. Both H were assaulted until they lost consciousness.

Mathonsi J

It is therefore amazing that, armed with these facts, the prosecution decided A to prefer lesser charges of culpable homicide when it should have charged the accused persons with murder. Granted, the prosecutor is *dominus litis*, but he has a responsibility delegated to him by the Attorney-General, to discharge a public function of prosecuting offenders. In doing so, the prosecutor must ensure that the correct charges are preferred against offenders. He fails in B his duty if, for some unknown reason, he trivialises the offences by opting for lesser charges where serious ones should be levelled against the offender.

For his part, the magistrate, as the trier of facts with the objective of doing justice between man and man should not allow the prosecutor to abuse his prosecutorial mandate in this way. The magistrate has a responsibility to ensure that suitable charges are preferred against accused persons who appear C before him. The magistrate must prevent the prosecutor from proceeding on a lesser charge where justice clearly requires that a more serious charge be preferred.

I associate myself fully with the words of Cheda J in *S* v *Thebe* 2006 (1) ZLR 208 (H) at 209A-C that: D

> "While it is part of our criminal procedure that the State is *dominus litis*, this rule is not absolute. The trial court is a trier of facts whose main object is to do justice between man and man. It therefore has inherent powers to ensure that suitable charges are preferred against those who appear before it. It is, therefore, within its power to prevent the State from proceeding with the prosecution on a lesser charge where justice clearly requires a more serious one. E
>
> The reason is simply that where the State fails to prove the serious charge, the court in most cases, where provided, can always convict on a lesser charge. It is therefore, the duty of every judicial officer to guard against the pitfalls of being misled by a prosecutor who opts for a lesser charge thereby avoiding the rigours of engaging in a fully fledged trial."

A judicial officer should be a political neutral who should be unwavering F in protecting innocent citizens and ensuring that those who offend the law are adequately punished without fear or favour.

It should have dawned on the trial magistrate, the moment the above facts were presented to him, that the prosecutor was proceeding on a wrong charge. He should have realised that these facts pointed to a charge of murder and G that prosecution on charges of culpable homicide was a sheer dereliction of duty on the part of the prosecution.

If the trial magistrate entertained any doubt as to the appropriateness or otherwise of murder charges, surely such doubt should have been wiped out the moment evidence was presented on behalf of the State. The trial court accepted as credible the following evidence given by Peter Sibanda: H

2012 (2) ZLR p29

Mathonsi J

A [*The learned judge then recounted the evidence and continued*:]

The evidence of Peter Sibanda was corroborated in material respects by that of another state witness, Chiedza Chigombe.

I have stated that it was a shameful dereliction of duty for the prosecution to prefer culpable homicide charges against accused persons when armed with B such evidence. The trial magistrate should not have allowed such injustice to perpetuate. I am in agreement with the pronouncement of Chatikobo J in *S* v *Sabawu* 1999 (2) ZLR 314 (H) at 317D where the learned judge said:

> "These courts have on numerous occasions implored prosecutors to exercise care when preferring charges so as to ensure that the correct charges are put to offenders. Magistrates for their part should not accept without question charges C which are not consistent with the evidence put before them. If it occurs to the magistrate during the course of the trial that the evidence established a more serious offence than the one brought against the accused, he or she should stop the trial in terms of s 54 of the Magistrates Court Act [*Chapter 7:10*] and refer the matter to the Attorney-General."

The magistrate should have stopped the trial and referred the matter the D moment the evidence which I have reproduced above was placed before him. He did not. Instead he allowed himself to be used as a vehicle of this facade, this charade of a criminal trial.

If I had any doubts that this trial was a charade, such doubts are eliminated completely by the conduct of the public prosecutor in failing, without proferring any reason whatsoever, to produce the post mortem report for E Rambisai. He only produced the post mortem report for Shepherd and kept quiet about the report for count 2.

Here is a woman who was bludgeoned in broad daylight, her body dumped in a kitchen hut at her homestead and her assailants made sure she was dead when, the following morning, they sent Chiedza Chigome and other girls F to check if indeed she was dead. When they confirmed she was dead the police were called and attended the scene. One can only assume that a post mortem was performed on her and a report compiled. Why then was it not produced in court?

In his judgment the magistrate ruled in respect of count 1 as follows:

> " G In the present case I am satisfied that all the essential elements of this offence have been satisfied, but however the State did not tender the post mortem report in respect of the first count involving the deceased Rambisai Nyikadzinashe. This omission on its own makes it difficult for the court to conclude that the deceased in count 1 died as a result of the assaults by the accused. It is against this background that the court will proceed to return a verdict of not guilty in respect of count 1 since the State has failed to establish the link between the H assault and her death."

2012 (2) ZLR p30

Mathonsi J

This, despite the fact that in terms of s 275 as read with the fourth schedule A to the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] assault is a permissible verdict on a charge of culpable homicide. The magistrate accepted the credible evidence that the accused person assaulted the deceased in count 1. For that reason, even with the inexplicable exclusion of the post mortem report, at the very least the court should have convicted the accused B person of assault in count 1.

Instead, after the State withdrew, after plea, charges against accused 2, the court acquitted accused 1 of count 1 and convicted him on count 2 and sentenced him to nine years' imprisonment, of which three years were suspended on the usual conditions, leaving him with an effective sentence of six years.

That outcome cries out to the sky for intervention because it is a glaring C absurdity. The magistrate does not have jurisdiction to try murder cases. He should have referred the matter to the Attorney-General for murder charges to be preferred at the High Court.

I am now faced with a record where the offences committed were trivialised and the result offends all sense of justice. Unfortunately, in terms of s 29(2) of D the High Court Act [*Chapter 7:06*], I cannot even substitute a stiffer penalty.

The circumstances of this case are an indictment of our criminal justice system. Gruesome offences were committed right under the noses of police officers. In fact, one of the victims actually ran from his assailants to hide behind a police officer. This did not deter the assailants from dragging him E from there and severely assaulting him inflicting fatal injuries. When the assailants were working on their second victim, a hapless young woman whose braids they had pulled off her head and they were assaulting her with logs even on her private parts, police officers arrived. They were even urinating in her month.

This did not stop the savagery, as they went further to dump her lifeless F body at her homestead. Although the assailants are known, were mentioned by name, and the police officers witnessed the assault only to plead with the criminals to release the victims, we are told, more than ten years after the victims met their painful death, that the "co-accused persons are still at large." How can they be at large when the police officers witnessed the G assault? Why did they not arrest them then and there? Why did it take such a long time to even commence this excuse of a trial?

It really leaves a sour taste in the mouth, as it suggests that the police just stood idly by as innocent victims were bludgeoned to death in their full view. The assailants were then allowed to walk free. In my view, the police should do a lot of soul searching if they are to sustain any credibility in the H

2012 (2) ZLR p31

Mathonsi J

A eyes of those whose safety and wellbeing they are sworn to safeguard. The same can be said of the prosecution which did not acquit itself well in these proceedings and one would not be judging them harshly at all by saying that they not only trivialised the offence but at times appeared to protect the accused persons, thereby showing no respect whatsoever for the sanctity of human life.

B I conclude therefore that these proceedings were not in compliance with real and substantial justice. I cannot confirm them and accordingly withhold my certificate.

© 2015 Juta and Company (Pty) Ltd.

Document 6 of 60

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2012/Volume 2/DOMBODZVUKA v CMED (PVT) LTD 2012 (2) ZLR 32 (S)

DOMBODZVUKA v CMED (PVT) LTD 2012 (2) ZLR 32 (S)

Citation	2012 (2) ZLR 32 (S)
Case No	Judgment No. S-31-12
Court	Supreme Court, Harare
Judge	Omerjee AJA
Heard	12 July 2012
Judgment	12 July 2012
Counsel	*J S Mandizha*, for the applicant *M Kamdefwere*, for the respondent
Case Type	Chamber application
Annotations	No case annotations to date

Flynote

Practice and procedure – *res judicata – application for condonation of late noting of appeal and for extension of time – application heard by one judge and granted – applicant then failing to comply with rules regarding noting of appeal – appeal accordingly a nullity – further application made – such application dismissed – dismissal not nullifying earlier* D *order – no further application possible*

Headnote

The applicant had purported to note an appeal against a judgment of the Labour Court. He was out of time so he applied to the Supreme Court for condonation of the late noting of the appeal and for an extension of E time. The application was granted by a Supreme Court judge in chambers, it being ordered that the applicant should file his notice of appeal and grounds of appeal within five days of the granting of the application. He noted an appeal and the matter was set down for hearing. At the hearing, the respondent pointed out that the applicant had failed to comply with the requirement that the notice be served on the Registrar of the Labour F Court. The matter was struck off on those grounds. Two days later, having regularised matters, the applicant again applied to the Supreme Court for condonation and an extension of time. The case was set down as an unopposed matter. A different judge, in chambers, eventually dismissed the application on the grounds that there were no prospects of success. G

Several months later the applicant made yet another application for condonation and an extension of time. The applicant said that he needed clarity as to whether there were prospects of success,

since there were two "conflicting" decisions of the court on this aspect. He submitted that the second judge had erred and misdirected himself by dismissing the second application for condonation and an extension of time, when the H

Omerjee AJA

A first judge had earlier acceded to a similar application on the same issue, that is, whether or not there were any prospects of success on appeal.

Held, that the effect of the judgment of the second judge was not to nullify the earlier order, because that earlier order was no longer operational. The first judge had ordered the applicant to file a notice and grounds of appeal within five days of the date of the order. The applicant failed B to comply with that order. The notice of appeal that was filed by the applicant was not only invalid but it was a nullity. That is the reason why the appeal was struck off the roll. As a result of such failure to comply by the applicant, there was no appeal before the court.

Held, further, that a fatally defective compliance with the rules regarding the C filing of appeals cannot be condoned or amended. What should actually be applied for is an extension of time within which to comply with the relevant rule. The only way this matter could be brought back to court is through a fresh application for condonation and an extension of time. This is what the applicant did. That application was placed before the second judge and was dismissed. This was a case where the principle D of *res judicata* applied. The matter could not be heard again.

Cases cited

de Kuszaba-Dabrowski Uxor v Steel NO 1966 RLR 60 (A)

Hattingh v Pienaar 1977 (2) SA 182 (O)

E *Jensen v Acavalos* 1993 (1) ZLR 216 (S)

O'Shea v Chiunda 1999 (1) ZLR 333 (S)

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

Legislation considered

Supreme Court Act [*Chapter 7:13*], s 26

F Supreme Court (Miscellaneous Appeals and References) Rules, 1975 (RGN of 1975), r 4

Case information

J S Mandizha, for the applicant

M Kamdefwere, for the respondent

Judgment

G **Omerjee AJA**: This is an application for condonation for the late noting of appeal and extension of time within which to note an appeal.

The background relevant to the determination of this matter is as follows: In July 2009, the applicant purported to note an appeal to the Supreme Court against a judgment of the Labour Court. On 30 October 2009 the applicant H made an application for condonation for late noting of appeal and extension

Omerjee AJA

of time within which to note an appeal in this Court. The application was A granted by Ziyambi JA on 21 December 2009. The order given reads as follows:

"IT IS ORDERED THAT:

1. The applicant be and is hereby granted leave to note an appeal against the entire judgment of the Honourable B T Chivizhe President of the Labour Court under Case No; LC/H218/2008 dated 24 February 2009 and extension B of time within which to appeal.

2. The applicant shall file his notice and grounds of appeal within 5 days of the date of this order".

The applicant proceeded to note his appeal. The appeal was set down for hearing on 16 March 2010. On that day the respondent raised a point *in limine* to the effect that there was no proper appeal before the court as the C applicant had failed to comply with the rules of this court, in particular rule 4 (1) of the Supreme Court (Miscellaneous Appeals and References) Rules, 1975. This rule provides that the notice of appeal shall be served upon the Labour Court Registrar. Such service as required was not done and as a result the matter was struck off the roll for non-compliance with this particular D rule. At that stage there was no proper appeal pending before this court.

On 18 March 2010, after having regularized the defects in his notice of appeal, the applicant approached this court for the second time, with an application for condonation for late noting of appeal and extension of time within which to note an appeal. The respondent opposed the application but E filed its notice of opposition out of time.

The applicant's application was then set down for hearing on 20 October 2010 before Cheda AJA as an unopposed matter. The matter proceeded on that day and judgment was reserved. It was then delivered on 30 August 2011. It was on that day that the applicant's application for condonation for late noting of appeal and extension of time within which to note an appeal was F dismissed. Cheda AJA went further and held that there were no prospects of success on appeal. In dismissing the application, the learned judge placed reliance on the principles outlined in *de Kuszaba-Dabrowski et Uxor v Steel NO* 1966 RLR 60 (A).

Aggrieved by the decision of Cheda AJA, the applicant, on 1 June 2012, made G another application for condonation for late noting of appeal and extension of time within which to note an appeal for the third time. The application was placed before me. The application was opposed. The applicant filed his heads of argument on 22 June 2012. The respondent did not file any heads of argument. Mr *Kamdefwere,* for the respondent, submitted that he had briefed an advocate who was supposed to draft heads of argument and file H

Omerjee AJA

A them, but the advocate had failed to do so. Mr *Kamdefwere* apologised and stated that he would present oral submissions.

At the commencement of the hearing, Mr *Mandizha,* for the applicant, was asked as to whether or not the application filed ought to be heard by a single judge, sitting in chambers or by three judges in open court. Following B consultations with counsel for respondent, Mr *Mandizha* indicated that the matter should be heard in chambers before a single judge. Mr *Kamdefwere* agreed with this approach.

The question now before me is whether there is any law that provides for such an application to be made. If there does exist such legal authority, then the next issue is whether or not Cheda AJA had dealt with the merits of the C application.

Mr *Mandizha* submitted that there was no law upon which this application was based. He said that he required clarity as to whether or not, the applicant had prospects of success on appeal since there are two "conflicting" decisions of this court on this aspect. He made reference to the decision by Ziyambi D JA on 21 December 2009 and the other by Cheda AJA on 30 August 2011. He submitted that Cheda AJA erred and misdirected himself by dismissing the second application for condonation and extension of time within which to appeal, when Ziyambi JA had earlier acceded to a similar application.

The applicant, in this application, is asking me to overturn the findings of E Cheda AJA that the appeal has no prospects of success. The applicant is not clear whether the application before me is for review or is an appeal.

Section 26 of the Supreme Court Act [*Chapter 7:13*] provides as follows:

> **"26. Finality of decisions of Supreme Court**
>
> (1) There shall be no appeal from any judgment or order of the Supreme Court. F
>
> (2) The Supreme Court shall not be bound by any of its own judgments, rulings or opinions or those of any of its predecessor".

Cheda AJA had determined that there are no prospects of success on appeal even if the application was granted. The applicant in his affidavit avers that the latest judgment delivered by Cheda AJA contradicts an earlier judgment of Ziyambi JA on the same issue that is whether or not there are any G prospects of success on appeal. Both parties have agreed that, in dismissing the application, Cheda AJA was not bound by the decision of Ziyambi JA.

There is no written judgment that was handed down by Ziyambi JA; only an order was granted. There are no written reasons for the order. It is, however, clear from the judgment delivered by Cheda AJA that the learned judge H consciously considered whether the applicant had any prospects of success

---

2012 (2) ZLR p36

Omerjee AJA

on appeal. The learned judge dealt with this issue at length and came to A the conclusion that the applicant had no prospects of success, even if the application for condonation was granted. In my view, the judgment delivered by Cheda AJA does not contradict the order granted by Ziyambi JA.

The effect of the judgment of Cheda AJA was not to nullify the earlier order granted by Ziyambi JA because that earlier order was no longer operational. B Ziyambi JA had ordered the applicant to file a notice and grounds of appeal within five days of the date of the order. The applicant failed to comply with such order. As a result of such failure to comply by the applicant, there was no appeal before this court.

It is trite in our law that fatally defective compliance with the rules regarding C the filing of appeals cannot be condoned or amended. Klopper JP in *Hattingh v Pienaar* 1977 (2) SA 182 (O) at 183 held that:

> "…a fatally defective compliance with the rules regarding the filing of appeals cannot be condoned or amended. What should actually be applied for is an extension of time within which to comply with the relevant rule".

This position was also confirmed and applied by this court in *Jensen v* D
Acavalos 1993 (1) ZLR 216 (S) at 220 where Korsah JA stated that:

> "… a notice of appeal which does not comply with the rules is fatally defective and valid. That is to say, it is a nullity. It is not only bad but incurably bad, … the appeal must be struck off the roll with costs".

The notice of appeal that was filed by the applicant was not only invalid but was a nullity. That is the reason why the appeal was struck off the roll on E 16 March 2010. Effectively, the order issued by Ziyambi JA was no longer operational. The only way this matter could be brought back to this court was through a fresh application for condonation for the late noting of appeal and extension of time within which to note an appeal. This is what the appellant did. That application was placed before Cheda AJA and it was dismissed. F

It is apparent, from an analysis of the facts before me, that the order by Ziyambi JA gave the applicant a chance to have his appeal heard but the applicant wasted it by not complying with the terms of the order. The applicant himself is to blame for what transpired on 16 March 2010 when his appeal was struck off the roll. G

There is no merit in this application at all. There is no basis at law upon which I can entertain such an application. I find that the order granted by Ziyambi JA and the judgment by Cheda JA do not contradict each other. This matter has been dealt with on the merits and disposed of by Cheda AJA who made a ruling on the merits of the matter.

In his findings Cheda AJA said this: H

2012 (2) ZLR p37

Omerjee AJA

> A "The appellants and their legal practitioners took a calculated risk that the matter would proceed without them.
>
> Worse still they left without responding to, or refuting the charges against them. They declined the opportunity to put forward their defences to the allegations. I find no fault in the Labour Court holding that the appellants waived their rights to be heard by walking out of the disciplinary proceedings.
>
> B In view of the above, *I am satisfied that there are no prospects of success if leave to appeal is granted*". (my own emphasis).

This is a clear indication that the learned judge had dealt with the merits of the application. The effect of his judgment was to bring finality to this matter. I cannot entertain the same application again and make findings on the merits because a ruling has already been made by Cheda AJA. The C parties are enjoined to honour the judgment and abide by its terms. There is need to bring finality to litigation.

This is a case where the principle of *res judicata* applies. The principle of *res judicata* has been pronounced by this court in various cases, including *O'Shea* v *Chiunda* 1999 (1) ZLR 333 (S) at 334, where Sandura JA held that,

> " D *Res judicata* applies where the two actions are between the same parties, or their successors in title, concerning the same subject matter and founded on the same cause of action".

Mr *Mandizha* conceded that this application is the same as the one that was dismissed by Cheda AJA on 30 August 2011. In *Wolfenden v Jackson* 1985 (2) ZLR 313 (S) E at 316, Gubbay JA (as he then was) stated as follows:

> "The *exceptio rei judicatae* is based principally upon the public interest that there must be an end to litigation and that the authority rested in judicial decisions be given effect to, even if erroneous. See *Le Roux en 'n Ander* v *Le Roux* 1967 (1) SA 446 (A) at 461H. 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 F judgment or their privies … are not permitted its correctness".

This court is a creature of statute and it operates within the confines of the enabling Act. The applicant conceded that there is no law that provides for such an application. The relief sought is not provided for by law. Accordingly this application must therefore fail.

G Mr *Kamdefwere* tried to persuade me to order costs on a higher scale. He submitted that the application was tantamount to an abuse of court process because the applicant knew very well that there was no basis at law to bring such an application. I am however not persuaded to grant costs on a higher scale in this matter and accordingly it is ordered as follows:

H The application is hereby dismissed with costs.

2012 (2) ZLR p38

Omerjee AJA

Mandizha & Co, appellant's legal practitioners A

Muringi Kamdwefere, respondent's legal practitioners

© 2015 Juta and Company (Pty) Ltd.

Document 7 of 60

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2012/Volume 2/JONES v JONES 2012 (2) ZLR 39 (H)

JONES v JONES 2012 (2) ZLR 39 (H)

2012 (2) ZLR p39

Citation	2012 (2) ZLR 39 (H)
Case No	Judgment No. HB-144-12
Court	High Court, Bulawayo
Judge	Cheda J
Heard	17 May 2012; *CAV*
Judgment	12 July 2012

Counsel *C Nunu*, for the applicant G
P Madzivire, for the respondent

Case Type Civil application

Annotations No case annotations to date

Flynote

Costs – *contribution towards – divorce action – spouse's entitlement to – principles – need for spouse seeking contribution to have reasonable prospect of success – need to be honest about own financial position*

D **Family law** – *husband and wife – divorce – contribution to costs – spouse's entitlement to – principles – need for spouse seeking contribution to have reasonable prospect of success – need to be honest about own financial position*

Headnote

An applicant for a contribution from the respondent for the legal costs of a E divorce bears the onus of satisfying the court that reasonable prospects of success exist in the main action. The applicant must therefore establish a *prima facie* case for the claim.

The applicant was married to her husband, the respondent, and sought from him a contribution for the legal costs of the pending divorce. The court, however, was not satisfied that the parties were giving it a full and F truthful account of their respective financial situations. The applicant, in particular, had tried to mislead it in claiming that she was a person of straw yet it was clear that she derived some income, which she did not disclose, from her business. It was also clear that her prospects of success in the main action, concerning the distribution of the marital G assets, were very doubtful as, according to the respondent, the main part thereof, the immoveable property, belonged to a third party.

Held, that all costs, unless expressly otherwise enacted, are in the discretion of the judge. However, that discretion must be judicially exercised.

Held, further, that In our law a wife is entitled to demand a contribution of costs from her husband towards a matrimonial action. The success of H that demand largely depends on the prospects of success of her claim.

2012 (2) ZLR p40

Cheda J

The wife must show that she has a reasonable prospect of success, but A it is not necessary for her to convince the court that there is a balance of probabilities in her favour. Our legal system is geared towards assisting those who are financially less privileged to access financial assistance in order for them to prosecute their claims or defend such claims. However, the courts should apply a strict means test in order to determine some B reasonable prospects of success. In as much as a wife is entitled to be adequately funded by her husband in order to prosecute her claim, factors like her own financial status should be taken into consideration. The fact that the husband may be wealthy would not and cannot entitle the wife to lavish spending or at the worst, destroy her husband's financial nest while hers is being cosily built. The applicant is expected to be honest C with the court. Any litigant who chooses to mislead the court by his or her conduct must reap the fruits of such deceit.

Held, further, that while the applicant was entitled to be funded by her husband in order to prosecute her claim, the court had to take into consideration her financial status. In this regard, she had failed to take the court into D her confidence. There was, therefore, no evidence to justify an order for a contribution for costs by the respondent.

Cases cited

Barass v Barass 1978 RLR 384 (G)

Bruwer v Smit 1971 (4) SA 164 (C) E

Evatt & Anor v Philip 1931 WLD 163

Glazer v Glazer 1959 (3) SA 928 (W)

Kruger Bros & Wasserman v Ruskin 1918 AD 63

Levben Products (Pvt) Ltd v Alexander Films (SA) Pty) Ltd 1957 R & N 575; 1957 (4) SA 225 (SR) F

Muzondo v Muzondo HH-247-83

Riches v Riches 1910 EDC 247

Ritter v Godfrey [1920] KB 47

Senior v Senior 1999 (4) SA 955 (W)

Case information

C Nunu, for the applicant G

P Madzivire, for the respondent

Judgment

Cheda J: This is an application for contribution of legal costs.

The genesis and background of this matter is that applicant and defendant are headed for the dissolution of their marriage under case number HC 2139/11. H

Cheda J

A The proceedings under case number HC 2139/11 progressed up to a point where a verbal agreement was reached and the parties were about to sign a consent paper when applicant changed her mind and sought to challenge what had been agreed upon.

In her quest to enforce her rights she sought the services of Mr Mazibuko B of Calderwood, Bryce, Hendrie and Partners. It is her averment that Mr Mazibuko charges on average US$250 (presumably *per* hour for his services.)

It is her argument that an uncontested divorce costs in the region of US$1 200. Since this one is contested, it is likely to exceed US$1 200. It is for that reason that she is claiming contributions of US$1 500 from respondent.

C The applicant has argued that the respondent runs a viable business, has a good career as an optometrist and is an interior decorator. Further, that he remained in the matrimonial house while she moved out and is presently renting accommodation and is paying exorbitant rentals. She earns US$515 net.

The respondent, on the other hand, has argued that the applicant issued D summons out of this court on 28 July 2011 which he defended. The matter proceeded up to pleadings stage. On 4 August 2011 the applicant moved out of the matrimonial home, taking with her all her personal belongings including all the household furniture and effects that she had brought into the matrimonial home. He also stated that she took away the beauty salon equipment and a Toyota Ceres motor vehicle. This, according to him, was E by mutual agreement as the parties desired to have a cooling-off period. He further argued that the applicant is not poor as she recently went on an overseas holiday with their child.

He further submitted that it was agreed by the parties that in the event of a divorce, it was him who was to issue out summons, thereby relieving her of F the financial burden of paying legal fees in the said suit.

He also submitted, that they had reached an agreement and all that was left was for the parties to sign a consent paper which the applicant later refused to sign and opted to issue out summons for divorce herself; hence her claim for contribution of costs from the respondent.

G It came out as a fact that the applicant is in full time employment and is engaged in a beauty therapy business after work, weekends and holidays. However, she was unable to table before the

court her earnings in that regard. It is also correct that she took a Toyota Ceres car upon separation. In addition, she recently embarked on an overseas holiday, although she says it was paid H for by her child who is based in Australia.

Cheda J

The general rule with regards to costs is that all costs unless expressly otherwise A enacted are in the discretion of the judge. See *Kruger Bros & Wasserman v Ruskin* 1918 AD 63. However, that discretion must be judicially exercised: *Levben Products (Pvt) Ltd* v *Alexander Films (SA) (Pty) Ltd* 1957 R & N 575; 1957 (4) SA 225 (SR) and *Bruwer* v *Smit*, 1971 (4) SA 164 (C).

In our law a wife is entitled to demand contribution of costs from her husband. B The success of that demand largely depends on the prospects of success of her claim: Hahlo *The South African Law of Husband and Wife* 4 ed pp 518-19, where the learned author stated:

> "The wife must show that she has a reasonable prospect of success, it is not necessary for her to convince the court that there is a balance of probabilities in her favour but she must at least make out such a case that if her allegations C are true, she is entitled to judgment,. If she is the plaintiff she must show that she has a prima facie case...."

The key factor therefore is the prospects of success to be shown on a *prima facie* basis only if she is plaintiff and, of course, that she has a *prima facie* defence if she is the defendant.

The main contention is that of the immovable property. It is highly contested D to an extent that it cannot be said that, *prima facie,* the applicant is likely to succeed in her claim as the respondent argues that the said property, being Stand No. 51A Percy Avenue, Bulawayo belongs to a third party. He also argues that she is not entitled to personal maintenance which she is also claiming. In the absence of a *prima facie* case that the applicant is likely to E succeed in its claim, the courts tend not to accede to the demand or claim for contributions. The court needs to fully consider each party's circumstances, before it reaches a conclusion.

The applicant stated that she earns US$515 per month and pays US$400 rent per month. That leaves her with US$115 for food and other general expenses. To me, this does not sound true. There is no way a person of her status can F live out of US$115 per month. If it is true, then the applicant's conduct is unreasonable as it does not make sense to use 9 per cent of one's salary for rent. The only irresistible conclusion I can come to is that the applicant has access to some income which she did not want to disclose, as such disclosure would have led the court to come to an objective conclusion. While it may be G self satisfying for a litigant to mislead the court, unfortunately such conduct, if discovered, will no doubt militate against his or her case.

During the arguments it emerged that the applicant is a qualified beauty therapist who practices during her spare time. It is clear that she derives some income, which income she was not at liberty to disclose to the court. It appears to me that both parties receive certain income which is not fully H

Cheda J

A disclosed to the court. The applicant has misled the court into believing that she is a person of straw, yet she derives some income from the beauty therapy business. The applicant has an onus to prove on a balance of probabilities that she has a *prima facie* claim against the respondent and that she has no means of prosecuting her claim. Above all, she has to convince the court that B she is likely to succeed in her litigation against the respondent.

Our legal system is geared towards assisting those who are financially less privileged to access financial assistance in order for them to prosecute their claims or defend such claims. However, the courts should apply a strict means test in order to determine some reasonable prospects of success.

To this end, the applicant has failed to take the court in her confidence by C failing to make a full disclosure of her income. There is, therefore, no tittle of evidence before the court to justify an order of contribution by the respondent. I am of the firm belief that the applicant sought to mislead the court about her earnings and the court was therefore deprived of the necessary facts in order to make an objective and fair assessment of her claim. As pointed out above, any litigant who chooses to mislead the court by his or her conduct D must reap the fruits of such deceit The courts will not

accept being misled: *Evatt and Another* v *Philip* 1931 WLD 163; *Ritter* v *Godfrey* [1920] KB 47 and *Riches* v *Riches* 1910 EDC 247.

In arriving at this conclusion, I am persuaded by the principle stated in *Senior* v *Senior* 1999 (4) SA 955 (W) at 961H, which cited with approval *Glazer* v *Glazer* 1959 (3) SA 928 (W) at 932A, where it was stated that:

> "The essential principle in determining this issue appears from various authorities ... and I would summarise them as follows:
>
> (i) the test to be applied in considering the amount is that [the] plaintiff should be placed in a position adequately to present her case;
>
> (ii) the fact that [the] respondent may be wealthy does not entitle the wife to unlimited spending."

In a nutshell, the correct legal position is that, in as much as the applicant is entitled to be adequately funded by her husband in order to prosecute her claim (see *Barrass v Barrass* 1978 RLR 384 (G) and *Muzondo* v *Muzondo* HH-247-83), factors like her own financial status should be taken into consideration. The fact that the respondent may be wealthy, which has not been proved, would not and cannot entitle her to lavish spending or at the worst, destroy her husband's financial nest while hers is being cosily built.

The applicant cannot expect a lavish lifestyle when she is no longer living with her husband. Any party who is no longer in the comfort of a matrimonial home must accept that the proverbial comfortable blanket which used to

provide optimum platonic warmth has been dragged away and should therefore adjust his or her life accordingly.

Both parties have not been beyond reproach with regards to disclosing their financial status. Therefore, neither of them should benefit from the other.

I fully realise the duty which falls upon me of weighing all the circumstances of the case before me before I come to a conclusion. Applying my mind, with a full conception of all that is involved in this matter, I have come to the conclusion that it is my duty to deprive the applicant of her claim. In my opinion, the applicant is adequately resourced from her other part time business engagements to an extent that she is not justified in getting a financial contribution from the respondent in a case where it had been previously agreed that, in the event of divorce proceedings being instituted, it was the respondent who was to incur legal expenses on the basis of terms and conditions of divorce which had been agreed. The fact that she has since changed her mind, against the advice of her erstwhile legal practitioners, means that it is only proper for her to chart her own financial course and carry the financial burden of the divorce proceedings.

It will therefore be unjust to allow her to ask the respondent to fund her unclear claim against the respondent.

The application is dismissed with costs on the ordinary scale.

Calderwood, Bryce Hendrie & Partners, applicant's legal practitioners

Joel Pincus Konson & Wolhuter, respondent's legal practitioners

© 2015 Juta and Company (Pty) Ltd.

Document 8 of 60

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2012/Volume 2/NYONI & ORS v BOPSE LAND DEVELOPERS (PVT) LTD & ORS 2012 (2) ZLR 45 (H)

NYONI & ORS v BOPSE LAND DEVELOPERS (PVT) LTD & ORS 2012 (2) ZLR 45 (H)

Citation	2012 (2) ZLR 45 (H)
Case No	Judgment No. HB-158-12
Court	High Court, Bulawayo
Judge	Makonese J
Heard	12 June 2013; *CAV*
Judgment	12 July 2013
Counsel	*Ms Mudenda*, for the applicants *N Dube*, for the respondents
Case Type	Opposed application
Annotations	No case annotations to date

Flynote

Company – *liquidation – assets which may be included in liquidation process – liquidator including assets that had already been alienated – court entitled to interfere with liquidator's decision*

Headnote

The first respondent entered into a contract with the City of Bulawayo (the fourth respondent) under which it purchased land for private development. The first respondent was expected to service the land in question, develop houses, and or sell stands to individuals requiring them. It was also mandated to enter into purchase agreements with prospective buyers. In pursuance of this arrangement the applicants purchased land for housing development. However, the first respondent ran into financial problems, and it failed to service or develop the land. The applicants had already commenced construction of their houses when the first respondent went into voluntary liquidation. The liquidator caused the assistant Master of the High Court to set a date for a meeting of creditors to be held. Included in the list of assets to be liquidated were the stands sold to the applicants. Believing that they might be prejudiced if the stands were included in the liquidation process, the applicants filed an urgent chamber application to prevent the inclusion of the allocated and sold stands in the liquidation process. The first respondent and the liquidator argued that the order sought was incompetent and that the applicants were not entitled to prevent the Assistant Master from performing his duties in terms of in the Companies Act [*Chapter 24:03*].

Held, that in terms of s 222(3) of the Companies Act, any person aggrieved by any act or decision of the liquidator may apply to the court for relief. The assets which the liquidator of a company takes over are primarily

Makonese J

those to which the company is entitled at the commencement of the liquidation. The basic proposition in insolvency proceedings is that all of the property of the debtor must be made available to the creditors and accordingly the liquidator must get into his possession or control all the property and assets to which the company is entitled. The first respondent and the liquidator should not be allowed to realize and liquidate property that was no longer theirs. All the requirements for a final interdict had been shown.

Cases cited

Bluston & Bramley v Leigh [1950] 2 KB 548

Gutaramwari v Tayali & Ors HB–132–04 C

John Strong (Pvt) Ltd & Anor v Wachenuka (1) 2010 (1) ZLR 151 (H)

Sage Hldgs Ltd & Anor v Financial Mail (Pty) Ltd & Anor 1991 (2) SA 117 (W)

Setlogelo v Setlogelo 1914 AD 221

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

Legislation considered

Companies Act [*Chapter 24:03*], s 222(3)

Case information

Ms *Mudenda,* for the applicants E

N Dube, for the respondents

Judgment

Makonese J: The applicant and 380 others filed an application seeking an order in the following terms:

> "(1) The second respondent, acting as liquidator of the first respondent, be and is F hereby debarred from holding a creditors' meeting on 20 April 2011, which meeting was expected to include the applicant and 380 stand holders of Pumula South Housing Scheme, Bulawayo, and that any future creditors' meeting to be called by the second respondent must exclude the applicant and the 380 stand-holders at Pumula South Housing Scheme, Bulawayo.
>
> (2) The Assistant Master be and is hereby compelled not to entertain any future G creditors' meeting which involves and includes the applicant and the said 380 stand holders of Pumula South Housing Scheme, Bulawayo.
>
> (3) The fourth respondent be and is hereby ordered to transfer immediately the interests, rights and title of the applicant and those of the 380 others of Pumula South Housing Scheme, Bulawayo, into their names.
>
> (4) The respondents to pay costs of suit should they oppose this application." H

Makonese J

A A provisional order was granted on 17 November 2011 and the first and second respondents oppose the confirmation of such order. The events forming the background to this case are as follows.

The first respondent acquired some land for development from the fourth respondent on 2 December 2002. The land was duly surveyed by the first B respondent in liaison with the fourth respondent, resulting in 381 residential stands, two local authority areas, two places of assembly, and an open space land being demarcated. The first respondent was contracted by the fourth respondent to develop the area for the said residential stands. The first respondent ran into financial difficulties and subsequently failed to develop the 381 surveyed vacant stands. The applicant and 380 other interested C individuals indicated an interest in purchasing the said stands in order to build houses. The first respondent agreed to sell the 381 vacant stands and agreements of sale were accordingly prepared in favour of the applicant and the other 380 persons. The first respondent charged each purchaser of the vacant surveyed stands a fee for the preparation of the agreements of sale, inclusive of legal fees for the transfer of rights, title and interest to the purchasers. D The applicant and the 380 others received written confirmation that they had satisfied all the requirements for the fourth respondent to effect transfer into the names of the applicants. The applicants were issued development permits authorising them to commence construction work on the surveyed land. By April 2012, the applicant and the 380 other stand holders were at different stages of construction of their houses. The fourth respondent had also begun E processing transfer documents in favour of the applicants. It would seem clear that at that stage the first respondent had effectively relinquished its rights, title and interest to and in the said stands. Some time in or around May 2012 the first respondent went into liquidation. The first respondent then sought to include the 380 stands allocated to the applicants as part of F the assets under liquidation. This

resulted in the applicant and the other 380 stand holders filing an urgent application with this court, seeking an order, *inter alia,* barring the first respondent from including the said stands in the liquidation process. The first respondent opposed the application arguing that each stand holder should prove their entitlement to the stands individually. A provisional order was issued in favour of the applicant and 380 others. G The first and second respondents are opposed to the confirmation of the provisional order and have advanced a point *in limine* in the following terms:
Locus standi

The deponent to the funding affidavit, Stanford Nyoni, has no *locus standi* as he is not part of the liquidation process. Further, it is argued that there H is no proof that Stanford Nyoni represents the other 380 stand holders and

---

Makonese J

that he should have furnished proof to indicate that he was authorised to A represent them in the proceedings before the court. The respondent referred the court to *Gutaramwari v Tayali & Ors* HB-132-04. In this particular decision, it was held that office bearers of a voluntary association such as a church are not automatically entitled to sue in terms of the constitution of the association. The office bearers, it was held, should establish that they B were mandated and authorised to bring the proceedings on behalf of the church. It is clear that the facts in the *Gutaramwari* case, *supra,* are entirely different from the present case.

In this matter, what has to be noted is that Stanford Nyoni is not purporting to bring legal action on behalf of a legal entity. The position is that Stanford Nyoni is one of the 380 stand holders who have an interest against the respondents C arising out of the sale to them of stands for housing developments. Stanford Nyoni avers in his founding affidavit that he was authorised to depose to an affidavit by his fellow 380 stand holders of Pumula South Housing Scheme, Pumula South Township, Bulawayo, such authority having been granted to him by his fellow stand holders of the said housing scheme by acclamation D at a general meeting held on 13 April 2011. Further, the applicant annexed to his founding affidavit supporting affidavits from at least five other members of the housing scheme. In all their supporting affidavits, the other members confirm that Stanford Nyoni was authorised to bring legal proceedings on behalf of the other members. I am satisfied on the facts of this matter that Stanford Nyoni does have *locus standi* to act on behalf of his colleagues in E bringing this legal suit. Apart from the fact that he was publicly appointed by members of the housing scheme, there are supporting affidavits which put the issue of legal authority to sue beyond dispute. See *John Strong (Pvt) Ltd & Anor v Wachenuka (1)* 2010 (1) ZLR 151 (H).

In the above case it was held that, in deciding whether or not to determine whether a person has *locus standi*, each case must be decided on its own F merits. *In casu*, Stanford Nyoni avers that he was mandated to act on behalf of the other 380 stand holders at a public meeting by acclamation. This fact has not been disputed and it has to be accepted that authority to institute legal action does not always have to be in writing. The principle has to be that for a person to have authority to act on behalf of another there has to be G clear proof that the person purporting to act possesses such authority. I am satisfied that on the facts of this matter the allegation that Stanford Nyoni has no *locus standi* has no merit. Accordingly, I would dismiss the point raised *in limine* and proceed to deal with the merits of the matter.

The central issue for determination is whether or not the first and second respondents are entitled to proceed with a liquidation process that includes H

Makonese J

A the 380 residential stands allocated to the applicant and 380 others. Both parties to this action agree that Bopse Land Developers (Pvt) Ltd entered into a contract with the City of Bulawayo where it purchased land for private development. The first respondent was in accordance with the agreement, with the fourth respondent expected to service the land in question, develop houses, and/or sell stands to individuals requiring them. The first respondent B was also mandated by the fourth respondent to enter into purchase agreements with prospective buyers. It is in pursuance of the said arrangement that the applicant and 380 others purchased land for housing development. However, the first respondent ran into financial problems and failed to service and develop the land. The applicant and 380 other stand-holders who had been C allocated the stands had already

commenced construction of their houses when the first respondent went into voluntary liquidation. The first respondent placed an advertisement in the *Chronicle* newspaper of 13 January 2011 with the following headline:

> "PUBLIC NOTICE ON RESIDENTIAL STANDS: PUMULA SOUTH PHASE II, BULAWAYO"

D The first respondent listed various stand numbers, calling upon all persons claiming right, title and interest in and to the aforementioned stands to contact them not later than six weeks from the date of publication, for verification and processing of such claim of right, title and interest, failing which the stands would be repossessed and dealt with without further notice.

E The second respondent, as liquidator of the first respondent, caused the Assistant Master of the High Court to set a date for a meeting of creditors to be held. What caused the applicant and other 380 stand-holders to panic was the inclusion of the residential stands that had been sold to them under various agreements of sale as part of the assets to be liquidated. Sensing that they might be prejudiced if the stands were included in the liquidation F process, the applicant and 380 others filed an urgent chamber application to prevent the inclusion of the allocated and sold stands in the liquidation process. A provisional order was granted by this court and consequently the first respondent persisted in seeking to proceed with the liquidation process which included the disputed stands, in spite of the provisional order.

G In their heads of argument, the first and second respondents have argued that the order sought by the applicants is incompetent at law. They further argued that the applicants seek to interdict the Assistant Master of the High Court from performing his duties as laid down in the Companies Act [*Chapter 24:03*]. The respondents contend that such an order is illegal and goes against statute. Furthermore the respondents argue that this court is being asked H to take away powers vested in the Assistant Master of the High Court by

---

statute. There is clearly no merit in the argument that the order sought seeks A to strip the Assistant Master of his powers. The basis of the order sought by the applicants is aimed at preventing the liquidator from including property which has been sold to the stand holders as part of the assets that fall under liquidation. In other words, what prompted this application is the attempt by the liquidator to include in the liquidation process property which had B been sold to the applicants. At the time the stands were sold to the stand holders and the process of the transfer of rights, title and interest thereto commenced, the first respondent divested itself of any ownership in regard to the stands. It stands to reason, therefore, that the liquidator is entitled to list all other assets belonging to the first respondent, but there is no legal basis for seeking to include in the list of assets, property that had been sold C to third parties prior to the liquidation process.

It is my view that the order sought by the applicants in this matter is sound and competent at law. It is especially aimed at preventing the liquidator from including property or assets which the first respondent is not entitled to at law, in the company's liquidation process. In proceedings under case number D HC 842/11, the only surviving co-director of the first respondent stated that the company was insolvent and had no money and no property except a few pieces of furniture. She expressly stated in her affidavit as follows:

> "The only assets left now in the company register and offices are an office desk and 4 chairs --- the company had no other immovable assets, it has no cars or any current contracts which are some of the issues that precipitated the fall E of the company."

The assertions referred to above can only lead to the conclusion that the first respondent can not on one hand claim that the only other assets in their books are a few pieces of furniture and then at the same time seek to include hundreds of residential stands in the liquidation process. In *Bluston & Bramley v Leigh* F [1950] 2 KB 548, it was held that the assets which the liquidator takes over are primarily those to which the company is entitled at the commencement of the liquidation. The basic proposition in insolvency proceedings is that all of the property of the debtor must be made available to the debtors and as such the liquidator must get into his possession or control all the property G and assets to which the company is entitled. At the time the first respondent went into liquidation, the applicant and 380 others had purchased the housing stands and duly completed agreements of sale and commenced construction of their houses on the said stands. The first and second respondents should not be allowed to realize and liquidate property that is no longer theirs, and it was wrong for them to stop the fourth respondent from concluding the H

Makonese J

A process of the transfer of stands to the applicants, which process the fourth respondent had already started.

The first and second respondents have also submitted that the requirements of a final interdict have not been satisfied. I am, however satisfied that all the requirements for the granting of a final interdict have been established. B *Setlogelo v Setlogelo* 1914 AD 221 set out the principles for the grant of a final interdict as follows:

(a) a clear or definite right

(b) an injury actually committed or reasonably apprehended and

(c) the absence of similar protection by any other remedy.

C It should be noted here that the reference to a clear right in regard to a final interdict, as opposed to a *prima facie* right in regard to a temporary interdict, means no more than a clear right must be established on a balance of probabilities. See *Universal Merchant Bank Zimbabwe Ltd v The Zimbabwe Independent & Anor* 2000 (1) ZLR 234 (H) and D *Sage Holdings Ltd & Anor v Financial Mail (Pty) Ltd* 1991 (2) SA 117 (W).

Firstly, it can be safely concluded on the facts of the present matter that it has been shown on the papers that the stand holders bought and paid for the stands from the first respondent and that the applicants not only signed agreements of sale but that the first respondent also relinquished all its E rights, title and interest in the stands. The applicants have therefore clearly established a clear right to seek the interdict in the manner they have done. Secondly, the applicants have a reasonable apprehension of injury or harm especially in view of the fact that the first and second respondents' actions are suggestive of a motive to re-sell the stands already sold to the applicants. The desire to include the stands as part of the property under liquidation has F no other explanation than a desire to cause real prejudice to the applicants. It is clear that the applicants risk losing their investments in the form of dwelling houses if the first and second respondents are not interdicted from including the stands in the liquidation proceedings and dealing with such stands as if they still belong to first respondent. Thirdly, there is no other G remedy satisfactory enough to protect the applicants. This court is enjoined to afford protection to innocent purchasers of land such as the applicants.

I am accordingly satisfied that this matter is properly before the court and the order sought by the applicants is competent at law. This is so especially, regard being had to the provisions of s 222(3) of the Companies Act [*Chapter* H *24:03*] which provides as follows:

Makonese J

> "Any person aggrieved by any act or decision of the liquidator may apply to the A court after notice of motion to the liquidator and therein the court may make such other as it thinks fit."

In the result, the provisional order granted on 17 November 2011 is hereby confirmed. The first and second respondents are ordered to pay the costs of this application on an attorney and client scale. B

Mudenda Attorneys, applicants' legal practitioners

Cheda & Partners, first & second respondents' legal practitioners C

© 2015 Juta and Company (Pty) Ltd.

Document 9 of 60

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2012/Volume 2/S v DAVID 2012 (2) ZLR 53 (H)

S v DAVID 2012 (2) ZLR 53 (H)

Citation	2012 (2) ZLR 53 (H)
Case No	Judgment No. HH-289-12
Court	High Court, Harare
Judge	Makoni J
Heard	18 July 2012
Judgment	18 July 2012
Counsel	Details not supplied
Case Type	Criminal review
Annotations	No case annotations to date

Flynote

C **Criminal law** – *offences under Criminal Law Code – assault – when constitutes domestic violence – need for person assaulted to be "complainant" as defined in Domestic Violence Act [Chapter 5:16]*

Headnote

D Where it is proposed to charge a person contravening the Domestic Violence Act [*Chapter 5*:*16*], it is essential that the person who is the victim of the violence be a "complainant" as defined in the Act. The Act was put in place for the protection and relief of victims of domestic violence, not to protect the victims of any other form of assault. If the assault does not constitute "domestic" violence, a charge of assault under s 89(1) E the Criminal Law Code [*Chapter 9:23*] may be brought. The penalties are the same .

Legislation considered

Criminal Law Code [*Chapter 9:23*] , s 89(1)

F Domestic Violence Act [*Chapter 5*:*16*], ss 2 & 3

Judgment

Makoni J: The accused was convicted, on her own plea of guilty, of contravening s 3(1)(a) as read with s 4(1) of the Domestic Violence Act [*Chapter 5*:*16*]. She was sentenced to 20 months' imprisonment, of which six months' imprisonment were suspended on the usual conditions of good G behaviour. The remainder were suspended on condition the accused performs community service.

It is the charge that the accused person was convicted of that I am concerned with.

The facts of the matter are that the accused is a female adult aged 47. The H complainant is female as well. They reside in the same farm compound. On

the day in question, the complainant was on her way to fetch some water A when she met the accused, who was in the company of another female. They accused the complainant of having a relationship with the accused's husband. They proceeded to assault the complainant with clenched fists. The accused took a domestic knife and stabbed the complainant on the head. The complainant sustained a deep cut. The complainant went to hospital B but the medical report was not produced as it was still outstanding at the time of the trial.

The issue that I am faced with is whether the above facts establish the offence of contravening s 3(1)(a) as read with s 4(1) of the Act. Section 2 of the Act, which is the interpretation section, defines a "complainant" in relation to Act. I will quote the section, as it is important for the discussion that I will C have later on in the judgment.

"2(1) In this Act –

"complainant," in relation to a respondent means –

(a) a current, former or estranged spouse of the respondent; or

(b) a child of the respondent, whether born in or out of wedlock, and includes D an adopted child and a step-child; or

(c) any person who is or has been living with the respondent, whether related to the respondent or not; or

(d) any person who–

(i) co-habits with the respondent; or

(ii) is or has been in an intimate relationship with the respondent; E

who applies for a protection order or in respect of whom a protection order may be issued."

In the same section, the "respondent" is defined as a person who is alleged to be a perpetrator of an actual or threatened act of domestic violence. Domestic violence is defined in s 3 of the Act. F

A careful reading of the facts and the relevant sections of the Act will show that the accused should not have been charged under the Act. The complainant does not fit into any of the definitions under s 2. For an accused (respondent) to be charged under the Act he or she must have perpetrated an act of domestic violence on a person who fits the definition of the complainant as G defined in the Act.

From the above, it is clear that the accused was wrongly charged and convicted of contravening s 3(1)(a) of the Act. My view is that prosecutors, when faced with facts that might suspect/suggest domestic violence, should read the relevant section of the Act before deciding the appropriate charge. If the facts do not fall under the Act, then the charge of assault is still available to H

Makoni J

A them. The magistracy, on their part, should also satisfy themselves, before proceeding with the matter, that the charge is appropriate. Incidentally, the penalty provisions for contravening s 3(1)(a) of the Act and contravening s 89(1) of the Criminal Law (Codification and Reform) Act [*Chapter 9*:*23*] are the same. The guiding factor in determining the appropriate charge should be the facts of each case and the relevant statute bearing in mind that the Act B was put in place for the protection and relief of victims of domestic violence and not victims of any form of assault.

There was a misdirection by the magistrate in so convicting the accused. In view of the misdirection I will set aside the conviction.

The accused is currently performing community service. The clerk of court C is hereby directed to advise the accused person immediately of the setting aside of the conviction.

D Kudya J agrees.

© 2015 Juta and Company (Pty) Ltd.

Document 10 of 60

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2012/Volume 2/KINGDOM CALLS (PVT) LTD v SUNSEEKER (PVT) LTD 2012 (2) ZLR 56 (H)

KINGDOM CALLS (PVT) LTD v SUNSEEKER (PVT) LTD 2012 (2) ZLR 56 (H)

Citation 2012 (2) ZLR 56 (H)

Case No	Judgment No. HH-301-12
Court	High Court, Harare
Judge	Hungwe J
Heard	9 December 2010; *CAV*
Judgment	18 July 2012
Counsel	*P C Paul*, for the applicant *S Machiridza*, for the respondent
Case Type	Opposed application
Annotations	No case annotations to date

Flynote

Landlord and tenant – *lease – premises leased – when premises are "commercial premises" and subject to Commercial Premises (Rent) Regulations 1983 – person leasing harbour for its own commercial purposes and concluding mooring agreements with owners of boats* D *used for commercial purposes – such mooring agreements constitute leases of commercial premises*

Headnote

The applicant operated a harbour at Lake Kariba. It leased the harbour from another company. The applicant concluded a harbour mooring agreement E with the respondent, in terms of which the respondent was permitted to moor its houseboat and tender boat. The agreement could be cancelled on one month's written notice. A dispute over a proposed rent increase arose between the parties. The respondent wanted to take the matter to the Rent Board in terms of the Commercial Premises (Rent) Regulations, 1983. In terms of s 3(1) of the Regulations, commercial premises are F "any premises or part thereof occupied under a lease for the purposes of carrying on therein industry, business, trade or occupation, and includes any ground, parking space, garage, outbuilding, workers' quarters and other improvement therewith".

The applicant sought an order declaring that the premises were not "commercial G premises" in terms of the Rent Regulations and that the agreement could be lawfully terminated. It argued that the respondent was not a lessee, since the harbour could not be regarded as being commercial premises and the premises were not occupied by the respondent under a lease. Further, the respondent did not carry out any business at the harbour but simply moored its boats there when not in use. H

2012 (2) ZLR p57

Hungwe J

A The respondent pointed out that it, and the owners of the other 150 boats moored at the harbour, hired out houseboats to various clients and made use of the facilities, including fuelling facilities, which had been established by the applicant.

Held, that it was common cause that the harbour was leased by the owner to the applicant for business or commercial purposes. This fact could not B be ignored. It was a question of fact and degree as to whether particular premises are "commercial premises". This could only be resolved by making a common sense judgment about the facts of each case and not by adopting any absolute rule. The whole arrangement had to be seen for what it was. Whether one called it a management contract or a mooring C agreement, the bottom line was that the one party made payment to the other for the occupation of space equivalent to parking, in advance, on a monthly basis. Owners of boats were given spaces in which to park their boats. Payment was made in

advance on a monthly basis to the applicant. Such payments could not be anything but rentals. This was a maritime equivalent of lessor-lessee arrangement and fell under the D Rent Regulations.

Case cited

Latimer Manley & Associates (Pvt) Ltd v Laverna Invstms (Pvt) Ltd 1990 (1) ZLR 200 (H)

Legislation referred to E

Commercial Premises (Rent) Regulations, 1983 (SI 676 of 1983), s 3

Case information

P C Paul, for the applicant

S Machiridza, for the respondent

Judgment

F **Hungwe J**: The applicant seeks an order declaring that the premises from which it operates are not "commercial premises" as defined in the Commercial Premises (Rent) Regulations, 1983 ("the Rent Regulations" and an order that the applicant has lawfully terminated the mooring contract that it had with the respondent. The applicant also seeks an order directing the G respondent forthwith to remove its boats, including the Ambuya Dambudzo, from Marineland harbour, and should it fail to do so, the Sheriff or his lawful deputy carries out the removal.

The respondent opposes the grant of this order.

A director of the applicant, one Derek Adamson, deposed to the founding H affidavit. In it he makes the following averments. The applicant operates a

---

harbour at Lake Kariba called Marineland. It leases it from African Sun Ltd. A In December 2006 the applicant concluded a harbour mooring agreement with the respondent in terms of which the respondent was permitted to moor its boat. The agreement could be cancelled on one month's written notice. In para 5 he makes the following averment.

> "Respondent simply moors its boat, together with tender boats, in the harbour B and does not and is not permitted to allow any person to reside in the harbour. Respondent hires out its boats and tender boats to its clients and the boats are removed from the harbour for the period that they are on hire. No particular location is reserved for the mooring of the boats and this location is selected by us and is changed from time to time depending on the level of the waters in the lake. Respondent does not occupy our facilities for the purposes of carrying on therein any industry, business, trade or occupation and simply uses the premises C for the mooring and storage of the boats during the period that the boats are not being hired out by it. The facilities which we have are therefore not Commercial Premises as defined in the Commercial Premises (Rent) Regulations 1983 as set out in Statutory Instrument 676 of 1983 and the provisions of those regulations have no application to our agreement with the respondent."

The order sought is premised on this paragraph. D

In the opposing affidavit filed by respondent's director, Ibbo Mandaza, the respondent answered in the following terms:

> "It is untrue that 'no particular location is reserved for the mooring of boats' as alleged by the applicant since the respondent's houseboat, like many other houseboats, is allocated a particular parking area. A signpost with the name of the houseboat is fixed into the ground demarcating the position of the houseboat. E This enables clients and various workmen to easily identify the location of the particular houseboat.
>
> Contrary to the applicant's assertion that 'the respondent does not occupy our facilities for the business of carrying on therein any industry, business, trade …' the hiring of houseboats to clients is indeed a business. Clients from inside and outside Zimbabwe hire houseboats from the harbour and go out for days F on Lake Kariba for relaxation, fishing, holidaying, etc. Clients pay a fee for the use of the houseboat, which is like a mini hotel on water, with the boat captain, cook and deck-hand on board the houseboat. It is therefore a business. Furthermore, the applicant operates a shop at the harbour to enable clients to purchase food, drinks, liquor, ice, snacks, etc prior to them departing from the harbour onto the lake. The applicant also

operates a filling-station (jetty) from G which clients re-fuel the houseboats and tender boats on return from the lake. Both petrol and diesel are sold from the filling-station (jetty) by the applicant. Around 150 houseboats and 300 tender boats park and use the harbour at which the applicant runs the business.

The premises are indeed commercial premises since the boat owners pay a monthly rental the applicant for the use of the facilities so described. In January 2009 boat owners, including the respondent, were paying to the applicant US$75 H

2012 (2) ZLR p59

Hungwe J

A per month for houseboats, which was increased by the applicant in March 2009 to US$150 and back-dated to January 2009. The rentals for tender boats were increased from US$7.00 per month to US$20.00 per month. With such rentals, and around 150 houseboats and 300 tender boats, the applicant is conducting a roaring business for letting out mooring spaces at the harbour, let alone shades for parking tenders and speedboats. The harbour is therefore operated by the applicant as commercial premises and falls under the Commercial Premises B (Rent) Regulations, 1983. Respondent is equally using the space provided by the applicant to operate its business enterprise… It is for this reason the respondent approached the Rent Board as it was aggrieved by the applicant's conduct ..."

The dispute between the parties can be resolved in terms of the Rent Regulations, the respondent contends. On the other hand, the applicant C contends that this cannot be so because the respondent is not a lessee, since the harbour cannot be regarded as being commercial premises. Further, the applicant argues, the respondent does not carry out any business at the harbour but simply moors its boats there when not in use. The fact that the applicant conducts its own business there is, according to the applicant, irrelevant.

If I understand the respondent's argument correctly, which I believe I do, D the point it makes is that the whole arrangement must be seen for what it is. Owners of boats are given spaces in which to park their boats. Payment is made in advance on a monthly basis to the applicant. Accordingly, such payments cannot be anything but rentals.

The Rent Regulations define commercial premises in s 3(1) as "any premises E or part thereof occupied under a lease for the purposes of carrying on therein industry, business, trade or occupation, and includes any ground, parking space, garage, outbuilding, workers' quarters and other improvement therewith." The contention here is that the premises are not occupied under a lease nor does the respondent carry on business thereat. In determining the meaning of the Regulations, they must be read in the context of the other legislation F governing the situation. The Acts create, among other things, regions or zones of premises according to use. It is common cause that the harbour is leased by African Sun to the applicant for business or commercial purposes. The applicant, however, says that this is irrelevant as the court should consider only whether the respondent carries on business from the harbour. In *Latimer* G *Manley & Associates (Pvt) Ltd v Laverna Investments (Pvt) Ltd* 1990 (1) ZLR 200 (H) it was held that the premises retain the character to which the zoning given under the Act relates. In my view, the court cannot ignore the admitted fact that the applicant leases the same premises from another, and in turn charges the users of boat parking space under what is called a mooring contract. It seems to me that this is an artificial approach that may H well defeat the mischief the legislature intended to avoid.

2012 (2) ZLR p60

Hungwe J

It is a question of fact and degree as to whether any particular premises are A "commercial premises". This can only be resolved by making a common sense judgment about the facts of each case and not by adopting any absolute rule. Whether one calls it a management contract or a mooring agreement, the bottom line is that the one party makes payment to the other for the occupation of space equivalent to parking, in advance, on a monthly basis. B This is a maritime equivalent of a lessor-lessee arrangement. In my view the argument put forward on behalf of the applicant cannot succeed.

Since I have decided the matter on the basis of whether or not the "premises" are commercial premises, I find no reason to deal with the other issues raised by the parties.

Accordingly, the application is dismissed with costs. C

Wintertons, applicant's legal practitioners

Muzangaza, Mandaza & Tomana, respondent's legal practitioners D

© 2015 Juta and Company (Pty) Ltd.

Document 11 of 60

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2012/Volume 2/ZETDC v RUVINGA (1) 2012 (2) ZLR 61 (H)

ZETDC v RUVINGA (1) 2012 (2) ZLR 61 (H)

Citation	2012 (2) ZLR 61 (H)
Case No	Judgment No. HH-307-12
Court	High Court, Harare
Judge	Bere J
Heard	26 May 2011; *CAV*
Judgment	18 July 2012
Counsel	*J Bakasa*, for the applicant Respondent in person
Case Type	Civil Application
Annotations	No case annotations to date

Flynote

Practice and procedure – *affidavit – founding affidavit – who may sign – party's legal practitioner – when may sign such affidavit – cautions to be observed*

D **Practice and procedure** – *judgment – default judgment – rescission – when party in wilful default*

Practice and procedure – *postponement – what party desiring postponement must show*

Practice and procedure – *set-down – setting matter down as unopposed –* E *new legal issue being raised – not a reason for not setting matter down on unopposed roll*

Headnote

The applicant had been sued by the respondent for losses arising out of erratic power supplies. In due course, the matter was set down for a pre-trial F conference. Before the conference commenced, however, the judge gave a directive that the parties convene on their own for a round-table conference and, with the concurrence of the two legal practitioners, had the matter postponed for the second pre-trial hearing a few days after that. Not only was the applicant not represented at the round-table discussion, it was not represented at the postponed pre-trial conference. G The given reason, which was not made entirely clear in the affidavit deposed to by the applicant's legal practitioner, was that the applicant needed the services of an expert witness who was unavailable. At the pre-trial conference, the judge struck out the applicant's defence and plea and referred the matter to the unopposed roll for proof of damage H by the respondent.

Thereafter, the applicant sought rescission of judgment in order to pave the A way for the reinstatement of its plea. In so doing, the applicant submitted that respondent's case in the main action was hopeless. The issues raised therein, so it was alleged, were *res nova,* in that the respondent's claim involved an unwarranted extension of Aquilian liability. On the other hand, the respondent raised, *in limine*, the issue of whether the applicant's B legal practitioner was competent to depose to the founding affidavit in the application. It also raised the issue of whether the applicant was in willful default.

Held, that within the context of this case it was indeed competent for the applicant's legal practitioner to swear to the founding affidavit. He was no stranger to the applicant's case, as he was its legal practitioner. C However, one should always be aware of the attendant risks involved in the case of a situation where the founding affidavit departs materially from the pleadings filed of record. If that happens, then the competence of the legal practitioner in filing a supporting affidavit inevitably calls for scrutiny. D

Held, further, that in order to succeed in having an order made in default of appearance set aside, the applicant must show good and sufficient cause. The explanation tendered must negate any willful default. In the context of default judgment, "willful" connotes deliberateness in the sense that the applicant must have had full knowledge of the set down date and E the risks attendant upon default; and freely took the decision to refrain from appearing, whatever the motivation of that decision may have been.

Held, further, that there is nothing like an automatic postponement when a matter is set down before a judge. A party desiring a postponement must advance cogent reasons for a postponement and seek the court's F indulgence in that regard. Only when the court agrees with the submissions of a party seeking postponement would the court accede to such an application. It was certainly not enough for the applicant's legal practitioner to decide not to attend court on a date that he had agreed to and to delegate his junior to handle the desired postponement.

Held, further, in dismissing the application, that the fact that the issues raised G in the matter were *res novae* did not mean that the court should condone the dilatory manner in which it had been handled by counsel. The court which would deal with the matter on the unopposed roll would not be precluded from considering the issues so as to arrive at a sound decision either for or against the respondent. H

Bere J

Cases cited A

Chetty v Law Soc, Transvaal 1985 (2) SA 756 (A)

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

Chitsaka & Ors v Public Svc Assn 1993 (2) ZLR 345 (S)

Deweras Farm (Pvt) Ltd v Zimbank 1998 (1) ZLR 368 (S)

Zimbank v Masendeke 1995 (2) ZLR 400 (S)

B *Zimbank v Trust Finance Ltd & Anor* 2006 (2) ZLR 404 (H)

Legislation considered

High Court Rules 1971 (RGN 1047 of 1971), rr 227(4) & 235

Case information

C *J Bakasa,* for the applicant

Respondent in person

Judgment

Bere J: From a distance this is a simple application for rescission of judgment in order to pave the way for the reinstatement of the defendant's plea which was struck out by this court on 21 October 2010. A closer look D at the application and the responses thereto make interesting, edifying and, of

course, quite revealing aspects of the law as canvassed by the parties. I propose to start by providing a detailed background of this case.

The background

E On 19 May 2010 the plaintiff (now the respondent) issued out process from this court against the respondent (the applicant in this matter) seeking the following:

"Payment of:

(i) US$9 800.00 being the costs of replacing the motor;

(ii) US$208 849.00 in respect of damages suffered as a result of the loss of the F plaintiff's crop;

(iii) US$200 000.00 being damages in respect of mental anguish, anxiety and depression;

(iv) costs of suit."

The defendant filed its papers in defence of the claim, which was followed G by all the other pleadings to the stage until all pleadings had been closed.

The matter followed its natural path, which culminated in the matter having to be set down for a pre-trial conference as provided for under Order 26 r 182 as read with the practice direction 1 of 1995.

At the pre-trial conference, which was scheduled for 21 October 2010, the H presiding judge felt inclined to have the applicant's defence and plea struck

---

Bere J

out. The learned judge proceeded to do so and referred the matter to the A unopposed roll for proof of damages by the now respondent.

Stung by this development, the applicant has now filed this application for the reinstatement of its defence and plea.

In filing the instant application, reliance was sought on the founding affidavit not of the applicant's representative, but of one Vote Muza (the applicant's B legal practitioner of record). In his founding affidavit, the deponent tried to give some explanation for the default on 21 October 2010 as well as commenting and emphasising on the strength of the applicant's case whose cumulative effect, he argued, warranted the court's indulgence in granting rescission of judgment and consequently reinstatement of the applicant's plea. C

The application for reinstatement of the applicant's plea was vehemently opposed by the respondent, basically on two grounds; *viz.* the point raised in *limine* and the alleged shortcomings in the founding affidavit of Vote Muza, as I will highlight later in this judgment. I propose to deal first with the point raised *in limine* by the respondent.

Was it competent for the applicant to rely on the affidavit of its D counsel Vote Muza as opposed to the applicant itself?

I do not wish to be detained by this argument in this matter. Suffice it to say that it is clear to me that the law is settled in this regard in favour of the applicant. Within the context of this case, it was indeed competent for Vote Muza to swear to the founding affidavit as he did. This position E was sufficiently canvassed by my sister Mavangira in *Zimbabwe Banking Corporation Ltd v Trust Finance Ltd & Anor* 2006 (2) ZLR 404 (H). In a fully reasoned judgment, the learned judge explored the legal position and concluded that there was nothing amiss with the legal practitioner deposing to an affidavit in circumstances similar to the instant case. I am in agreement F with the legal position exposed in that case. Vote Muza is no stranger to the applicant's case as he is its legal practitioner and I am satisfied it was competent for him to depose to the founding affidavit. See r 227(4)(a) of the High Court Rules 1971.

The content of Vote Muza's affidavit on merits

Our law is settled that in order to succeed in having an order made in default G of appearance set aside, the applicant must show good and sufficient cause. See *Chitsaka & Ors* v *Public Service Association* 1993 (2) ZLR 345 (S); *Chetty* v *Law Society of Transvaal*1985 (2) SA 756 (A) at 764.

The explanation tendered by the applicant must negate any wilful default on the part of the applicant. It has been stated time without number that in the H

Bere J

A context of a default judgment, "wilful" connotes deliberateness in the sense that the applicant must have had full knowledge of the set down date and of the risks attendant upon default, and freely took the decision to refrain from appearing, whatever the motivation of that decision may have been. See *Deweras Farm (Pvt) Ltd & Ors* v *Zimbank* 1998 (1) ZLR 368 (S) at 369H-370B*; Zimbank* v *Masendeke* 1995 (2) ZLR 400 (S) at 402D.

B It is within the context of the legal position as stated that I must now attempt to consider the content of Vote Muza's founding affidavit upon which the applicant's case is pinned.

The first point that comes to my attention is that there is clearly a yawning gap in the application for rescission of the decision made against the applicant. C When the matter was initially set down for the pre-trial hearing on 23 September 2010, the learned judge felt very strongly that the parties assisted by their respective legal practitioners should try to engage each other with a view to reaching a settlement, failing which she would naturally consider referring the matter to trial. The court then gave a directive that the parties D convene on their own on 18 October 2010 for a round table discussion. The court with the concurrence of the two legal practitioners, who incidentally included Vote Muza, had the matter postponed for a second pre-trial hearing on 21 October 2010.

Vote Muza and his client's representative, fully aware of the date of pre-trial hearing, chose not to attend the hearing. Therein lies the problem. In his E founding affidavit, Vote Muza has chosen to extensively speculate on what may or may not have happened. The deponent has speculated about the alleged inability of the applicant's alleged key witness, Steven Mbavarira, to attend the round table discussion of 18 October 2010. Stephen Mbavarira's affidavit is deliberately missing from the application.

F In his founding affidavit, Vote Muza gives the impression that he discussed the matter with Mr Ncube's clerk and sought to have both the round table conference and the pre-trial hearing postponed. Mr Muza must simply not be taken seriously when he says he believes Mr Ncube's clerk's indication to him would bind both Mr Ncube and the presiding judge in having the matter set down for a pre-trial conference automatically postponed in Vote G Muza's absence.

There is no such thing as an automatic postponement when a matter is set down before a judge. A party desiring a postponement must advance cogent reasons for a postponement and seek the court's indulgence in that regard. Only when the court agrees with the submissions of a party seekinga postponement H would the court accede to such an application. It was certainly not enough for

Bere J

Mr Muza to decide from the comfort of his office not to attend court himself A on a date that he had personally consented, to have the matter postponed and to delegate his junior Mr Tawona to handle the desired postponement.

One of the yawning gaps in Vote Muza's founding affidavit is that he does not himself explain why he did not personally take it upon himself to appear before the presiding judge and seek a postponement. Equally surprising is Mr B Muza's desire to speculate, on behalf of Mr Tawona, without appreciating the wisdom of compiling Tawona's affidavit in support of the application.

The founding affidavit of Mr Muza attempts to monopolise the alleged expert evidence of Stephen Mbaravira, whose evidence he alleged was central and decisive in the applicant's defence. But if this witness was that important one C does not understand why he could not make himself available on either 20 or 21 October 2010 if he was writing his professional examinations during the week commencing 25 October 2010. Again, Mbavarira's affidavit is conspicuously deficient in explaining his alleged challenges and to explain that of all the experts within the applicant's employment, he was the only one fully qualified to defend the applicant in the manner alleged by Vote D Muza in his founding affidavit.

From the founding affidavit of Vote Muza, one cannot avoid coming to the seemingly inevitable conclusion that with his mind fully alert, he deliberately decided not to attend, firstly, the round table conference as directed by the presiding judge and, secondly, the pre-trial hearing of 21 October 2010 which E date he had accepted for a pre-trial hearing.

The frustrations exxperienced by the presiding judge are understandable and easily discernable from her brief ruling on 21 October 2010 when she stated:

> "1. Result: The defendant is not in attendance. Its legal practitioner was unable to proffer a reasonable excuse for failure by the defendant to send a representative to attend the pre-trial conference. F
>
> 2. Mr Ncube submitted that this was the second occasion on which the defendant failed to attend the pre-trial conference without a reasonable explanation. The parties were supposed to have met yesterday to discuss settlement and the plaintiff and his legal practitioner waited for them for thirty minutes. A call then came from Muza to say that his client could not come because of a course in Kadoma. G
>
> 3. The defendant has been dilatory in dealing with this PTC and having no explanation for its non-attendance on two occasions. I find that it is in default. The plaintiff sought and has applied for its defence to be struck out.
>
> It is ordered:
>
> 1) That the defence and plea by the defendant be and is hereby struck out. H

Bere J

> 2) The A matter is referred to the unopposed roll for proof of damages by the plaintiff."

It is quite significant that the ruling by the judge concerned provides another dimension to the *bona fides* of the applicant's explanation for the default. Whereas, in his founding affidavit, Mr Muza stoutly tried to convince the court that the reason for default was that his client's representative was held B up by professional examinations, his fellow legal practitioner Mr Tawona was singing a different song before the presiding judge by advising him that the representative was attending a course in Kadoma. One can only conclude that there was a clear determination by the applicant to frustrate the conclusion of this case and such conduct must find no sympathy from the court.

C Whilst it is true that a legal practitioner is competent to file a founding affidavit for and on behalf of an applicant, as in the instant case, one should always be aware of the attendant risks involved in the case of a situation where the founding affidavit departs materially from the pleadings filed of record. If that happens, then the competence of the legal practitioner in filing a supporting affidavit inevitably calls for scrutiny.

D In the instant case, and in a desperate effort to lay the foundation of the applicant's *bona fides* in its defence, the deponent has completely denied liability on the part of the applicant. Unfortunately the filed pleadings do not quite support him. It will be noted that on 16 January 2010, the applicant wrote to the applicant complaining about the burnt electric motors which had been caused by low voltage leading to a disruption of the supply of electricity at the respondent's plot, which disruption is the cause of his action in the main matter. In its response the applicant, through its secretary, one J Tsamba, partially accepted blame through its letter of 27 January 2010 which was to the following:

> "We acknowledge receipt of your letter dated 6 January 2010 whose contents F have been noted.
>
> Please be advised that it was established that a 100 KVA transformer which was available by then was installed in 2002 at Exwick Plots and could cater for the load. *Due to the increase in the load over the years, the transformer capacity could not match the load*.
>
> To ensure adequate supplies an increase in transformer capacity will be made G from 100 KVA to 315 KVA. The LT line will be uprated from 50 mm2 HAD to 100 mm2 HAD by 15 February 2010.
>
> We hope this addresses your concerns" (my emphasis).

Compare this conciliatory gesture, which in my view is a partial admission of liability, with the fully fledged denial of liability that runs through Vote Muza's H founding affidavit filed for and on behalf of the applicant. This conflicting

---

Bere J

approach in dealing with this matter neither assists the applicant's defence A nor portrays Vote Muza in good light. If anything, it casts reasonable doubt on the *bona fides* of the application filed.

In para 11 of his notice of opposition to the application, the respondent had challenged the applicant as to why its entire institution had failed to nominate a representative to represent it at the pre-trial conference of 21 B October 2010. In response, and in his answering affidavit, Vote Muza then grudgingly referred to the affidavit of Judith Tsamba "filed herewith."

It seems to me that reference to Judith Tsamba's affidavit further compounded the applicant's application as it amounted to improperly smuggling Tsamba's affidavit into this application. There was a complete violation of the rules of C procedure in introducing the affidavit of Tsamba. It occurs to me that what the applicant did is exactly the mischief that was sought to be prevented by r 235 which is couched as follows:

> "After an answering affidavit has been filed, no further affidavit may be filed without the leave of the court or a judge." D

It goes without saying that if reliance was to be sought on Tsamba's affidavit, the leave of the court or a judge ought to have been obtained first.

In both his founding affidavit and the answering affidavit Mr Vote Muza goes out of his way to explain what he perceives to be the hopelessness of the respondent's case. The deponent states *inter alia*, at para 18 (i) of his E founding affidavit:

> "The matter to be determined by the court is essentially *res nova*. Any judgment to be granted by the court will be ground breaking in one way or the other. The Supreme Court has already said that in respect of such matters, either party has prospects of success and the same have to be fully interrogated. Reliance will be placed upon the relevant authorities should the matter be argued.'" G

In his heads of argument, the applicant's counsel further emphasized that the issues raised in the main matter are *res nova.* This is what the applicant's counsel stated in his heads of argument:

> "At any rate, the issues raised by the main matter are *res nova*. The liability of the applicant under these sort of circumstances has to my knowledge never been G pronounced upon by the court… The law has to be settled on whether Aquilian liability can be extended under these sorts of circumstances. In this regard the Judge hearing the application for reinstatement is in the position commented upon by the Chief Justice in *Chikafu* v *Dodhill (Pvt) Ltd & Ors* 2009 (1) ZLR 293 (S). The result is that the application, as observed by the Supreme Court ought to be granted." H

Bere J

A I did not hear counsel to be arguing that, to his understanding, the Supreme Court would condone counsel's lackadaisical or dilatory approach in the handling of this matter as demonstrated in this judgment.

In my view, there can be no doubt that, through its conduct via its duly chosen counsel, the applicant has deprived itself of the opportunity to clearly ventilate the issues in fully fledged adversarial proceedings.

B In any event, it cannot be seriously contended that in a default judgment the court that will be seized with the matter on the unopposed roll will be precluded from canvassing the issues in order to arrive at a sound decision either for or against the respondent. I remain firmly convinced that all these issues about the respondent's claim being *res nova*, the extension of the C Aquilian liability, if at all, the ground breaking judgment, etc., squarely fall within the province of the court that will be seized with the assessment of damages and they will be adequately addressed it that forum.

In conclusion, and after having looked at the explanation tendered for the default in conjunction with the alleged *bona fides* of the applicant's defence on the merits, as I am obliged to do, I am satisfied that the applicant has not D made a good case to warrant the granting of the relief sought.

The application is accordingly dismissed with costs.

Muza & Nyapadi, applicant's legal practitioners

E *Gill*, *Godlonton & Gerrans,* respondent's legal practitioners

---

© 2015 Juta and Company (Pty) Ltd.

Document 12 of 60

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2012/Volume 2/S v L S (A JUVENILE) 2012 (2) ZLR 70 (H)

S v L S (A JUVENILE) 2012 (2) ZLR 70 (H)

Citation	2012 (2) ZLR 70 (H)
Case No	Judgment No. HB-165-12
Court	High Court, Bulawayo
Judge	Ndou J
Heard	19 July 2012
Judgment	19 July 2012
Counsel	Details not supplied
Case Type	Criminal review
Annotations	No case annotations to date

Flynote

Criminal procedure (sentence) – *general principles – juvenile – probation officer's report – importance of – need to call officer to explain and clarify recommendations made*

Headnote

The accused was convicted of rape. He was aged 16 years at the time of the offence and he already had a previous conviction for aggravated indecent D assault for which he was sentenced to corporal punishment. During the trial a probation officer's report was produced. The recommendation of the probation officer was that the accused be referred for psychiatric examination. The prosecutor advised the magistrate that he did not agree with the probation officer's recommendation, and the magistrate E sentenced the accused to 12 years' imprisonment, of which three years were suspended on condition of good future behaviour.

Held, that the greatest regard should always be paid to the report of a probation officer. These officers are experts in their own field. The probation officer's report in this matter was based on careful investigation of the accused's home background, family relationship, personality traits, education and F other social factors. The least the magistrate could have done was to call the probation officer to testify and clarify on the recommendation in light of the factors she had discovered during the trial. The probation officer would have been cross-examined on the report with some thoroughness. While a court is never compelled to accept any expert evidence at its face G value, where that evidence is honestly given and supported by sound reasons, which are not contradicted in evidence, a court should not lightly disregard that opinion. Oral evidence of probation officers should not be easily dispensed with for the sake of convenience. The sentence would be set aside and the matter remitted to the trial court for the evidence of the probation officer to be heard and sentence passed afresh. H

Ndou J

Cases cited A

S v Barry; S v Chemaly 1973 (2) RLR 1 (A)

S v G & Anor 1970 (2) RLR 28 (A)

S v Ghoor 1969 (2) SA 555 (A)

S v Yibe 1964 (3) SA 502 (E)

Judgment

B **Ndou J:** The accused was properly convicted, by a Bulawayo regional magistrate, of rape as defined in s 65(1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. He was aged 16 years at the time of the offence and disturbingly he already has a previous conviction for aggravated indecent assault, for which he was sentenced to corporal punishment. He was C sentenced to 12 years' imprisonment, of which three years were suspended on the usual conditions of good future behaviour. During the trial a probation officer's report was produced. The recommendation of the probation officer was as follows:

> "It is respectfully recommended that LS be referred to a psychiatrist for examination to determine if he is not neurotic or even suffering from mild psychosis."

D After submitting the report, the prosecutor went on to attack its recommendation in the following manner:

> "Court to Public Prosecutor
>
> Q What is the State's attitude towards the recommendations of Probation Officer? E
>
> A The State is not subscribing to the PO's recommendations that accused be examined by a psychiatrist as he might be a maniac, for the sole reason that its just a suggestive comment. It can be further be sidelined [*sic*] by accused's demeanour in court. Accused had a grounded reason and able to cross-examine all the witnesses for the State. The probation officer's report is just persuasive and does not bind the court."

F After this submission by the prosecutor, the regional magistrate asked the accused a few basic questions and thereafter justified the disregarding of the probation officer's report and the imposition of the above-mentioned custodial sentence as follows:

> "… overall probation officer felt his early life has been a rough one … The probation officer has suggested that he be examined by a psychiatrist to determine G if he is not a maniac. This the court did not take, reason being accused simply committed the offences. In court after conviction he was now showing contrition showing that he really appreciates his wrongdoing but could not simply control himself. He appreciates that he is well looked after by the paternal aunt. This is shown by the school he attended, Plumtree High. He is simply a bully …"

It is clear from the foregoing that the public prosecutor and the regional H magistrate found themselves unable to agree with the recommendations in

---

the probation officer's report. The report of the probation officer was based on A careful investigation of the accused's home background, family relationship, personality traits, education and other social factors. The least the regional magistrate could have done was to call the probation officer to testify and clarify on the recommendation in light of the factors she had discovered during the trial. The probation officer would have been cross-examined on B the report with some thoroughness. The approach to a probation officer's report was aptly captured by Beadle CJ in *S* v *Barry*; *S* v *Chemaly* 1973 (2) RLR 1 (A). On pp 6H and 7A the learned Chief Justice had this to say:

> "In considering cases of this sort the greatest regard should always be paid to the report of the probation officer, when it is clear from the evidence of that officer that he has gone to trouble in arriving at his evaluation to which the probation C officer in these cases went. It must be remembered that these officers are experts in their own field, and while a court is never compelled to accept any expert evidence at its face value, where that evidence is honestly given and supported by sound reasons, which are not contradicted in evidence, a court should not lightly disregard that opinion. Authority is hardly required to show that the opinions of probation officers always receive very careful consideration, but if required such authority can be found in such cases as *S v Adams* 1971 (4) SA 125 (C); D translation p 592."

See also *S* v *Yibe* 1964 (3) SA 502 (E) at 510H-511A; *S* v *Ghoor* 1969 (2) SA 555 (A) at 559D-H and *S* v *G & Anor* 1970 (2) RLR 28 (A).

Oral evidence of probation officers should not be easily dispensed with for the sake of convenience. With the involvement of the probation officer there E is a real chance of saving the juvenile from a life of crime. The magistrate's unshakeable faith in a particular form of punishment may be destructive to the juvenile if it is randomly imposed without reference to the character and the needs of the specific offending juvenile.

In the circumstances, it was a misdirection on the part of the regional magistrate to lightly dismiss the probation officer's recommendation without F even hearing him or her.

Accordingly, the conviction is confirmed. The sentence imposed by the regional magistrate on 5 June 2012 is hereby set aside. It is hereby ordered that the regional magistrate hears the evidence of the probation officer and thereafter sentences the accused person afresh. G

Kamocha J concurred. H

© 2015 Juta and Company (Pty) Ltd.

Document 13 of 60

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2012/Volume 2/S v MHAKO 2012 (2) ZLR 73 (H)

S v MHAKO 2012 (2) ZLR 73 (H)

Citation	2012 (2) ZLR 73 (H)
Case No	Judgment No. HH-315-12
Court	High Court, Harare
Judge	Musakwa J & Assessors
Heard	12 July 2012; 13 July 2012; 16 July 2012; 17 July 2012; *CAV*
Judgment	20 July 2012
Counsel	*E Mungoni*, for the State *T Hungwe*, for the accused
Case Type	Criminal trial
Annotations	No case annotations to date

Flynote

Criminal law – *offences under Criminal Law Code – murder (s 47) – intent to kill – realisation of risk or possibility of death ensuing from conduct – what must be shown*

Headnote

D The accused was charged with the murder of his seven-year-old daughter. He had severely beaten her with a bamboo stick for a misdemeanour and she had fallen down and injured herself when

she managed to run away from him. She died a week later.

E *Held*, that although moderate corporal punishment of a child by its parent is permitted by the Constitution, there was no doubt that the accused had exceeded the bounds of moderate corporal punishment. The question was whether he exceeded such bounds with intent to kill or did so negligently.

Held, further, that the common law concept of "constructive intent" has been replaced by the term "realisation of risk or possibility" in the Criminal F Law Code [*Chapter 9:23*]. There are two components. The first is a component of awareness, that is, whether or not the accused realised that there was a risk or possibility, other than a remote risk or possibility, that

(i) his conduct might give rise to the relevant consequence; or

(ii) the relevant fact or circumstance existed when he engaged in the conduct.

G The second is a component of recklessness, that is, whether, despite realising that risk or possibility referred, the accused continued to engage in that conduct. If the component of awareness is proved, the component of recklessness is inferred from the fact that

(a) the relevant consequence actually ensued from the conduct of the H accused; or

---

Musakwa J

(b) the relevant fact or circumstance actually existed when the accused A engaged in the conduct.

According to his confession and to the evidence of an eye witness, the accused must have realised that there was a real risk or possibility that his conduct might cause death but nonetheless continued in such conduct despite that risk or possibility. B

Cases cited

Ex p *Min of Justice*: in re *S v SAUK* 1992 (4) SA 804 (A)

S v Chikukutu 1996 (1) ZLR 702 (S)

S v Gumbi 1994 (2) ZLR 323 (S)

R v M 1946 AD 1023 C

S v Ngubane 1985 (3) SA 677 (A)

Legislation considered

Constitution of Zimbabwe 1980, s 15(1)

Criminal Law Code [*Chapter 9:23*], ss 15 & 16

Criminal Procedure and Evidence Act [*Chapter 9:07*], s 256

Case information

E Mungoni, for the State

T Hungwe, for the accused

Judgment

Musakwa J: The accused was charged with contravening s 47 of the E Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. He tendered a plea of not guilty.

The facts are that the deceased was the accused's daughter and she was aged seven years. Between 21 and 23 September 2011 the accused assaulted the deceased with a bamboo stick. The deceased sustained injuries which the accused treated using some herbs. The deceased succumbed to the injuries F on 28 September 2011. The post-mortem report noted that the deceased had cuts, grazes and bruises all over the body, with internal bleeding. The cause of death was given as multiple body injuries caused by assault resulting in internal bleeding and possible renal failure.

The accused's defence was to the effect that on the day of assault he received G a report that the deceased had defecated in the communal well. He then cleaned the well. Thereafter when the

deceased came home he chastised her with a stick. In the process the deceased extricated herself from the accused's grip. As she ran away she fell down and sustained injuries to her elbow. According to the accused, normal family life resumed until the deceased died a week later. H

2012 (2) ZLR p75

Musakwa J

A The broader facts being common cause, the court will not go into greater detail in respect of the evidence.

Dr Siamuchembu, who conducted the autopsy, testified. He did not conduct an internal examination as they did not have specialised equipment for that purpose. It was his evidence that the cuts on the deceased's body were not B deep. On why he stated renal failure was a possible cause of death, he stated that bleeding of tissues releases myoglobin which may enter the blood stream and clog normal kidney functions. The deceased could have survived had she received appropriate medical attention. For example, he explained that the deceased could have been placed on dialysis or she could have been administered with a drug that enhances urine production.

C Chenai Mhako, the teenage daughter of the accused, also testified. Although she was not specific on the dates, she said the accused assaulted the deceased on two separate occasions. The first such assault was on a Friday, whilst the second incident was on a Thursday. She mentioned the use of booted feet as well as a stick. Her testimony gave the impression that the assaults D happened on several occasions. This is because when she was asked if they reported the assaults, she replied that when they reported to an uncle and grandparents the accused threatened them.

Chenai also gave a different reason for the deceased's assault. She explained that, as the accused assaulted the deceased, he claimed that she was not his E daughter. She also stated that on the second occasion their step-mother was present. When the step-mother remonstrated with the accused the latter shouted at her. She then went away and spent the night at her parents' home.

The witness also stated that on the second occasion the deceased spent the night groaning in pain. The accused told her to shut up as she was making noise.

F From this witness's testimony it was also clear that she did not observe the first assault she alluded to. She stated that when they returned from the well they found the deceased crying. The deceased then reported that she had been assaulted by the accused.

Freddy Mufunga, a neighbour of the accused, also testified. He estimated that his home is about 100 metres from that of the accused. He stated that G he saw the accused assaulting the deceased on two occasions. On those two occasions he said he informed members of the village committee.

He mentioned the assault that occurred on a Friday. He said he saw this from his home. It looked like the accused was using a stick. The accused's wife was present. He then cautioned the accused against beating the child. The H accused is said to have replied that it was not his child and if the deceased

---

2012 (2) ZLR p76

Musakwa J

died he should not attend the funeral. It turned out the accused's utterances A proved true, as the deceased subsequently died.

The accused also gave evidence. He amplified his defence outline. He maintained that he never disputed the deceased's paternity. He confirmed using a bamboo stick to assault the deceased. We did not hear why he had to use such weapon to assault the deceased. Suffice to note that the accused B gave the impression that the assault was of short duration as he said he assaulted the deceased for about two to three minutes.

The accused seemed to ascribe some of the injuries sustained by the deceased to her falling down as she escaped from the beating. Primarily this is in reference to the injury to the elbow. He also stated that there was nothing C unusual from the day of the assault until the deceased died. The accused also disputed making the utterance attributed to him by Freddy Mufunga. He also denied threatening Chenai. The accused also claimed that, although he gave a warned and cautioned statement in which he admitted the assault, he disputed some of its contents. When he did so, he was threatened by the recording detail. The warned and cautioned statement was confirmed by a D magistrate and no issue was taken regarding the confirmation process.

Rashy Zacharia, the accused's wife, also testified as a defence witness. It must be noted that initially she was meant to testify as a State witness. There was the legal hurdle that she is not a competent and compellable witness to testify against her husband in terms of s 247 of the Criminal Procedure and E Evidence Act [*Chapter 9:07*]. Nonetheless, there had been an indication that the defence intended to waive the privilege. This is understandable, as this witness gave evidence that was largely favourable to the accused.

The witness denied having witnessed the fatal assault. She said on that particular day she had a misunderstanding with the accused in connection F with a traditional ceremony she was supposed to attend at her parents' home. As a result she did not sleep at home. She did not state she was threatened by the accused. When she returned the following morning she learnt that the deceased had been assaulted the previous day.

She was generally not a truthful witness. It must be noted that both Chenai and Freddy Mufunga told the court that she was present when the deceased G was assaulted. Why would these witnesses lie in this respect? Why the coincidence that she slept at her parents' home during that night?

In any event, during her evidence in-chief, she had evidently lied that the deceased had never been assaulted in her presence. Yet, under cross-examination, she admitted that there was an occasion when the deceased H

Musakwa J

A had been assaulted for refusing to bath after they had been panning at the river. She said a switch had been used.

The witness became emotional when she was answering questions posed by the court. She sought to volunteer additional reasons why the deceased was assaulted despite the fact that she claimed not to have been present.

B Both the State and defence undertook to file written submissions on 19 July 2012. However, it was only State counsel who filed his submissions on 18 July. The defence's closing submissions must have been filed late on 19 July because they were only referred to me this morning.

In his closing submissions, Mr *Mungoni* urged the court to return a verdict C of murder with constructive intent.

The warned and cautioned statement by the accused states as follows:

> "Yes I admit the charge being levelled against me. I assaulted the now deceased as a way of chastising her since she was my daughter and that she had defecated in a water well from where the whole community get drinking water. I assaulted her too severely with a bamboo stick on her buttocks and back until she defecated D in her pants because she got seriously injured on positions I had assaulted her. The now deceased then managed to break free and when she was running away, she fell down and she got seriously injured on her face. From the day I assaulted the now deceased she never went to hospital or clinic to seek medical treatment because I was treating her using traditional herds. We woke up and found that my daughter had died in the morning of the 28 September 2011 but I had assaulted her on 21 September 2011. That is all."

E Section 256 of the Criminal Procedure and Evidence Act provides:

> "(1) Any confession of the commission of an offence and any statement which is proved to have been freely and voluntarily made by an accused person without his having been unduly influenced thereto shall be admissible in evidence against such accused person if tendered by the prosecutor, whether such confession or statement was made before or after his arrest, or after committal and whether F reduced into writing or not:
>
> Provided that –
>
> (i) a certified copy of the record produced in terms of subsection (1) of section 115B shall be admissible in evidence against the accused;
>
> (ii) any information given under any enactment which provides a penalty for a G failure or refusal to give such information shall not, on that account alone, be inadmissible.
>
> (2) A confession or statement confirmed in terms of subsection (3) of section *one hundred and thirteen* shall be received in evidence before any court upon its mere production by the prosecutor without further proof:
>
> Provided that the confession or statement shall not be used as evidence against H the accused if he proves that the statement was not made by him or was not

Musakwa J

made freely and voluntarily without his having been unduly influenced thereto, A and if, after the accused has presented his defence to the indictment, summons or charge, the prosecutor considers it necessary to adduce further evidence in relation to the making of such confession or statement, he may re-open his case for that purpose.

(3) If in any confession or statement made or evidence given by an accused person which would otherwise be admissible there is contained matter which may B be prejudicial to the accused and which is not relevant to the charge preferred against him, the prosecutor may delete such matter from the confession, statement or evidence, as the case may be, and such confession, statement or evidence, as the case may be, shall be admissible against such accused person:

Provided that no confession, statement or evidence from which any matter has been deleted shall be adduced or received in evidence unless a copy of the C confession, statement or evidence from which such matter has been deleted has been served upon the accused and he has not, within five days of such service, demanded that the whole or part of any matter so deleted shall be included in the confession, statement or evidence if it is adduced in evidence by the prosecutor.

(4) If an accused person demands that the whole or any part of any matter referred to in subsection (3) shall be included in his confession, statement or D evidence if it is adduced in evidence by the prosecutor, then such confession, statement or evidence containing such matter shall, notwithstanding anything to the contrary in this Act, be admissible in evidence against him."

Mr *Mungoni* referred to s 16 of the Criminal Law Code in relation to whether or not the accused person was merely grossly negligent in his conduct. The provision states that – E

"(1) Where negligence is an element of any crime

(a) constituted by the performance of an act, the test is objective and consists of the inquiry whether the accused person's performance of that act was blameworthy in that

(i) a reasonable person in the same circumstances as the accused would not have performed that act; F

or

(ii) the accused failed to perform the act with the care and skill with which a reasonable person in the same circumstances would have performed that act;

whichever inquiry is appropriate to the crime in question; or

(b) constituted by the omission to perform an act, the test is objective and consists G of the inquiry whether the accused person's omission to perform that act was blameworthy in that a reasonable person in the same circumstances would not have omitted to perform the act; or

(c) constituted wholly or partly by a consequence resulting from the conduct of an accused person, or by the existence or absence of any circumstance in which such conduct occurred, the test is objective and falls into two parts: H

Musakwa J

(i) whether A or not the accused person failed to realise that his or her conduct might produce the relevant consequence or that the relevant circumstance might exist or be absent; and

(ii) if the accused person did fail as provided in subparagraph (i), whether or not the person's failure was blameworthy in that a reasonable person in the same circumstances B

A would have realised that the relevant consequence might be produced and would have guarded against it; or

B would have realised that the relevant fact or circumstance might exist or be absent and would have taken steps to ascertain whether or not it did exist;

as the case may be.

(2) For the avoidance of doubt it is declared that paragraph (c) of subsection (1) C shall apply to the determination of the criminal liability of any person accused of culpable homicide, negligently causing serious bodily harm or negligently causing serious damage to property."

Since Mr *Mungoni*'s contention is that the accused should be found guilty of murder, one would have thought that he should have referred to s 15 D instead. That provision states:

"(1) Where realisation of a real risk or possibility is an element of any crime, the test is subjective and consists of the following two components:

(a) a component of awareness, that is, whether or not the person whose conduct is in issue realised that there was a risk or possibility, other than a remote risk or possibility, that E

(i) his or her conduct might give rise to the relevant consequence; or

(ii) the relevant fact or circumstance existed when he or she engaged in the conduct; and

(b) a component of recklessness, that is, whether, despite realising the risk or possibility referred to in paragraph (a), the person whose conduct is in issue continued to engage in that conduct. F

(2) If a crime of which the realisation of a real risk or possibility is an element is so defined in this Code or any other enactment that:

(a) the words describing the component of awareness are omitted, the component of awareness shall be implicit in the word "recklessly" or any derivatives of that word; or G

(b) the words describing the component of recklessness are omitted, the component of recklessness shall be implicit in the expression "realise a real risk or possibility" or any derivatives of that expression.

(3) Where, in a prosecution of a crime of which the realisation of a real risk or possibility is an element, the component of awareness is proved, the component of recklessness shall be inferred from the fact that: H

(a) the relevant consequence actually ensued from the conduct of the accused;

2012 (2) ZLR p80

Musakwa J

Or A

(b) the relevant fact or circumstance actually existed when the accused engaged in the conduct; as the case may be.

(4) For the avoidance of doubt it is declared that the test for realisation of a real risk or possibility supersedes the common-law test for constructive or legal intention and its components of foresight of a possibility and recklessness B wherever that test was formerly applicable."

In his closing submissions, Mr *Hungwe* contended that the State failed to prove its case beyond a reasonable doubt. In support of this contention, he further submitted the following: that the State failed to prove any motive on the part of the accused why he would want to kill his own daughter; that the State also failed to prove that the accused acted negligently in failing to C seek medical intervention when the deceased's condition deteriorated; that that the defence's version could reasonably possibly be true, taking into account the inconclusiveness of the post-mortem report. In support of this submission he cited *R* v *M* 1946 AD 1023.

Finally, Mr *Hungwe* submitted that the accused does not bear any onus to D prove his innocence. Rather, he merely has to place before the court a defence that raises triable issues and in this case he has cast a doubt on his liability.

The starting point to note is that according to s 15(1) of the Constitution of Zimbabwe, which states:

"No person shall be subjected to torture or to inhuman or degrading punishment E or other such treatment."

However, s 15(3) provides derogations from that provision by stating that:

"No moderate corporal punishment inflicted –

(a) in appropriate circumstances upon a person under the age of eighteen years by his parent or guardian or by someone *in loco parentis* or in whom are F vested any of the powers of his parent or guardian; or

(b) in execution of the judgment or order of a court, upon a male person under the age of eighteen years as a penalty for breach of any law;

shall be held to be in contravention of subsection (1) on the ground that it is inhuman or degrading."

Therefore, there is no denying that the accused was entitled to inflict moderate G corporate punishment on the deceased as part of his parental responsibilities. However, taking into account the injuries sustained by the deceased, there is no doubt that the accused exceeded the bounds of moderate corporal punishment as envisaged in the Constitution. The question to determine is whether he exceeded such bounds with intent to kill or did so negligently. H

2012 (2) ZLR p81

Musakwa J

A In respect of the requirements for constructive intent which has been replaced by the term realisation of risk or possibility in the Code, Mr *Mungoni* cited *S* v *Chikukutu* 1996 (1) ZLR 702 (S) and *S* v *Gumbi* 1994 (2) ZLR 323 (S). In dealing with the concept of constructive intent McNally JA in *S* v *Gumbi supra* had this to say at 326:

> "Constructive intent to kill is not an easy concept to apply to a set of facts, B especially when a gun is involved. The difficulty arises in separating the facts, on the one hand from those which show an actual intent to kill, and on the other from those which show negligence in shooting which falls short of recklessness.
>
> We are not concerned in the present case with an actual intent to kill. We are concerned with the other distinction, between mere negligence and negligence so gross as to amount to recklessness. Mere negligence cannot found an intent to C kill. Compare *S* v *Ndlovu* S-131-90 (not reported) and *S* v *Henderson* S-17-84."

The learned judge of appeal further went on to say at 327:

> "The point, in essence, is that there must be more than negligence and even more than gross negligence to constitute that form of recklessness which amounts to constructive intent or *dolus eventualis*. As was said by Beadle AJ (as he then was, having retired as Chief Justice**)** in *R* v *Kadongoro* 1980 ZLR 54 (G) at D 55B:
>
> > 'It seemed to me that the magistrate was clearly wrong in confusing *dolus eventualis* with gross negligence ...'"
>
> There must be, in the mind of the accused person, what has been called 'a volitional component'. See the judgment of Jansen JA in *S* v *Ngubane* 1985 (3) SA 677 (A) at 685D. In other words he must, in effect, say to himself 'I know E I may kill this person if I shoot. But I am going to shoot anyway'. As Jansen JA went on to say:
>
> > 'Our cases often speak of the agent being "reckless" of that consequence, but in this context it means "consenting", "reconciling" or "taking into the bargain", and not the "recklessness" of the Anglo-American systems, nor an aggravated degree of negligence.'"

F See also Ex p *Minister van Justice*: In re *S* v *SAUK* 1992 (4) SA 804 (A) at 808A.

Coming to the present matter, notwithstanding the accused's entitlement to chastise the deceased, there was no justification in the use of a bamboo stick. The warned and cautioned statement states that he assaulted the deceased G severely until she defecated. The accused did not desist from assaulting the deceased voluntarily. Rather, it is the deceased who managed to break free from his grip and run away.

We also take into account the evidence of Freddy Mufunga who cautioned the accused as he assaulted the deceased. The accused retorted that he was H disciplining his child and that if the child died Freddy should not attend

---

the funeral. The accused must have realised that there was a real risk or A possibility that his conduct may cause death but nonetheless continued in such conduct despite that risk or possibility.

The absence of ill-motive on the part of the accused is not a legal requirement in a case of murder. In addition, the medical evidence is coherent enough even without an internal examination having been conducted. The stark B facts of this case are that an otherwise healthy child succumbed to death after sustaining injuries from an assault perpetrated by the accused. In the circumstances the exact cause of death is immaterial. Were it not for the assault, would the deceased have died in the manner described?

Accordingly, the accused is found guilty of murder, in contravention of C s 47(1)(b) of the Code.

Attorney General's *Office*, for the State

Venturas & Samukange, accused's legal practitioners D

© 2015 Juta and Company (Pty) Ltd.

Document 14 of 60

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2012/Volume 2/GUARD-ALERT (PVT) LTD v MUKWEKWEZEKE & ANOR 2012 (2) ZLR 83 (H)

GUARD-ALERT (PVT) LTD v MUKWEKWEZEKE & ANOR 2012 (2) ZLR 83 (H)

Citation	2012 (2) ZLR 83 (H)
Case No	Judgment No HH-405-12
Court	High Court, Harare
Judge	Mutema J
Heard	25 July 2012
Judgment	25 July 2012
Counsel	*T S Manjengwah,* for the applicant First respondent in person No appearance for second respondent
Case Type	Opposed application
Annotations	No case annotations to date

Flynote

C **Costs** – *legal practitioner and client scale – grant of – losing party a self-actor – action frivolous and vexatious and an abuse of court process – costs on higher scale appropriate*

Headnote

While normally a litigant should not be penalised with costs, especially when D that litigant is a lay person, there may exist instances where a litigant – lay person or not, or self-actor or not – deserves to be mulcted with costs on an attorney-client scale. This could happen where the action is frivolous and vexatious and an abuse of court process and where the court considers that, as a result, it would be just, by means of such an order, to ensure, more effectively than it can do by means of a judgment E for party and party costs, that the successful party will not be out of pocket in respect of the expense caused to it by the litigation.

Cases cited

African Tribune Newspapers (Pvt) Ltd & Ors v *Media and Information Commission & Anor* 2004 (2) ZLR 7 (H) F

Ndlovu v Regional Magistrate, Eastern Division & Anor 1989 (1) ZLR 264 (H)

Nel v Waterberg Landbouwers Ko-operatieve Vereeniging 1946 AD 597

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

Rascher v Min of Justice 1930 TPD 810

Legislation considered G

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

High Court Rules, 1971 (RGN 1047 of 1971), r 256

H Labour Act [*Chapter 28:01*], ss 89(1) & (6), 98(14)

Mutema J

Case information

T S Manjengwah, for the applicant A

First respondent in person

No appearance for second respondent

Judgment

Mutema J: Job's patience is certainly among the virtues which a judicial officer must possess in the discharge of his/her functions, especially when B dealing with a lay person self-actor to whom knowledge of both adjectival and substantive law is an intellectual exercise not subscribed to by the common man.

The applicant (Guard-Alert) is a member of the National Commercial Employers Association of Zimbabwe (the Association), while the first respondent (Mukwekwezeke) is a member of the Commercial Workers C Union of Zimbabwe (the Union).

On 12 August 2009 the arbitrator, Mr Hutire, made an arbitral award ordering the Association's members to pay the Union's members a minimum wage of US$150 per month for the period 1 April, 2009 to 31 July, 2009. Dissatisfied with that arbitral award, the Association appealed to the Labour Court. In D its judgment LC/H/420/10 handed down on 3 December, 2010 the Labour Court dismissed the appeal with costs.

On 17 December, 2010 the respective office bearers of the Association and the Union held a meeting whereat "it was agreed that wages for grade 1(a) shall be USD200 per month, effective 1 January 2011 until 30 June 2011 E and that the Union and the Association agreed to waive and abandon their rights arising from the award made by Arbitrator Hutire and the Labour Court judgment of Judge President Musariri handed down on 3 December, 2010".

The papers filed of record do not indicate whether or not Mukwekwezeke was aware of the waiver agreement of 17 December 2010 between the Association and the Union, because on 21 March 2011 he issued a summons F in the magistrates' court under case number 3068/11. In the case he was suing Guard-Alert for payment of $660 representing what he termed "underpayments back pay as said by the Labour Court with case No. LC/H/420/10 calculations are as follows: 1 April 2009 to August 2009 paid $84 instead of $150 Balance $66 x 5 months = $330. 1 September 2009 to 28 February 2010 paid $94 G per months (*sic*) instead of $160 Balance $66 x 5 months = $330, $66 x 10 months x daily rates that is $660….". He was a self-actor.

Guard-Alert entered a special plea in bar to the effect that the magistrates' court had no jurisdiction to entertain the matter since the issues arise from an employer/employee relationship. On the merits, Guard-Alert pleaded that Mukwekwezeke could not seek to enforce a judgment to which he was not a H

Mutema J

A party and that the parties to that judgment had agreed, on 17 December 2010, that the rights arising from the arbitral award and judgment Mukwekwezeke made reference to be waived. On 13 April, 2011 Mukwekwezeke withdrew his claim.

But he had remained undaunted because, on 11 April 2011, he lodged a B chamber application in the magistrates' court seeking to register the Labour Court judgment in terms of s 98(14) of the Labour Act [*Chapter 28:01*]. He contended that he was a direct beneficiary of the Labour Court judgment and that he never agreed to waive or forgo his back pay with Guard-Alert and was not party to any "negotiations" and "agreements" purportedly made to waive employees' rights to the back pay. He wanted Guard-Alert to pay C him $660 in terms of the Labour Court judgment alluded to *supra* calculated from April, 2009 to December 2010 with interest at the rate of 25per cent per annum from 20 December,2010 to date of full payment.

In opposing that application for registration of the judgment, Guard-Alert argued that Mukwekwereke's claim by way of action in case no. 3068/11 D was still extant for the purported withdrawal was ineffectual for the simple reason that he did not tender costs. Over and above that, Guard-Alert and he were not parties to both the arbitral award and the Labour Court judgment so he had no *locus standi* to seek the registration of the judgment and its enforcement against Guard-Alert. Further, Guard-Alert argued that the E judgment Mukwekwezeke attached to his application was incapable of registration as it was not quantifiable and also that the actual parties had waived and abandoned their rights arising from both the arbitral award and the judgment. Mukwekwezeke's application was dismissed, the court ruling that the matter was improperly before it as the applicant had not shown a cause of action as there was no *nexus* between the parties to that application F and the parties to the judgment sought to be registered and enforced. This was on 11 May, 2011.

Still obdurate and undaunted, on 12 May 2011 Mukwekwezeke lodged yet another chamber application in the magistrates' court for registration of the same Labour Court judgment in terms of s 98(14) of the Labour Act. In his G founding affidavit he wrote, *inter alia,* that:

> "2. I am a security guard Morgan Mukwekwezeke. I hereby inform you that, I am employee of Guard-Alert (Pvt) Ltd. I have 10 years with the same employer. My complaint is that when the judgment came from the Labour Court done by Miss Hutire L on April 2009 it was given in favour of the workers. The judgment given by the workers committee (Guard-Alert (Pvt) H Ltd)

Mutema J

> 3. Then as time goes on there was a dispute of right to the employee since A the employers of the whole sector had defied the order by not complying to it positively saying they were not able to pay any increase backdated to April 2009.
>
> 4. Therefore as this dispute took more time to ripen I saw it worth forwarding it ahead as my individual since doing it collectively was bearing us no fruits.
>
> 5. As to my last resort, I approached the magistrate court in order to advance B this dispute of right. That's why I am still persisting to insist the court order be paid my wages as accumulated to the figures amounting to US$660, as per given time. Draft order is attached …."

Naturally Guard-Alert opposed that application before the second respondent, pointing out that Mukwekwezeke required legal counsel as he kept raising C the same issues when the matter had already been dealt with and was *res judicata.* The second respondent's terse ruling was this:

> "From the papers filed in his application the applicant has shown himself to be party to labour arbitration by way of his membership to the appeal's (*sic*) respondent's committee. However the court is of the view that there are material disputes of fact on whether he was part of the employees that waivered (*sic*) D their back pay. And as such the court should decide the matter after hearing evidence".

This ruling was made on 23 May 2011. It prompted the current application for review in terms of r 256 of the High Court Rules 1971, as read with ss 26 and 28 of the High Court Act [*Chapter 7:06*].

It is pertinent to point out that, despite being aware that Guard-Alert had E launched this application for review, Mukwekwezeke had by 21 June 2011 lodged yet another application in the magistrates' court for registration of the same Labour Court judgment alluded to *supra* which magistrate Manyika postponed *sine die* pending the outcome of this review application.

Guard-Alert's submitted the following grounds for review: F

(a) The decision by the magistrate (to refer the matter to trial) was so unreasonable that no person properly applying his/her mind would have reached it in that the order which Mukwekwezeke sought to register was not attached to the application and so did not form part of the record.

(b) The application was based on the same facts and sought the same relief G that Mukwekwezeke had sought in case number 4511/11 which the court had dismissed, hence the matter was clearly *res judicata*.

(c) The benefits of the judgment referred to (i.e. the Labour Court judgment as well as the arbitral award) were waived by the parties to that judgment and no claim could arise therefrom. H

Mutema J

A Section 28 of the High Court Act empowers this court to set aside or correct proceedings or decisions on review where any of the grounds provided for in s 27(1) of the that Act are established *viz*:

- absence of jurisdiction on the part of the court *a quo*;
- interest in the cause, bias, malice or corruption on the part of the person B presiding over the court;
- gross irregularity in the proceedings or decision.

The first ground for review is that the magistrate's decision was so unreasonable that no person properly applying his/her mind to the matter would have reached it. In other words, the decision complained of must be so outrageous C in its defiance of logic that no reasonable person properly applying his/her mind to the matter would have arrived at the same decision. The grievance here is that labour awards sought to be registered in terms of s 98(14) of the Labour Act must be attached to the application for registration. Failure to so attach that award means that there is nothing to be registered before the court. In the instant case, the arbitral award was not attached to the application. D The Labour Court judgment that was attached was an appeal judgment, not quantified or sounding in money, and therefore incapable of registration for enforcement purposes. Since the arbitral award was not available and the Labour Court judgment that was attached was not quantified, this did not imbue the second respondent with power to refer the matter to trial as if the E court were one of first instance. In terms of s 89(1), as read with subs (6), of the Labour Act, the court *a quo* has no jurisdiction to hear the matter as a court of first instance. Over and above that, the second respondent's decision was so unreasonable in failing to appreciate that her mandate was limited merely to attend to the registration of an award which is capable of enforcement that her conduct amounted to gross irregularity in the decision arrived at.

F Regarding the second ground for review, it goes without saying that in case number 4511/11 Mukwekwezeke had filed the same application based on the same facts, seeking the same relief and between the same parties, and that application had been dismissed on the merits. This means that the matter had become *res judicata*. In the event, the second respondent should not have entertained the later application. Her entertaining it and referring it G to trial was palpably grossly unreasonable which warrants the setting aside of the decision: *African Tribune Newspapers (Pvt) Ltd & Ors* v *Media and Information Commission & Anor* 2004 (2) ZLR 7 (H), *Pondoro (Pvt) Ltd & Anor* v *Nemakonde & Anor* 2008 (1) ZLR 6 (H). The irregularity amounts to a clear case of miscarriage of justice, in that the second respondent H strayed from the task before her and arrogated to herself the jurisdiction to

---

delve into the merits of the matter by referring it to trial, thereby exceeding A her mandate, as well as prejudicing Guard-Alert's rights and interests by exposing it to a second suit when the matter was *res judicata*. In *Ndlovu* v *Regional Magistrate, Eastern Division & Anor* 1989 (1) ZLR 264 (H) at 267C-D Adam J quoted with approval what was held in *Rascher* v *Minister of Justice* 1930 TPD 810 that:

> "a wrong decision of a magistrate in circumstances which would seriously B 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 third ground for review also exhibits gross unreasonableness amounting to gross irregularity in the decision by the second respondent. She referred the matter to trial on the purported basis that Mukwekwezeke had "shown C himself to be party to labour arbitration by way of his membership to the appeal's (*sic*) respondent's committee. However the court is of the view that there are material disputes of fact on whether he was part of the employees that waivered (*sic*) their back pay …"

The ruling not only prompted Guard-Alert to file this review application D but also Mukwekwezeke to file documents, titled "Pre-Trial Conference Issues and Notice of Set down For Pre-Trial Conference", on 3 June, 2011.

Apart from the fact that the magistrate's court does not have the jurisdiction at first instance to hear the labour dispute in view of the provisions of s 89(1), as read with subs (6), of the Labour Act as already stated above, the issue E purportedly referred to trial as a material dispute of fact had already been disposed of on 11 May 2011 in case number 4511/11, when the same suit was dismissed. Over and above the *res judicata* issue, there is also evidence of the minutes of 17

December, 2010 in which the Association and the Union agreed to waive and abandon their rights arising from the arbitral award as well as the Labour Court judgment, to which the two entities and not F Mukwekwezeke were the parties. Apart from the fact that Mukwekwezeke did not have the *locus standi* to institute the application for the registration of any award – he not being a party to any of the previous award(s) – the Union of which he was a member was his representative/agent and to that end, whatever decision the Union made, did bind Mukwekwezeke. He thus could not be heard to argue that he was not part of the employees who waived G their rights to the back pay.

At the end of the day, each of the three grounds for review *in casu* have a common thread running through them, *viz.* unreasonableness which is so extreme that little further evidence, if none at all, is needed for proof of gross irregularity, making the decision complained of so outrageous in its H

A defiance of logic that no reasonable person properly applying his/her mind to the matter would have arrived at the same decision.

In closing, there is an issue I am constrained to advert to. Earlier in this judgment I adumbrated Mukwekwezeke's conduct of continuously filing applications and documents in the magistrates court which plainly amounts to abuse of court process. That he is a lay person cannot amount to an excuse. B Even in this court, Mukwekwezeke repeated his haranguing. The documents filed of record show the following:

1. After this review application was filed on 13 June 2011, on 29 July 2011 he wrote a letter to Guard-Alert's legal practitioners asking them to speed up the review "so that the matter can be finalised at the magistrates court C where they are waiting for the outcome of the review".
2. Before penning the above letter Mukwekwezeke had, on 23 June 2011 filed what he termed "Notice of Responding For Review" and an affidavit headed "Respond to the Applicant (*sic*) For Review".
3. On 25 July 2011 he had again filed his notice of opposition to the review D application as well as a document titled "1st Respondent's Answering Affrtidavit (*sic*) For Review".
4. On 4 August 2011 he again filed a "Notice of Opposition For Review" as well as "Notice For Respond (*sic*) For Review" in affidavit form attaching documents he had used in cases 6633/11 and 4511/11 in the E magistrates' court.
5. On 13 December 2011 he again filed two documents titled "1st Respondent's Notice of Opposition" and "Notice of Opposition of M Mukwekwezeke" with the latter being in affidavit form.
6. On 14 June 2012, exactly seven days after being served with the notice F of set down of this review application, he again filed a "Notice of Opposition" and "Opposition (*sic*) Affidavit of M. Mukwekwezeke" wherein not even himself can comprehend what the head or tail of his story is.

I was constrained to advert to all the forgoing episodes related to G Mukwekwezeke's conduct for the simple reason pertaining to the scale of costs. I accept that generally a litigant should not be penalised with costs, especially when that litigant is a lay person. However, there are certain instances where a litigant – lay person or not or self-actor or not – deserves to be mulcted with costs on an attorney-client scale. In *Nel v Waterberg Landbouwers Ko-operatieve Vereeniging* 1946 AD 597 at 607 Tindall JA (as H he then was) said:

> "The true explanation of awards of attorney and client costs not authorised by A statute seems to be that, by reason of special considerations arising either from the circumstances which gave rise to the action or conduct of the losing party, the court in a particular case considers it just, by means of such an order to ensure more effectively than it can do by means of a judgment for party and party costs that the successful party will not be out-of-pocket in respect of the expense caused to him by the litigation". B

In the instant case, Mukwekwezeke, the losing party, by his conduct, both in the magistrates court and in this court, as shown above, clearly abused court process. He was clearly frivolous and vexatious. There are therefore ample grounds to mulct him with costs on the scale of attorney and client.

In the result, I make the following order:

1. The application for review succeeds and the second respondent's decision C in case number MC 6633/11 be and is hereby set aside and is substituted with "The application is dismissed with costs".
2. The first respondent is ordered to pay the applicant's costs on the scale of legal practitioner and client. D

Wintertons, applicant's legal practitioners E

© 2015 Juta and Company (Pty) Ltd.

Document 15 of 60

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2012/Volume 2/KUTSANZIRA v MASTER OF THE HIGH COURT 2012 (2) ZLR 91 (H)

KUTSANZIRA v MASTER OF THE HIGH COURT 2012 (2) ZLR 91 (H)

Citation	2012 (2) ZLR 91 (H)
Case No	Judgment No. HH-309-12
Court	High Court, Harare
Judge	Guvava J
Heard	27 July 2012
Judgment	27 July 2012
Counsel	*C Kwaramba*, for the applicant
Case Type	Chamber application
Annotations	No case annotations to date

Flynote

C **Family law** – *child – guardianship – attributes of – common law rights of parents to be guardian of minor child – transfer of guardianship from parents to a third party – power of court to divest a parent of guardianship – power to be exercised very sparingly – inquiry into guardianship – factors requiring to be considered before a parent can be divested of* D *rights of guardianship.*

Headnote

The applicant, the mother of a minor child, sought to have guardianship of the child transferred to the child's aunt. The applicant was unemployed and her husband, the child's father, was serving a prison term. She did E not have the financial resources to look after the child. The child's aunt had been providing financial support for the child for a long time and if she were to be awarded guardianship of the child she would be able to take advantage of her employment benefits, such as medical and education allowances, to maintain minor child.

Held, that parents are the *legitimi tutores* of their children, which makes F them guardians by operation of law. Parental power consists of duties and rights which parents have in respect to

their minor children. Children are from birth subject to the guardianship of their father or parent. The father or parent of a child is the natural guardian of his legitimate children until they attain the age of majority. Parents acquire parental power over G a legitimate child at the time of its birth. The natural guardianship of parents is identical with parental power. This power cannot be waived or abandoned in favour of someone else as this is considered to be contrary to public policy. The reason why public policy is against transfer or delegation of parental power in favour of another is basically to protect the child from abuse, which could occur should the parental power fall into H the wrong hands. Transfer of guardianship thus is only allowed in very

limited circumstances and, normally, only after a full enquiry has been A conducted so as to safeguard the interests of the minor child concerned.

Held, further, that there are basically three situations recognized by the law whereby guardianship or parental power may be lawfully transferred. These are (a) adoption; (b) *legitimatio per subsequens matrimonium,* where children whose parents marry after their birth become legitimated B as a result of the subsequent marriage of their parents; and (c) *venia aetatis*, the grant by a sovereign or the courts of the status of majority to a minor. Guardianship cannot merely be transferred from one person to another if it does not fall under any of these categories. The willingness of the parents to give away their guardianship does not appear to have any significance in the ultimate decision by the court of whether or not C to grant the guardianship of the minor child to another. None of these situations applied here.

Held, further, that the Guardianship of Minors Act [*Chapter 5:08*], whilst imposing on the father the duty to consult with the mother on questions on guardianship of their minor child and setting out the powers of this court D relating to custody and guardianship of a minor where the parents are no longer living together, has not altered the common law position, especially relating to transfer of guardianship. The Act provides primarily for the situation where a minor has no natural guardian or tutor testamentary and sets out a procedure to allow a third party to be appointed as guardian. This procedure (outlined in s 9 of the Act) specifically requires that an E inquiry be conducted to determine the suitability of the person who seeks to be appointed as guardian. In making the appointment of guardianship, the court must consider the minor child's best interests. This applies whether the child's parents are alive or dead. The courts may divest a parent of guardianship where it is established that to retain guardianship F in the parent would pose a danger to the child.

Held, further, that the inquiry into guardianship, like that of custody, cannot be one sided. It is not only an inquiry into the advantages that will accrue to the child if guardianship is granted to the applicant but also an inquiry into why the respondent must be deprived of his guardianship. Thus, an inquiry seeking to divest one parent of guardianship in favour G of another or of a third party must involve not only an inquiry into why and how the respondent parent must be divested of guardianship but also why the applicant is deemed suitable to be able to discharge those legal obligations that are imposed on natural guardians by law. An inquiry into guardianship is an inquiry into the suitability of a person to discharge the legal obligations imposed by law on the guardian of a minor child. H

Guvava J

A It is not an inquiry into issues like where the child will live or how and where it will be educated, as those inquiries relate to issues of custody. *In casu*, no basis had been laid out for the parents to be relieved of their obligations. Although the father was in prison, the mother was available. Poverty does not appear to be a reason to consider in order to divest a mother of guardianship. More importantly, no investigation B had been conducted as to the suitability or otherwise of the aunt to be the guardian of the minor child and for the court to satisfy itself that it was in the child's best interest for the aunt to be appointed as guardian. These days, when there is rampant abuse of children by relatives and child trafficking, it can only be in the best interest of any child that a C proper inquiry is conducted in terms of the Childrens Act [*Chapter 5:06*].

Cases cited

In re *Gonyora* 2001 (2) ZLR 573 (H)

In re *Maposa* 2007 (2) ZLR 333 (H)

Ex p *Sakota* 1964 (3) SA 8 (W)

D *van der Westhuizen v van Wyk & Anor* 1952 (2) SA 119 (G)

van Rooyen v Werner (1892) 9 SC 425

Legislation considered

Guardianship of Minors Act [*Chapter 5:08*], s 9

E High Court Rules 1971 (RGN 1047 of 1971), r 249

Case information

C Kwaramba, for the applicant

Judgment

Guvava J: This is again another application which raises the issue of guardianship rights and the circumstances under which a parent may be F divested of such rights. The application was initially allocated to Chatukuta J who raised a query with the legal practitioner on 28 December 2010. When this query was not responded to, she then referred the matter to the Family Court Division of the High Court on 18 October 2011. On receipt of the chamber application I then requested the Registrar to invite the applicant's legal practitioner to come in so that I could discuss his application with him G as he had not addressed the query raised. Due to an administrative mix up in the Registrar's office the legal practitioner was only advised on 12 June 2012 and he promptly attended on 13 June 2012.

Facts

The applicant in this case is the mother and natural guardian of the minor H child E.M. She seeks an order for the appointment of a *curator ad litem*

Guvava J

in terms of r 249 of the High Court Rules 1972 as amended so that he can A investigate and make recommendations in regard to the application by Shingirai Vaidah Mungadzi to be appointed guardian of the minor child. The applicant states that she is unemployed and her husband is currently serving a prison term (the length of the term of is not stated). She does not have the financial resources to look after the child. She states that Shingirai B Mugadzi is the child's aunt and has been providing financial support for the child for a long time. If she is awarded guardianship of the child she will be able to take advantage of her employment benefits such as medical and education allowances to maintain the minor child. The father of the child has also deposed to an affidavit where he supports the stance taken by his wife. They thus both seek to divest themselves of the parental rights to the C minor child so that they may be conferred on the Shingirai Mungadzi. Whilst this is an application for appointment of a curator *ad litem* it is my view that the court in considering such an application must consider the merits of the main matter.

The law

The law relating to rights of parents as guardians of children finds its origins D in the Roman Law of *patria potestas*, which was an absolute right of control. This law is no longer in force and what has remained of it is the principle that the parents are the *legitimi tutores* of their children, in other words guardians by operation of law. See E Spiro *Law of Parent and Child* 4 ed at p 47. It is now settled that parental power consists of duties and rights which E parents have in respect to their minor children. According to *Grotius* 1.6.1, children are from birth subject to the guardianship of their father (parent). In *van Rooyen* v *Werner* (1892) 9 SC 425 the father or parent of a child is described as the natural guardian of his legitimate children until they attain the age of majority. Parents acquire parental power over a legitimate child at the time of its birth. It is considered by a number of authorities that the F natural guardianship of parents is identical with parental power and I will therefore use the terms interchangeably. This power cannot be waived or abandoned in favour of someone else as this is considered to be contrary to public policy. Spiro states that the purpose

of having public policy against transfer or delegation of parental power in favour of another is basically to G protect the child from abuse, which can occur should the parental power fall into the wrong hands. In this respect it is only allowed in very limited circumstances and normally, only after a full enquiry has been conducted so as to safeguard the interests of the minor child concerned.

Under the common law there are basically three categories which are recognized by law whereby guardianship or parental power may be lawfully H

A transferred. These are adoption, *legitimatio per subsequens matrimonium* (which means that children whose parents marry after their birth become legitimated as a result of the subsequent marriage of their parents) and *venia aetatis* (which means grant by a sovereign or the courts of the status of majority to a minor). It seems to me therefore that guardianship cannot merely be transferred from one person to another if it does not fall under any of these B categories. The willingness of the parents to give away their guardianship does not appear to have any significance in the ultimate decision by the court of whether or not to grant the guardianship of the minor child to another.

The facts before me do not show that this application would fall under any one of these categories. The applicant in the main matter has not sought C to legally adopt the minor child nor has the court granted the minor child majority status. The applicant cannot claim under the second category which deals with children born out of wedlock.

Intervention by the legislature, through the Guardianship of Minors Act [*Chapter 5:08*], whilst imposing on the father the duty to consult with the D mother on questions on guardianship of their minor child and setting out the powers of this court relating to custody and guardianship of a minor where the parents are no longer living together, has not in my view altered the common law position especially relating to transfer of guardianship. The Act provides primarily for the situation where a minor has no natural guardian or tutor testamentary and sets out a procedure to allow a third party to be appointed E as guardian in their stead. It should be noted that the procedure outlined in s 9 of that Act specifically requires that an inquiry be conducted to determine the suitability of the person who seeks to be appointed as guardian. In In re *Gonyora* 2001 (2) ZLR 573 (H) it was held that, in making the appointment of guardianship, the court must consider the minor child's best interests. F Although in this case the court was dealing with a child whose parents were deceased the same principles must be taken into account even in a case such as this where both parents are still alive.

The High Court, as upper guardian of all minor children has in some instances intervened especially in circumstances where a minor child would effectively be without a guardian. In Ex p *Sakota* 1964 (3) SA 8 (W) the G court appointed the applicant in that case as guardian of the minor children of his brother. The children's father had been convicted in the High Court of Yugoslavia of killing his wife, the children's mother, and sentenced to 20 years' imprisonment. The court had also made an order divesting him of natural guardianship over his children. The court found that it had the power H to deprive a natural guardian of his rights and since the children now had

---

no natural guardian, it was desirable that a guardian be appointed in South A Africa where the children were residing.

The courts have also divested a parent of guardianship in cases where it has been established that to retain guardianship in the parent would pose a danger to the child. This point was emphasized in *van der Westhuizen* v *van Wyk* 1952 (2) SA 119 (G), where it was held that a court cannot intervene B with the guardianship rights of a parent unless there is danger to the child. It seems to me, therefore, that the power to divest a parent of guardianship is a common law power which is exercisable by the courts very sparingly.

In In re *Maposa* 2007 (2) ZLR 333 (H) Cheda J, when faced with an application as in the present matter, stated that this court must not readily C grant guardianship to persons other than the minor children's natural parents.

The inquiry into guardianship, like that of custody, cannot in my view, be one sided. In other words, it is not only an inquiry into the advantages that will accrue to the child if its guardianship is granted to the applicant but also an inquiry into why the respondent must be deprived of his guardianship. Thus, in my view, an inquiry seeking to divest one parent of guardianship D in favour of another or of a third party must involve not only an inquiry into why and how the respondent parent must be divested of guardianship but also why the applicant is deemed suitable to be able to discharge those legal obligations that are imposed on natural guardians by law. An inquiry into guardianship is an inquiry into the suitability of a parent to discharge E the legal obligations imposed by law on the guardian of a minor child. It is not an inquiry into issues like where the child will live or how and where it will be educated as those inquiries relate to issues of custody.

In my view, the present application does not fall under any of the criteria discussed above. It seems to me that no basis has been laid out in this case for the parents to be relieved of their obligations. Although it is accepted F that the father is in prison the mother is available. Poverty does not appear to be a reason to consider in order to divest a mother of guardianship. More importantly, no investigation has been conducted as to the suitability or otherwise of the Shingirai Mungadzi to be a guardian of the minor child and for the court to satisfy itself that it is in the child's best interest for the G applicant to be appointed as guardian. In this day when there is rampant abuse of children by relatives and child trafficking, it can only be in the best interest of any child that a proper inquiry is conducted in terms of the Childrens Act [*Chapter 5:06*]. The process of adopting a child provides proper counsel to both the parents and the prospective adoptee of their rights and obligations in respect to the child H

Guvava J

A It is my view that it is unnecessary for a *curator ad litem* to be appointed in this case, as it is incumbent for the Shingirai Mungadzi to proceed in terms of the Childrens Act. It is for these reasons that the application is hereby dismissed, with no order as to costs.

B *Mbidzo Muchadehama & Makoni*, applicant's legal practitioners

---

© 2015 Juta and Company (Pty) Ltd.

Document 16 of 60

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2012/Volume 2/INDUSTRY PENSION FUND v UNITED REFINERIES LTD & ANOR 2012 (2) ZLR 98 (H)

INDUSTRY PENSION FUND v UNITED REFINERIES LTD & ANOR 2012 (2) ZLR 98 (H)

Citation	2012 (2) ZLR 98 (H)
Case No	Judgment No. HH-313-12
Court	High Court, Harare
Judge	Zimba-Dube J
Heard	16 March 2012: *CAV*
Judgment	31 July 2012
Counsel	*L Uriri*, for the applicant *T Mpofu*, for the respondent
Case Type	Opposed chamber application

Annotations No case annotations to date

Flynote

Practice and procedure – *admission – withdrawal of – when permissible – what must be shown by party seeking to withdraw admission* D

Practice and procedure – *affidavit – further affidavit – party seeking to file further affidavit, having already filed answering affidavit – what party seeking to file such affidavit must show*

Headnote

The ordinary rule with regard to affidavits is that three sets of affidavits are E allowed in pleadings, namely, supporting affidavits, answering affidavits and replying affidavits. The court may in its discretion permit the filing of further affidavits in terms of r 235 of the High Court Rules 1971. It is only in exceptional circumstances or if the court considers such a course advisable that a fourth set of affidavits may be received. The purpose F of allowing a further or supplementary affidavit is to enable a litigant to file additional information that he becomes aware of after the filing of the three affidavits as required in terms of the Rules. There must be an application for leave to file such affidavit. The party applying for the leave must provide a satisfactory explanation for the failure to put the G information or facts before the court at an earlier stage and for the late filing of the affidavit. The explanation must be one that negatives bad faith or culpable failure to act timeously. The court must also be satisfied that no prejudice will be caused to the opposing party which cannot be remedied by an appropriate order as to costs. If there is an explanation which negatives *mala fides* or culpable remissness as the cause of the H

A facts or information not being put before the court at an earlier stage, the court should incline towards allowing the affidavits to be filed.

Where a party makes an admission in its pleadings, the admission is binding and it is unnecessary for the other party to prove such admission. A party wishing to resile from such an admission may amend or withdraw such B pleadings in terms of r 189, which permits a withdrawal of an admission. Where a party seeks to withdraw an admission he is required to apply to the court for such a withdrawal. He must give a reasonable explanation of the circumstances under which the admissions were made and the reasons for the withdrawal. The court in its discretion may allow such amendment or withdrawal on such terms as it deems fit. If the court C is of the view that to allow the admission to be withdrawn will cause prejudice or injustice to the other party to the extent that a special order for costs will not compensate him, it will refuse the application. The court will have to be satisfied that the amendment sought is a *bona fide* one. The question must always be posed: "Is the applicant acting *mala* D *fide* in seeking to withdraw his admission?"

Cases cited

ANZ v MIC 2006 (1) ZLR 128 (H)

Canaric NO v Shevil's Garage 1932 TPD 196

E *Chimutanda Motor Spares (Pvt) Ltd v Musare* 1994 (1) ZLR 310 (H)

Cobra & The Wild Cat (Pvt) Ltd v Tundu Distributors (Pvt) Ltd 1990 (1) ZLR 133 (H)

DD Tpt (Pvt) Ltd v Abbot 1988 (2) ZLR 92 (S)

Diocesan Trustees, Diocese of Harare v Church of the Province of Central Africa 2010 (1) ZLR 267 (S)

F *Kasiyamhuru v Min of Home Affairs & Ors* [1998] 3 All SA 116 (W); 1999 (1) SA 643 (W)

Munhuwa v Mhukahuru Bus Svcs (Pvt) Ltd 1994 (2) ZLR 382 (H)

Northern Mounted Rifles v O'Callaghan 1909 TS 174

Silver's Trucks (Pvt) Ltd & Anor v Dir of C & E 1999 (1) ZLR 490 (H)

Transvaal Racing Club v Jockey Club of SA 1958 (3) SA 599 (W)

van Deventer v de Villiers 1953 (4) SA 72 (C)

Case information

L Uriri, for the applicant

T Mpofu, for the respondent

Zimba-Dube J

Judgment

Zimba-Dube J: This is a chamber application for leave to admit into evidence a supplementary opposing affidavit earlier filed without the leave of the court.

Background

The background to this matter is that the respondent, on 3 February 2011, filed an application under HC 1130/11 to compel the applicant to transfer stand 13981 Khami Road Extension, Kelvin West, Bulawayo, into its name. Following this the applicant in this application, who is the respondent in HC 1130/11, filed its opposing papers, followed by an answering affidavit from the first respondent. The applicant subsequently filed a supplementary opposing affidavit [hereinafter referred to as the supplementary or further affidavit] on 9 May 2011, without the leave of court. This was followed by a chamber application to admit the same affidavit filed on 19 May 2011. Both the chamber and the opposed applications were consolidated by consent of both parties on 10 November 2011. At the commencement of the hearing of the matter the court heard argument on the application to admit the supplementary affidavit first and it reserved its ruling.

The applicant's explanation for filing the further affidavit without the leave of the court and the reasons for failing to include the information sought to be introduced at this stage may be summarised as follows:

The applicant states that

(1) the opposing affidavit filed by the applicant did not deal with the full details of the applicant's defence to the principal matter because its legal practitioner did not agree to include the full details of its opposition as instructed by the applicant;

(2) the agreement between the parties was a loan disguised as a sale rather than a sale agreement and that its legal practitioners failed to detail the exact nature of the transaction. The applicant claims that it had no capacity to take a loan and the respondent had no legal authority to give a loan, resulting in the parties resolving to disguise the loan as a sale. Following disagreement over the exclusion of that detail in the opposing affidavit with Mr Pattison of Webb Low and Barry Legal Practitioners, he renounced agency.

(3) on 8 April 2011 the applicant's new legal practitioners advised the first respondent's legal practitioners that they were instructed to file a supplementary affidavit and requested the respondent's consent in writing, to file the further affidavit. They were advised that the first respondent would not address the request pending the regularisation of the notice of renunciation by the applicant's former legal practitioners.

Zimba-Dube J

(4) after the filing of the renunciation of agency the applicant filed the supplementary affidavit with the registrar of this court in anticipation of the consent of the first respondent. That consent never came. The further or supplementary affidavit was thus filed without the leave of court.

The applicant states that it is essential that the court adjudicate on the real dispute between the parties with the full facts of what transpired, to ensure that justice is done between the parties. Mr *Uriri*, who represented the applicant, submitted that the pleadings in the principal application

portray a misleading impression as they omit the full statement of the facts of the true transaction entered into between the parties. He submitted that the overriding consideration in a matter such as this is whether the further affidavit C relates to the real issue between the parties. The applicant maintained that the supplementary affidavit relates to the real issue between the parties and will enable the court to adjudicate upon the true dispute between the parties as the admission of the supplementary affidavit ensures that all the facts are placed before the court, thereby doing justice between the parties. The applicant asserted that the further affidavit does not introduce anything new, D as the fact that the transaction was a loan appears on the agreement of sale. Mr *Uriri* drew the court's attention to para 3 of the sale agreement which he contended is clear that a loan was advanced to the applicant and outlines the details of the payment. He said that the affidavit tells the story already appearing *ex facie* the agreement, which is that the applicant was given a E loan and the sale was one with a buy-back option. The applicant claimed that the lease arrangement makes it clear that this arrangement was a loan and the sale was entered into to disguise the loan. He submitted further that the intention was that the applicant would get a loan and pay back and this is the reason why the applicant was not required to vacate the premises. The applicant contends that the admissions made regarding the existence of F the agreement of sale and its binding effect are not being withdrawn as the applicant does not deny that the agreement was signed, but that it is simply saying that this is not the whole story and the supplementary affidavit tells the correct story that already appears *ex facie* the agreement of sale.

The first respondent, represented by Mr *Mpofu,* opposed the application and G submitted that the further affidavit sought to be admitted was irregularly filed and that an application for admission of a further affidavit filed without the leave of the court is an incompetent application as r 235 prescribes the filing of an affidavit and not its admission. He pointed out that, as the applicant has already filed the affidavit, any application it makes is no longer an application to file an affidavit in terms of r 235 and it becomes an unknown H application which finds no support at law and the court should insist on the

---

observance of its rules. The applicant cannot remedy *ex post facto* its failure A to seek the leave of the court to file the supplementary affidavit as required by r 235 by making a chamber application. He also contended that if the further affidavit sought to be admitted is allowed at this stage, it will have the effect of withdrawing the following facts in para 14 of the founding affidavit which it did not dispute in para 8 of its opposing affidavit and B consequently admitted:

(1) The parties entered into a valid and binding relationship which remains binding.

(2) The first respondent in HC1130/11 is obliged to transfer the property in terms of that agreement and it cannot resile from that agreement.

(3) The conveyancers have the responsibility to prepare transfer documents C in order to pass transfer.

The respondent is opposed to the proposition that the supplementary affidavit be admitted at this stage and asserts that the applicant has failed to provide a satisfactory explanation for the failure to put the facts before the court at an earlier stage and for the late filing of the affidavit. The respondent submitted D that the story it tells is a simple story. Mr *Mpofu* maintained that the transaction was an agreement of sale and refuted that the agreement was a loan agreement disguised as a sale. He argued that the applicant has failed to explain why its legal practitioner, hearing such a simple story, could refuse to record such an arrangement. He took issue with what he termed an attempt by the applicant E to withdraw the admissions it made concerning the agreement of sale without making an application to do so as required at law. He relied on *Munhuwa v Mhukahuru Bus Services (Pvt) Ltd* 1994 (2) ZLR 382 (H) for the principle that a pleader cannot be permitted to withdraw an admission without making a formal application for that purpose. The respondent also contended that the withdrawal of these admissions will prejudice the respondent to the extent that F an order of costs will not compensate it. The court was also referred to *DD Transport (Pvt) Ltd v Abbot* 1988 (2) ZLR 92 (S) for the same proposition. The respondent suggested further that the applicant has failed to provide a satisfactory explanation for the failure to put the facts before the court at an earlier stage, and that this could have been achieved by a supporting G affidavit from the legal practitioner concerned, that the information sought to be placed before the court was known to the applicant at the time it deposed to its opposing affidavit and that the court cannot permit the admission of such averments. Mr *Mpofu* submitted in addition that the information

sought to be admitted offends the parole evidence rule in that the applicant seeks to add new details to the agreement of sale and that the applicant has H

Zimba-Dube J

A failed to make an application for the rectification of the agreement of sale. He argued that admitting the further affidavit will lead to parole evidence being led in the absence of an application for it. The respondent contended further that the application was not made in good faith and that the applicant aims to avoid the agreement of sale and create a dispute of fact which will prolong the matter and ensure that the applicant will continue to enjoy the B property in issue without paying any rentals for the property; the applicant proceeded after filing this application, to file a summons matter which seeks the dismissal of the main application and this reveals bad faith on the part of the applicant; that if the applicant is allowed to change its position, the prejudice to be suffered by the respondent is colossal.

C **The issues**

There are a number of issues involved in this dispute. The first issue is whether the applicant can *ex post facto* remedy its failure to seek leave of the court to file a further affidavit as required by r 235 by making a chamber application to admit the affidavit already filed on record. Secondly, whether the applicant has provided a satisfactory explanation for the failure to put D the facts sought to be introduced by the further affidavit before the court at an earlier stage and for the late filing of the affidavit. Thirdly, whether the application amounts to a withdrawal of admissions previously made, and lastly whether the information contained in the supplementary affidavit offends the parole evidence rule.

E **The law**

Leave to admit a further affidavit

The practice at law is that only three affidavits are permissible in an application**.** Herbstein and van Winsen *The Civil Practice of the Supreme Court of South* F *Africa* 5 ed at 433 states this position as follows:

> "The ordinary rule is that three sets of affidavits are allowed, i.e. supporting affidavits, answering affidavits and replying affidavits. The court may in its discretion permit the filing of further affidavits."

Further affidavits may only be filed with the leave of the court in terms of r 235. It is only in "exceptional circumstances", or if the court considers G such a course advisable, that a fourth set of affidavits may be received. This approach was enunciated in *Kasiyamhuru v Minister of Home Affairs* [1998] 3 All SA 1169 (W); 1999 (1) SA 643 (W).The purpose of allowing a further or supplementary affidavit is to enable a litigant to file additional information that he becomes aware of after the filing of the three affidavits as required in terms of the rules. In *Silver Trucks (Pvt) Ltd & Anor v Director of* H *Customs and Excise* 1999 (1) ZLR 490 (H) a supporting affidavit was filed

Zimba-Dube J

by a respondent after the applicant had filed its answering affidavit. There A was no application to file an additional affidavit and no explanation why it was not filed earlier or why it was filed late. The court ruled the supporting affidavit inadmissible. Smith J discussed extensively the law pertaining to additional affidavits and remarked as follows:

> "It is only in exceptional circumstances that the court will allow the filling of an B additional affidavit. There must be an application for leave to file such affidavit. The party applying for the leave must provide a satisfactory explanation for the failure to put the information or facts before the court at an earlier stage and for the late filing of the affidavit. The explanation must be one that negatives bad faith or culpable failure to act timeously. The court must also be satisfied that no prejudice will be caused to the opposing party which cannot be remedied by an appropriate order as to costs. In the present case, a day after the applicants C filed their answering affidavit and a few hours before the matter was heard, the respondents filed a so-called supporting affidavit. This affidavit was not admissible as there was no application for leave to file the additional affidavit and no explanation was offered as to why it was not filed with respondent's opposing affidavit or why it was late.''

Another relevant case is *Transvaal Racing Club v Jockey Club of South* D *Africa* 1958 (3) SA 599 (W) where Williamson J, as he then was, at 604B-E, said the following:

> "I think that if there is an explanation which negatives *mala fides* or culpable remissness as the cause of the facts or information not being put before the court at an earlier stage, the court should incline towards allowing the affidavits to E be filed. As in the analogous cases of the late amendment of pleadings or the leading of further evidence in a trial, the court tends to [take] that course which will allow a party to put his full case before the court. But there must be a proper and satisfactory explanation as to why it was not done earlier, and, what is also important, the court must be satisfied that no prejudice is caused to the opposite party which cannot be remedied by an appropriate order as to costs."

The cases referred to reveal that where a litigant makes an application to file F a further affidavit without the leave of the court, the court may on application by the party, determine whether special circumstances exist justifying that leave be granted to formally file or admit that affidavit as part of the record. The court may, in exercising its discretion, take into account the following:

(a) Whether a satisfactory explanation has been given explaining the reasons G for leave to file the further affidavit.

(b) Whether the information was available at the time the recognized affidavits were filed.

(c) Whether the information sought to be introduced does not bring a new cause of action or defence H

Zimba-Dube J

(d) The A prejudice likely to be suffered by the other party if the further affidavit is introduced.

Admissions

Where a party makes an admission in its pleadings, the admission is admitted and binding and it is unnecessary for the other party to prove such admission. B A party wishing to resile from such an admission may amend or withdraw such pleadings in terms of r 189, which permits a withdrawal of an admission.Where a party seeks to withdraw an admission he is required to apply to the court for such a withdrawal. He must give a reasonable explanation of the circumstances under which the admissions were made and the reasons for C the withdrawal. The court in its discretion may allow such amendment or withdrawal on such terms as it deems fit. The court has a discretion which it is required to exercise judiciously. See *Canaric NO v Shevil's Garage* 1932 TPD 196 at 199, *per* Greenberg J (as he then was) and *van Deventer v de Villiers* 1953 (4) SA 72 (C) at 75G, *per* Herbstein J.

In *DD Tpt (Pvt) Ltd v Abbot* 1988 (2) ZLR 92 (S) at 98, Gubbay JA (as D he then was), in dealing with an amendment involving a withdrawal of admissions, held that:

> "An amendment which involves the withdrawal of an admission will not be granted by the court simply for the asking, for it is an indulgence and not a right. See *Zarug v Paravathie NO* 1962 (3) SA 872 (D) at 876C. Before the court will exercise its discretion in favour of the desired amendment it will require E a reasonable explanation, of both the circumstances under which the pleader came to make the admission and the reasons why it is sought to resile from it. If persuaded that to allow the admission to be withdrawn will cause prejudice or injustice to the other party to the extent that a special order for costs will not compensate him, it will refuse the application. See *Amod v SA Mutual Fire and General Insurance Co Ltd* 1971 (2) SA 611 (N) at 614H-615A*; Beck's Theory* F *and Principles of Pleadings in Civil Actions* 5 ed para 83 p 191. And, of course, the court will have to be satisfied that the amendment sought is a *bona fide* one. The question must always be posed: 'Is the applicant acting *mala fide* in seeking to withdraw his admission?' See *Rishton v Rishton* 1912 TPD 718 at 722*; Moolman v Estate Moolman & Anor* 1927 CPD 27 at 29*; Trans-Drakensberg Bank Ltd v Combined Engineering (Pty) Ltd & Anor* 1967 (3) SA 632 (D) at G 642A."

See also *Munhuwa v Mhukahuru Bus Services (supra).*

This approach was also followed in *Chimutanda Motor Spares (Pvt) Ltd v Musare* 1994 (1) ZLR 310 (H).The same principles are applicable in this case as the filing of the further affidavit making changes to pleadings already H filed may involve the withdrawal of admissions.

Zimba-Dube J

The parole evidence rule A

The parole evidence rule is a common law rule that prohibits a party to a written contract from introducing extrinsic evidence that either contradicts or adds further information to the contract. Where a written contract has been entered into, the agreement falls within the four corners of the document. No extrinsic evidence is allowed .The parties should confine themselves to B the four corners of the document.

The merits

It is common cause that the applicant filed its supplementary affidavit without the consent of the respondent and without leave of the court. There seems to have been confusion as to whether the respondent was prepared to consent C to the filing of the affidavit. There is no need for the court to determine this issue as ultimately what is required to be determined is whether the further affidavit is properly before me and whether leave to admit or file the affidavit should be granted. The applicant seeks the court's indulgence for the admission of the affidavit into evidence. The applicant is in fact seeking leave to regularise the filing of a further affidavit filed without leave. The first D issue is whether this application is competent at law. There seems to me to be no real distinction between leave to file and leave to admit a further affidavit. It is a distinction without a difference and is a question of terminology and amounts to splitting of hairs. The fact remains that the applicant seeks to file a further affidavit. I understand this to be an application to file although E the applicant applied for leave to admit the affidavit. In *ANZ v Media & Information Commission* 2006 (1) ZLR 128 (H) *,* an application was made to admit further affidavits filed in circumstances similar to this case and the court did not deal with semantics and went on to consider the application on the merits and considered whether leave to file the further affidavits should be granted. I will adopt the approach taken in this case. The facts of that F case are briefly that the respondent filed a further affidavit without leave of the court .The supplementary affidavit included an averment not made in its founding affidavit and the applicant alleged that its legal practitioner had omitted to include the averment. The applicant in that matter also filed a further affidavit without leave of the court. In total three affidavits were filed without leave of court. Leave to admit the three additional affidavits was G applied for. Makarau J (as she then was) fittingly expressed her abhorrence at the approach adopted and remarked as follows:

> "Leave to file additional affidavits cannot be had for the asking. The court will insist on the observance of its rules regarding the sequencing of affidavits to be filed in an application, the uniformity of practice and certainty in the system, unless in the view of the court justice will miscarry. In particular, the court will H

> A not readily grant leave to file an additional affidavit to deal with facts that were available to the parties at the time the permitted affidavits were drawn up and deposed to."

She proceeded to consider each of the further affidavits in turn. She considered the reasons for leave to file each supplementary affidavit, whether the information sought to be introduced did not bring in a new cause of action B or defence, whether the information was available at the time they filed the recognized affidavits, the failure to include certain averments in one of the affidavits and the prejudice likely to be suffered by the other party if each of the affidavits was admitted.

In order to determine if there are exceptional circumstances justifying the C admission of the further affidavit, the court will consider firstly the explanation for the failure to include the information sought to be admitted now, at an earlier stage.The applicant's reason for failing to include the information sought to be introduced now is attributable to its erstwhile legal practitioners' conduct and attitude. The blame is laid squarely on the shoulders of its former legal practitioners who ostensibly refused to include that information D in the opposing affidavit. This averment is not supported on the papers.The applicant's former lawyer is the only and best person who can inform the court in detail, the circumstances under which the information disputed was omitted and his reasons for doing so. The applicant has failed to file a supporting affidavit from its former lawyer who prepared the opposition papers, giving a E chronology of his involvement in this matter and the reasons why he refused to set out the applicant's full defence. This failure presents a difficulty to the applicant's case. Ultimately, thereis no comprehensive and inclusive explanation for the omission of this information. There is no suggestion that the legal practitioner refused to depose to a supporting affidavit. There is a plethora of cases where it was decided that in any case where a party seeks F to redress or explain a procedural omission, irregularity or wrongful conduct which he

attributes to the conduct of his legal practitioner, it is imperative to outline fully that position in its papers. The best way to achieve this is to request such legal practitioner to depose to a supporting affidavit outlining the role that he or she played in that matter. The court is not satisfied that the applicant has advanced a full and satisfactory explanation for the failure G to include this information in its opposing affidavit.

The court has also considered that the applicant took from 2006, when it entered into the agreement of sale, to May 2011, when the further affidavit and chamber application were filed, to remedy the situation and set the record clear. The opposing affidavit in the main matter was filed on 24 H February 2011 and the supplementary affidavit on 9 May 2011.There is no

explanation why this information was not brought to the attention of the A court much earlier. Even after the applicant supposedly had a disagreement with its former legal practitioners over the inclusion of the new detail in the opposing affidavit, it took more than two months to file the supplementary affidavit. The applicant's failure to file the supplementary affidavit on time is not acceptable. This analysis shows that the applicant is not serious or B *bona fide* when it claims that the agreement is not what it appears to be and that they now want to set the record straight.

There are two agreements at the centre of this dispute. The parties entered into a written agreement of sale on 17 October 2006, for a fixed amount payable in instalments. The agreement provides that the applicant would lease back the property sold. Although the agreement of sale was signed on this date, the C agreement discloses that the purchase price had earlier been agreed to, on 25 August 2005, when the parties signed a memorandum of understanding for the purchase of the property in issue. The lease-back agreement entitles the applicant to remain in the premises whilst the applicant leases the property and the seller has the right of first refusal to purchase the property should the buyer decide to sell the property. D

A close look at the agreement of sale reveals that it refers to a "loan" in paragraph 3 as follows:

> "AND FURTHER WHEREAS The purchaser has in terms of the written Memorandum of Understanding advanced to the seller a loan in the amount of $ 17 000 000 000. The said amount being paid as follows……" E

The contract further stipulates that the $17 000 000 000 referred to in the recitals shall be appropriated by the seller in payment of the purchase price. The memorandum of association filed on record is silent on the issue of the loan. If there is another memorandum of association, it does not form part of the record. The issue of a loan agreement is not captured anywhere else. The reference to a loan was explained by the respondents in their F submissions. The respondents submitted that whilst the applicant asserts that the relationship started as a loan, the applicant fails to tell the court that it received the money as a loan but instead of paying the money back, it would use it as the purchase price of the property. This position is supported in the purchase clause which provides that the money loaned to the applicant shall G be appropriated by the seller as the purchase price.

The facts sought to be introduced at this stage are facts that were available to the applicant at the time the dispute erupted and when the opposing affidavit was deposed to. This information did not come to the applicant's attention after the opposing affidavit had been deposed to. The averments sought to be introduced are therefore not new facts. In the opposed application, the H

A respondents claimed transfer of the property in issue on the basis of a contract of sale. If the further affidavit is admitted, the respondent will be required to deal with a new set of facts based on the claim that the agreement was a loan disguised as a sale. It will be required to defend its position and these calls for it to answer the averments which could have been outlined in the opposing affidavit.The applicant omitted to include this information as part B of its opposing affidavit and no satisfactory explanation has been given for this omission. No exceptional circumstances have been advanced to justify the filing of the further affidavit.

The averments in the further affidavit sought to be introduced contradict the terms of the written contract. It seeks to add additional information by C seeking to introduce information to the effect that the loan was disguised as a sale.The applicant is in breach of the parole evidence rule. There is

no justification for admitting this affidavit in order to further examine whether this arrangement was a sale or a loan as the agreement speaks for itself. Reference to the loan is explained in the purchase clause. The applicant has resorted to trickery to change the terms of this sale by seeking to introduce D new averments through the supplementary affidavit. The agreement of sale should be confined to the four corners of the agreement of sale.

The respondent admits in its opposing affidavit that it bought the property from the applicant and agreed to transfer it into the respondent's name. These indications amount to admissions of the respondent's averments that the first E respondent bought the property from it and that the applicant agreed to be bound by the terms of the agreement of sale. The applicant argues that the further affidavit will not have the effect of withdrawing admissions made. The applicant seeks to introduce evidence by way of a supplementary affidavit to the effect that this arrangement was never a sale. The supplementary affidavit supposedly paints a completely different picture of the transaction. F The applicant has not followed the correct procedure outlined in rule 189 which provides for the withdrawal of the admissions it made. No formal application for the withdrawal of admissions was made. There is no doubt in my mind that once the supplementary affidavit is admitted, the applicant will effectively be saying, "Yes, we made the admissions but that is not a correct G reflection of the transaction as it was a loan agreement". The admissions earlier made are therefore being challenged and will fall away on the filing of the further affidavit. The applicant has not laid a basis for the filing of a further affidavit that has the effect of withdrawing admissions earlier made. In *Northern Mounted Rifles v O'Callaghan* 1909 TS 174 the court, in dealing with an amendment that had the effect of withdrawing admissions earlier H made, held that an admission can only be withdrawn if it has been made in

---

error and secondly if it arises out of a clerical error or misunderstanding by A the client's lawyer of what the client is prepared to admit. In addition it must be a *bona fide* application to submit a supplementary affidavit.

It is this court's view that allowing the applicants to file a supplementary affidavit would amount to withdrawing the admissions without leave of the court. See *Cobra & The Wild Cat (Pvt)Ltd v Tundu Distributors (Pvt)Ltd* B 1990 (1) ZLR 133 (H) *,* and *Diocesan Trustees, Diocese of Harare v Church of the Province of Central Africa* 2010 (1) ZLR 267 (S).The applicant does not claim that the admissions were made in error. Unfortunately, in the absence of a supporting affidavit by the applicant's erstwhile legal practitioners explaining the role it played, the court is not satisfied that a full and reasonable explanation has been proffered for the withdrawal of the admissions. C

It is this court's view that the applicant is not *bona fide* when it says that this transaction was not a sale but rather a loan disguised as a sale. It failed to assert its rights timeously and has failed to avail to the court sufficient information to enable the court to make a decision. The suggestions of a loan raised now are clearly an afterthought. Besides not being serious, this D opposition is suggestive of a malice and bad faith on the part of the applicant.

In the circumstances, I am unable to find the existence of special circumstances justifying the granting of leave to file a further affidavit. There is no basis upon which I should receive a further affidavit and I decline to do so. The court has already found that the applicant's explanation is not satisfactory. E

There is no doubt that the respondent will suffer an injustice if this affidavit is admitted at this stage. The court is of the view that the admission or filing of the affidavit would clearly prejudice the applicant which relied on these admissions in the main matter, as it will not be able to maintain its position on the merits. The respondent will be placed in a worse position if the affidavit is admitted than he would have been had the pleading in its amended form F been filed in the first instance: see *DD Transport (Pvt) Ltd v Abbot (supra*) for the proposition. Once this happens the matter will change its course. The main matter will have a completely different outlook as the applicant is raising a defence as opposed to admissions it made in the opposing affidavit. The cause of action will fall away. If the further affidavit is allowed, this signals the end of the matter.The new averments sought to be admitted dispose of G the respondent's claim to the property. This prejudicial outcome cannot be cured or compensated by a special order award of costs.

The application for leave to admit a further affidavit is refused.

Costs follow the event. The respondent asked for costs on a higher scale. I have decided that the applicant should pay the respondent's costs on an H

Zimba-Dube J

A attorney-client scale. The court does not take lightly the conduct of the applicant in this matter. The information in the further affidavit could have been included at an earlier stage without causing unnecessary costs to the respondent by having to defend this matter. The respondent has had to incur unnecessary costs to defend this application. The applicant was sloppy in the manner in which it handled this matter. The court must express its displeasure B at such conduct by awarding costs at a higher scale.

Gill, Godlonton & Gerrans, applicant's legal practitioners

C *Magwaliba & Kwirira*, first respondent's legal practitioners

© 2015 Juta and Company (Pty) Ltd.

Document 17 of 60

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2012/Volume 2/MASUKU v DELTA BEVERAGES 2012 (2) ZLR 112 (H)

MASUKU v DELTA BEVERAGES 2012 (2) ZLR 112 (H)

Citation	2012 (2) ZLR 112 (H)
Case No	Judgment No. HB-172-12
Court	High Court, Bulawayo
Judge	Cheda J
Heard	11 June 2012; *CAV*
Judgment	2 August 2012
Counsel	*I Mafirakureva*, for the applicant *S Chamunorwa*, for the respondent
Case Type	Opposed application
Annotations	No case annotations to date

Flynote

Practice and procedure – *declaratory order – application for – distinction from application for review – application for order having all characteristics of application for review – order sought being appropriate to review proceedings – application should be treated as one for review*

Practice and procedure – *parties – citation of – inaccuracy in identification* D *of party cited – party nevertheless pointed out with sufficient accuracy to enable it to be correctly identified – process valid*

Headnote

The applicant brought an application against her former employer, which was cited as "Delta Beverages". She sought a declaratory order to the E effect that the freezing of her salary and her later dismissal were null and void and that she should be reinstated in her position. She alleged that she had not been afforded a hearing in terms of the company's code of conduct or in terms of the principles of natural justice.

The company raised three objections *in limine*: (a) that the applicant had F cited a non-existent entity, the company's correct name being "Delta Beverages (Pvt) Ltd)"; (b) that the High Court had no jurisdiction, as the application was in reality one for review and the correct forum was the Labour Court; and (c) that the matter was prescribed.

Held, that generally, proceedings against a non-existent entity are void *ab initio* and thus a nullity. However, where there is an entity which through G some error or omission is not cited accurately, but where the entity is pointed out with sufficient accuracy, the summons would not be defective. Here, the respondent was a well known blue chip company whose fleet of cars were all over the nation's roads. Its commercial advertisements needed no introduction. The applicant may have technically erred in her description, but described the respondent with sufficient clarity, to H

Cheda J

A the extent of eliminating any mistake, either legal or factual, about the respondent's identity.

Held, further, that there is a clear distinction between an application for a declaratory order and an application for review. Although the application was presented as one for a declaratory order, its contents were those of an application for review. In such an application, the applicant seeks B a review arising out of the irregularity of the procedure adopted by a tribunal or board. This what the applicant was seeking. The draft order was clearly not a declaratory order, but relief obtainable on review. As the application was in fact one for review, the correct forum for its determination was the Labour Court, as provided for under s 89(6) of C the Labour Act [*Chapter 28:01*].

Held, further, that in any event, the claim was prescribed, as the debt arose over three years before the respondent was summonsed.

Cases referred to

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

D *Johnsen v AFC* 1994 (1) ZLR 95 (H)

Kwete v African Commercial Publishing & Development Trust & Ors HH-216-98

Marasha v Old Mutual Life Assurance Co 2000 (2) ZLR 197 (H)

Matsambire v Gweru City Council S-183-95

Mushariwa v Zimbank 2008 (1) ZLR 125 (H)

E *Nyandoro v CIMAS* HC 6652/08

Sibanda & Anor v Chinhemhute NO & Anor HH-131-04

van Vuuren v Braun & Summers 1910 TPD 950

Legislation considered

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

High Court Rules 1971 (RGN 1074 of 1971), r 256

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

Case information

I Mafirakureva, for the applicant

G *S Chamunorwa*, for the respondent

Judgment

Cheda J: On 19 January 2012 the applicant filed an application for a declaratory order whose prayer is couched as follows:

"IT IS HEREBY DECLARED THAT:

(1) The freezing of the applicant's salary and the subsequent dismissal thereto H be and is hereby declared null and void.

Cheda J

(2) The applicant be and is hereby reinstated to her position with full pay and A benefits from date of dismissal to date.

(3) Costs of suit on an attorney-client scale."

According to the applicant, she was employed by the respondent from May 2008 until 14 August 2011 when she was purportedly dismissed by respondent.

The respondent is Delta Beverages, which was the employer of the applicant, B although they argue that they were wrongly cited, as the name of their company is Delta Beverages (Pvt) Ltd. This, however, is an issue which will be visited later in this judgment.

The applicant's averments are that she was duly employed by the respondent from May 2008 until she fell sick and was granted a three months' sick leave C by a doctor who issued her with a sick leave report. Upon receipt of the report, she submitted it to her immediate boss, a Mr Mahlangu, the stores Controller. She further averred that Mr Mahlangu verbally advised her that her sick leave had been granted and as a result of that she proceeded to go on a three months' sick leave with effect from 2 May 2008. However, on 28 D June 2008, the respondent wrote a memorandum to a Mr Mwanda advising him that the applicant had proceeded to go on leave without approval and that her salary should be stopped. The memorandum was given to her husband at the relevant time, as she had then proceeded to her rural home to see her sick mother. E

She went to Harare on 27 September 2008, where she saw a Mr Mirando, who advised her to put her grievances in writing, which she did, but has received no response to date. The basis of her application is that the freezing of her salary and subsequent dismissal was unlawful as she was not afforded a hearing in terms of the company's code of conduct or in terms of the F principles of natural justice.

For that reason, she contends that the respondent is guilty of unfair labour practices. It is her argument that the dismissal was unprocedural as it infringed on her well established rights to a fair hearing.

The respondent has vigorously opposed this application and raised three G points *in limine*, being:

(1) the applicant cited a non-existent entity;

(2) jurisdiction; and

(3) prescription.

I shall deal with these issues hereinunder. H

Cheda J

A **Citation of a non-existent entity.**

(1) Non-existent company

It is their argument that their company is registered under the Companies Act [*Chapter 24:03*] as Delta Beverages (Pvt) Ltd and to cite it as Delta Beverages is illegal as there is no company by that name. They argued that B they advised the applicant's legal practitioners of this error, expecting them to correct it, but they did not do so.

The applicant in her answering affidavit concedes that indeed the respondent has not been cited in the name in which it is called in the memorandum and articles of association, but argues that this is not enough legal reason for C the justification of the dismissal of the matter. This reason is based on the long held view, almost trite, that these courts are of the view that in deciding labour matters

they must dispense with simple, cheap and industrial justice, unhampered by legal jargon and technicalities.

The general rule is that proceedings against a non-existent entity is void *ab* D *initio* and a nullity. See *Gariya Safaris (Pvt) Ltd v van Wyk* 1996 (2) ZLR 246 (H), although the decision in the said matter was faced with an action case as opposed to a motion case as is the position in this matter. *In casu*, I am of the considered opinion that the approach is distinguishable. In that matter Malaba J (as he then was) stated at 252G:

> "A summons has legal force and effect when it is issued by the plaintiff against E an existing or a natural person. If there is no legal or natural person answering to the names written in the summons as being those of the defendant, the summons is null and void."

Where the entity is non-existent, indeed the issue of nullity sinks to the bottom of the sea like lead and cannot be brought up to the surface. However, the F issue adopts a completely different complexion where there is in existence an entity who is by some error or omission is not cited. It would seem that authorities held that there should be a distinction. In *van Vuuren* v *Braun & Summers* 1910 TPD 950 at 955 Wessels J stated:

> "Now in order to bring a defendant legally into court a summons is required. In order that summons may be valid it must comply with the requirements of r 6. G It must purport to be a summons; a mere request or letter to the effect that the defendant is kindly requesting to appear in court on a certain day is an invalid citation. Next, the summons must specify the defendant. It is true that it will not be a flaw in the summons if the defendant is not described as accurately as he should be. If a man is baptised 'George Smith' it is no defect to call him 'John Smith' because the individual is pointed out with sufficient accuracy. But if H there were no mention of the defendant at all the summons would be a wholly

---

> worthless document and could not be amended by inserting the defendant's A name in court."

In casu the entity whom the applicant has sued is said to be non-existent. The argument is grounded on the fact that the citation omitted the full description of the respondent. The crucial question that irresistibly begs an answer is, to what extent does the omission affect the identification of the respondent? B The respondent is a well-known blue chip company whose fleet of cars is all over our national and domestic roads and its commercial advertisements need no introduction.

In other words, Delta Beverages is known here and beyond. To me, the applicant may have technically erred in her description, but has described C the respondent with sufficient clarity to the extent of eliminating any mistake either legal or factual of the respondent's identity. The applicant sufficiently described the respondent.

(2) Jurisdiction

The second point relates to jurisdiction, which the respondent has taken issue D with. The applicant has applied for a declaratory order, which is taken care of by s 14 of the High Court Act [*Chapter 7:06*] which provides as follows:

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

The position was clearly laid down in *Johnson v AFC* 1994 (1) ZLR 95 (H) E at 98 where Chidyausiku J (as he then was) stated:

> " Firstly the applicant must satisfy the court that he is a person interested in an existing future of contingent right or obligation. If satisfied on that point, the court then decides a further question of whether the case is a proper one for the exercise of the discretion conferred on it." F

The learned judge indeed laid down three requirements, being:

(1) the person instituting the proceedings must be an interested person;

(2) the court must inquire and determine an existing future or contingent right or obligation; and

(3) the case must be the proper one for the court to exercise the discretion G conferred on it.

I agree with Mr *Chamunorwa* that the above is the correct legal position. The first and second requirements pose no problem at all for the court, as the applicant indeed has a direct interest in

the problem, which therefore makes her an interested person. In addition, the court is obliged to determine H

2012 (2) ZLR p117

Cheda J

A the existence or otherwise of future or contingent right or obligation. This fact admits of no doubt.

The question which no doubt falls for determination is whether there is a proper case for the court to exercise the discretion conferred upon in it in terms of s 14 of the High Court Act.

B It has been argued by Mr *Chamunorwa*, for the respondent, that although the application is marked "Declaration", its contents are those of a review. An application for review is governed by r 256 of the High Court Rules which provides:

> **"Review proceedings by Court application**
>
> C Save where any law otherwise provides, any proceedings to bring under review the decision or proceedings of any inferior court or of any tribunal, board or officer performing judicial, quasi-judicial or administrative functions shall be by way of court application directed and delivered by the party seeking to review such decision or proceeding to the magistrate, presiding officer or chairman of the court, tribunal or board or to the officer as the case may be and to all other parties affected."

D The determining factor in the position of an application for review is the irregularity of the procedure adopted by a tribunal, board or presiding quasi-judicial board. An application for review is validated or authenticated, not by its mere title, but by the facts, which should be a complaint regarding the irregular procedure adopted by the authoritative body whose determination E has prejudiced applicant. This legal position is well set out in *Matsambire v Gweru City Counci*l S-183-95 and *Kwete v African Commercial Publishing & Development Trust & Ors* HH-216-98. The distinction between an application for a declaration order and an application for review can easily be found in the remarks by Adam J in *Marasha v Old Mutual Life Assurance Co* 2000 (2) ZLR 197 (H) F at 198 where the learned judge stated:

> "It is clear from the papers filed before me by the applicant that essentially he sought review of proceedings well out of time without first making an application for condonation and establishing that he was entitled to bring an application out of time. *What is significant is not heading the proceeding "Court Application for Declaration"* but the draft order which asks the decision to be set aside and his salary to be paid. This clearly is not a declaratory order" (the emphasis is G mine).

The applicant's complaint is that the procedure adopted by the respondent was irregular, in that she was not accorded a fair hearing. An argument of this nature is slanted towards reviewing the said procedure. In my opinion, it therefore has nothing to do with the declaration but is pregnant with all the H necessary and essential elements of an application for a review procedure,

---

2012 (2) ZLR p118

Cheda J

as the above authorities have clearly stated. Therefore, the irregularities A complained of can only be dealt with under review.

As the application is for review, it therefore stands to reason that the correct forum for its determination is the Labour Court, as provided for in s 89(6) of the Labour Act [*Chapter 28:01*], which provides thus:

> "No court other than the Labour Court shall have jurisdiction in the first instance B to hear and determine any application, appeal or matter referred to in subsection (1)."

Subsection (1) provides:

> "The Labour Court shall exercise the following functions:
>
> (a) hearing and determining applications and appeals in terms of this Act or C any other enactment; and
>
> (b) hearing and determining matters referred to it by the Minister in terms of this Act; and
>
> (c) referring a dispute to a labour officer, designated agent or a person appointed by the Labour Court to conciliate the dispute if the Labour Court considers it expedient to do so;
>
> (d) appointing an arbitrator from the panel of arbitrators referred to in subsection D (6) of section *ninety-eight* to hear and determine an application;
>
> (di) exercise the same powers of review as would be exercised by the High Court in respect of labour matters;

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

The jurisdiction of this court has no doubt been ousted by s 89 of the Labour Act, thereby giving this court no discretion to entertain a review application in the first instance. This legal position was again taken in the following cases: *Sibanda & Anor* v *Chinhemhute NO & Anor* HH-131-04; *Nyandora* v *CIMAS* HC 6652/08; and *Mushariwa* v *Zimbank* 2008 (1) ZLR 125 (H), where Gowora J (as she then was) stated: F

> "What the applicant seeks from this court is the court grants him an order for reinstatement in his former position. To that end, he has invoked the *audi alteram partem* principle to the effect that he was not heard before the respondent made a decision dismissing him from his employment. It is trite that the *audi alteram partem* rule is a ground for review. Reviews relating to labour matters, being issues for determination at first instance, are one of the matters specifically G reserved for the Labour Court. The jurisdiction of the High Court to determine such reviews has been ousted by the legislature under the Act and the applicant will therefore not be afforded relieve by the court in respect of same."

In light of the above authorities, it is now settled law that labour disputes of this nature are specifically ousted from the jurisdiction of the High Court and have been securely and firmly placed in the hands of the Labour Court H

Cheda J

A as the forum created for such matters. In the absence of an amendment to that legislation, this court's hands remain tied.

(3) Prescription

It is the respondent's argument that the applicant's claim has prescribed, as it arose in 2008 and this application was only served on the respondent on 24 B January 2012. The applicant avers that she was dismissed in 2008. It is for that period that she was owed her salary. When the issue of prescription was raised, she argued that the period was interrupted by negotiations. A salary is a debt and a debt falls within the definition of 15(b) of the Prescription Act [*Chapter 8:*11], which stipulates a debt's lifespan. For that reason the said prescription falls foul of s 19 of the said Act and therefore the claim is C indeed prescribed.

(4) Costs

Mr *Chamunorwa* has urged the court to award the respondent costs at a higher scale. Costs are in the discretion of the courts. It is important, in my view, that these courts should be slow in awarding costs at a higher scale, as awarding D them willy-nilly may scare away the majority of litigants, who have genuine claims or defences, from approaching the courts for enforcement of their rights for fear of being saddled with higher litigation costs. Such costs should be, in my view, be reserved for cases which a litigant was acting unreasonably, fraudulently, insulting or, at the worst, dishonestly. The list is inexhaustive. E I find no such conduct on the part of the applicant to warrant such censure.

Order

In light of the above the following order is made:

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

F *Mweli Ndlovu & Associates*, applicant's legal practitioners

Gill, Godlonton & Gerrans, respondent's legal practitioners

© 2015 Juta and Company (Pty) Ltd.

Document 18 of 60

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2012/Volume 2/MASHAVIDZE v A-G & ANOR 2012 (2) ZLR 120 (H)

MASHAVIDZE v A-G & ANOR 2012 (2) ZLR 120 (H)

Citation	2012 (2) ZLR 120 (H)
Case No	Judgement No HB-177-12
Court	High Court, Bulawayo
Judge	Kamocha J
Heard	3 July 2012; 19 July 2012; *CAV*
Judgment	2 August 2012
Counsel	*N Mlala*, for the applicant *A Munyeriwa,* for the respondent
Case Type	Urgent chamber application
Annotations	No case annotations to date

Flynote

Criminal procedure – *trial – conduct of – cross-examination of prosecution witness – defence counsel not in court for examination–in-chief – whether allowed to conduct cross-examination*

Headnote

The applicant was appearing in the regional court on a charge of rape, to D which he had pleaded not guilty. At the trial, his chosen legal practitioner, M, did not initially appear. Instead, another lawyer from the same firm, K, appeared in court. He introduced himself to the court as defence counsel for the applicant and advised the court that he was doing so in his representative capacity for M, who was to join the proceedings at E a later stage. K said he was to record the complainant's evidence-in-chief and begin cross-examination, and that M was going to join the proceedings and continue with the cross-examination of the complainant. After K had finished cross-examining the complainant he handed over to M, who had by then joined the proceedings, so that he could also cross-examine the complainant. The prosecutor informed the court that F he had no objection to this procedure, but the magistrate not only did not allow M to continue, he ordered M to leave the court. The applicant sought an order for trial *de novo* before another magistrate.

Held, that the prosecutor's concession was completely erroneous and misleading. The procedure that M, with the support of the prosecutor, G was attempting to adopt was not only wrong but was also absurd. He wanted to take over cross-examination of a witness whose testimony was given in his absence. The trial magistrate was entirely correct in refusing to allow him to do so. A legal practitioner may not walk into a court room where proceedings are in progress and take over cross-examination of a witness whose evidence-in-chief was given during H

Kamocha J

A his absence. He does not know what the witness said. This is common sense. What M attempted to do was grossly improper.

Case information

N Mlala, for the applicant

A Munyeriwa, for the respondent

Judgment

B **Kamocha J**: The applicant in this matter was seeking an order which provided interim relief was as follows:

> "Pending the finalisation of the matter under HC R209/12, the applicant be granted the following relief:
>
> (1) That the respondents be and are hereby jointly interdicted from proceeding C with the trial or deal with case number CRB REG 218/12 pending the finalisation of the application for review under HC R209/12.
>
> (2) That the applicant only appears in the Regional Court under CRB REG 218/12 for routine remand until HC R209/12 is finalised."

The final order being sought was in the following terms:

> "That the provisional order granted by this honourable court be confirmed in the D following manner:-
>
> (1) The proceedings of trial under CRB 218/12 be and are hereby set aside.
>
> (2) The matter be referred to trial *de novo* before a different magistrate
>
> (3) There be no order as to costs unless opposed and the party which opposes to bear costs of suit on an attorney-client scale."

E The basis for launching this application on a certificate of urgency is stated in the founding affidavit as follows. He is appearing in the regional court facing a charge of rape to which he pleaded not guilty. Right from the outset his legal practitioner was Mr Mlala of Cheda and Partners. The applicant's wish was that Mlala would handle his case from the initial bail application to F finality. His initial remand was at the Western Commonage magistrates court.

On 18 June 2012 the trial was to commence in the regional court. For reasons best known to Mlala and Mr Khumalo, also from Cheda & Partners, Khumalo appeared in court representing him. He introduced himself to the court as defence counsel for the applicant and advised the court that he was doing so G in his representative capacity for Mlala, who was to join the proceedings at a later stage. The applicant went on to aver that Khumalo was to record the complainant's evidence-in-chief and begin cross-examination and Mlala was going to join the proceedings and continue with cross-examination of the complainant. After Khumalo had finished cross-examining the complainant he handed over to Mlala, who had by then joined the proceedings, to also H cross-examine the complainant.

Kamocha J

The regional magistrate objected to that. However, the public prosecutor stood A up to advise the magistrate that the procedure was proper and declared that the State did not object to it. I pause to observe that the public prosecutor's remarks were completely erroneous and misleading.

Relying on the misleading remarks of the prosecutor, Mlala stood up to also cross-examine the complainant, but the court asserted its authority and B ordered him to sit down, which he did, and then the court went on to say:

> "If you want to incur the full wrath of the law, you will experience it, in fact you get out of my court now, get out!"

Mlala left the court room as ordered and the trial continued. As the matter was about to be remanded to the following day Khumalo advised the court C that he would not proceed with the defence case, as he was not briefed about the case. He needed time to go and prepare for the matter. He then sought a week's remand to do that. That was unacceptable to the court, which gave him time up to 20 June 2012 at 0900 hours instead of 19 June 2012.

The applicant stated that the court told him that, with or without his lawyers, the trial would proceed on 20 June 2012. The applicant harboured the D feeling that since the court was not prepared to grant a week's remand, it had developed a personal interest in the matter or was not handling the trial properly. He concluded that there existed a serious irregularity which necessitated a review. In the light of that he filed an application for review on 20 June 2012 when the trial should have

commenced. He feared that E serious prejudice would be occasioned to him since the presiding officer was allegedly handling the matter in an unprocedural fashion, leading to chances of him being convicted being high. He based his conclusion on the belief that the legal practitioner of his choice had been wrongfully denied the right to represent him.

The procedure that Mlala, with the support of the public prosecutor, was F attempting to adopt was not only wrong but was also absurd. He wanted to take over cross-examination of a witness whose testimony was given in his absence. The trial magistrate was entirely correct in refusing to allow Mlala to do so. That was so because Khumalo introduced himself as the defence counsel at the commencement of the trial. The complainant gave G her evidence-in-chief. He cross-examined her and Mlala only walked into the court room and sat at the bar when Khumalo was close to the end of his cross-examination of the complainant. When Khumalo declared that he had no further questions to the witness, Mlala stood up and said he also wanted to cross-examine her. When asked by the court to explain the procedure he purported to follow, he retorted: H

Kamocha J

A "Am I not allowed to cross-examine the witness?"

A legal practitioner may not walk into a court room when proceedings are in progress and purport to join in or take over cross-examination of a witness whose evidence-in-chief was given during his absence. He does not know what the witness said. This is common sense. What Mlala attempted to do B was grossly improper. As if that was not enough, when asked to explain what he was trying to do he questioned the court, asking why he was not allowed to do what he was about to do. Depending on the manner in which the question was put to the court, Mlala could be viewed as being contemptuous to the court. It is difficult to understand how a trained lawyer can attempt to cross-examine a witness on the testimony that was given in his absence. C Such level of ignorance of procedure is astounding. The court had to assert its authority by ejecting him from the court room.

Mlala was not alone in that astounding ignorance of procedure, as he was supported by the State counsel, who suggested to the court that the procedure was in order and that the State accepted it. The public prosecutor filed an D affidavit and does not deny having said so. It is accepted that he made the remarks.

The trial continued after Mlala had been ejected from the court room. Khumalo continued with the trial until the State closed its case. It was at that stage that he sought for a postponement which the court would not accede to. Khumalo was seeking a postponement in order to go and prepare his E defence case. This again is difficult to understand when regard is had to the fact that the defence counsel had presented the following defence outline at the commencement of the trial.

> "Defence outline
>
> The accused will plead not guilty to the charge of rape as defined in section 65 of F the Criminal Law (Codification and Reform) Act and will apply to be acquitted on the following grounds:
>
> (a) He did not have forced sexual intercourse with the complainant Tsitsi Meredzi.
>
> (b) He was in love with the complainant and the complainant expected much from the accused. G
>
> (c) all hell broke loose when the accused had consensual sexual intercourse but failed to leave something in return as the complainant expected.
>
> (d) This the accused will prove in court.
>
> Wherefore accused pray (*sic*) for an acquittal in this charge."

The accused's defence is straightforward and yet Khumalo was seeking a H week's postponement to prepare the defence case. He needs to be censured

---

Kamocha J

for his conduct. He just wanted to waste the court's time. The request for A a week's remand was just designed to buy time. When the court would not accede to his request for a week's postponement but still generously granted him a postponement for two days to 20 of June, he and Mlala advised the applicant to launch an application for review on that day, i.e. 20 June.

Khumalo and Mlala did not conduct themselves properly and must be B reprimanded for their despicable conduct. The trial magistrate must have had a very difficult time in working with court

officials who are not conversant with court procedures.

This application was brought on a certificate of urgency to stay the proceedings pending the finalisation of the said application for review filed on 20 June. I cannot accede to the application which is a clear abuse of court process. C

In the result, I would dismiss the application with costs. The same regional magistrate should continue with the trail to finality without any further delay.

Cheda & Partners, applicant's legal practitioners

Attorney General's Office, respondent's legal practitioners D

© 2015 Juta and Company (Pty) Ltd.

Document 19 of 60

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2012/Volume 2/S v BABBAGE 2012 (2) ZLR 125 (H)

S v BABBAGE 2012 (2) ZLR 125 (H)

Citation	2012 (2) ZLR 125 (H)
Case No	Judgment No. HB-157-12
Court	High Court, Bulawayo
Judge	Kamocha J and Cheda J
Heard	4 June 2012; *CAV*
Judgment	2 August 2012
Counsel	*C P Moyo,* for the applicant *L Maunze,* for the respondent
Case Type	Criminal appeal
Annotations	No case annotations to date

Flynote

Criminal law – *statutory offences – offences under Road Traffic (Rules of the Road) Regulations – policy of referring certain offences to court instead of taking deposit fines – lawfulness of such policy*

Criminal procedure (sentence) – *general principles – probation officer's report and recommendations – court departing from such recommendations* D *– court's duty to give reasons for such departure*

Criminal procedure (sentence) – *statutory offences – offences under Road Traffic (Rules of the Road) Regulations – deposit fines – fine which may be demanded by police*

Headnote

E Although the Road Traffic (Rules of the Road) Regulations, 1974 (RGN 308 of 1974), as amended by SI 299 of 2002, provide no penalties for a contravention of any of the provisions thereof, such penalties are provided by the proviso to s 81(5)(i) of the Road Traffic Act [*Chapter 13:11*]. In all

cases the penalty is a fine of level 5 ($200) or imprisonment F for a period of six months, or both such fine and such imprisonment.

A police officer stopped and arrested the appellant for using a mobile phone whilst driving, in contravention of s 16B(1) of the Regulations. The appellant was issued with a "ticket" notifying him to appear in court. He duly appeared and pleaded guilty. In spite of a recommendation from G a probation officer recommending community service, the magistrate sentenced the appellant to 14 days' imprisonment. The appellant appealed against this sentence.

Held, that where a court is of the view that a person should be sentenced to imprisonment for an offence which is not serious, it should seriously consider a non-custodial sentence. Failure to consider community H service for a minor offence constitutes a serious misdirection on the part

of the judicial officer which would call for interference by an appeal A court. Where a court has reason to differ from the recommendations of probation officer, it should proffer reasons for departing from those recommendations.

Held, further, that in any event, the regulations did not authorize the police to refer persons contravening s 16B(1) thereof to court for trial. Any B practice that had been adopted to refer such cases to court was outside the powers conferred on them and on the prosecuting authorities by statute or the common law and was therefore *ultra vires* and unlawful.

Held, further, that where a motorist is caught using a mobile or cellular phone, he should be issued with a ticket to pay a fine as stipulated in level 5; the ticket should give the motorist a reasonable time within C which to pay the fine unless the offender elects to pay the fine on the spot; and the police are, however, empowered to use their powers as they deem fit, depending on the motorist e.g. if he is a foreigner or if he has no acceptable identification which will make it difficult for him to be traced in the event of a default in paying the fine. D

Held, further, that a police officer cannot and should not insist on a spot fine on the basis that he is not in possession of a ticket book. A ticket book is a necessary administrative tool for executing his duties. A police officer's failure to carry relevant stationery can not be used to curb and/or infringe people's right.

Held, further, allowing the appeal, that the appellant should fined be $20 or E in default of payment, five days' imprisonment.

Cases cited

Carltona Ltd v Commissioners of Works [1943] 2 All ER 560

S v Antonio & Ors 1998 (2) ZLR 64 (H) F

S v Gwarada 1981 ZLR 17 (A)

S v Julius GS-269-80

S v Khumalo HB-39-03

S v Majaya HB-39-03

S v Mgemezula HB-123-12 G

S v Moyo HB-132-12

S v Ndebele 1988 (2) ZLR 249 (H)

S v Shariwo HB-18-03

Legislation considered

Road Traffic Act [*Chapter 13:11*], s 81(5) H

Cheda J

A Road Traffic (Rules of the Road) Regulations 1974 (RGN 308 of 1974), s 16B(1)

Case information

C P Moyo, for the applicant

L Maunze, for the respondent

B *Editor's note*: invitations to pay deposit fines are lawful only under s 141 of the Criminal Procedure and Evidence Act [*Chapter 9:07*], which provides that where a peace officer, on reasonable grounds, believes that a magistrates court, on convicting such accused of that offence, will impose a fine not exceeding level three (currently $20), the peace officer may issue which is commonly referred to as a "ticket". This ticket acts as a summons to appear in court on a specified date, but gives the person the option to pay a deposit fine before an earlier specified date. The procedure for payment of a C deposit fine is set out in s 356 of the Act, which also refers to a maximum deposit fine of level 3. It would seem, therefore, that a "ticket" may not be issued where a fine of over $20 is warranted.

The Rules of the Road Regulations do not provide for a specific penalty in respect of any particular provision. Section 38 of the Regulations makes it an offence to contravene or fail to comply with any of the provisions of the regulations with which it is the motorist's duty to comply, but does not set out a penalty. The Act itself does not D say, either expressly or implicitly, that it is an offence to contravene any provisions of any regulations made under the Act, nor does it state that the penalties set out in s 81(5) apply if regulations made under the Act do not prescribe penalties. Nonetheless, on the basis of the decision of Squires J in *S* v *Madziwa* 1982 (1) ZLR 25 (H), it is probably permissible to apply the penalties set out in s 81(5) of the Act.

Judgment

E **Cheda J**: This is an appeal against sentence only.

The appellant is 27 years of age, and is employed as a manager in Morningside, Bulawayo. On 23 January 2011, whilst driving along Robert Mugabe Road, Bulawayo he was stopped by a police officer who arrested him for using a mobile phone. He was issued with a ticket notifying him to appear in court for the said offence.

F He indeed appeared in court on 9 February 2011 when he was charged with the said offence. He pleaded guilty and was sentenced to 14 days' imprisonment.

Before sentence was passed, a community service officer compiled a presentence report and submitted it to the court wherein he recommended a sentence of community service in light of the fact that appellant is employed. G Despite this recommendation, the trial court in its wisdom imposed a prison term.

There are three issues which fall for determination in this matter.

Firstly, it is trite that where a court is of the view that a person should be sentenced to imprisonment for a non-serious offence, it should seriously H consider a non-custodial sentence.

Cheda J

These courts have for a long time urged the trial courts to seriously consider A community service for minor offences. The pronouncement of a prison term should not be arrived at lightly by the courts as its consequences are very dire. It is not enough for the court to merely state that the said factor has been considered. The said consideration must clearly manifest itself in the sentence the court passes thereafter. In this jurisdiction, the courts have held B that failure to consider community service for a minor offence constitutes a serious misdirection on the part of a judicial officer and will no doubt call for interference by the appeal court: *S* v *Khumalo* HB-39-03; *S* v *Majaya* HB-15-03; and *S* v *Shariwa* HB-37-03. This court has emphasized this point time without number: see *S* v *Julius* GS-269-80; S v *Gwarada* 1981 ZLR 17 and *S* v *Moyo* HB-132-12. Our jurisdiction has now moved away from viewing C imprisonment as the first port of call, as such, non-custodial sentences are now the general rule as opposed to being an exception.

The sacrosanct approach of these courts is that the appeal court is slow in interfering with the sentences of lower courts unless such sentences are so harsh to an extent of unreasonableness or appear to have been arrived at as D a result of irregularity of the proceedings. Therefore sentencing remains the province and domain of the trial court.

However, in as much as sentencing remains a discretional and onerous responsibility, it should be exercised judiciously, failing which the offender can suffer serious prejudice. In *Moyo's* case *supra* at p 2, I remarked:

> "It is trite that sentencing is the most difficult aspect of a judicial officer's decision E yet it is arguably most important as it seals the conclusion of a criminal trial. It is for that reason that serious thought should be given before sentence is passed on an individual. It is a legal operation which derives from both statute and case law. The sentencer should, therefore, have the basic knowledge of the appropriate law.
>
> However, sentencing becomes a more sophisticated business where there are F alternative methods of punishment.
>
> A judicial officer should always bear in mind the rigours of a prison term. It is trite law that sentence of a prison term should be the last resort which our courts should be slow in arriving at. However, where the court prefers to impose a prison term it should proffer special reasons for doing so." G

I still hold that view.

The second issue is that of a community service report. Judicial officers are urged and encouraged to consider opinions and recommendations of other professionals whose objectives are to assist them in arriving at suitable sentences. Where they have reason to differ with these recommendations they should proffer reasons for their departure: *S* v *Mgemezulu* HB-123-12. H

Cheda J

A The third issue, and the most important, is the reason for the appeal itself. The thrust of the appeal is that the sentence passed by the court *a quo* is excessive in the circumstances and induces a sense of shock. The respondent also conceded that indeed it was unduly harsh.

Of late, quite a number of these cases have come before the courts. In my assessment of a suitable sentence, I perused SI 299 of 2002 for a penalty, but B I could not find it. I then sought guidance from the Attorney-General's Office, Bulawayo, to which Mr *Mabhaudi* responded and I am indeed grateful for his research and confession of an anomaly which for a long time has been hidden from the courts and members of the public in general and motorists in particular. In his response he agreed with me that there is no specific penalty C for contravening s 16B(1)(a) of SI 299 of 2002, (use of a mobile telephone while driving) but that such penalty is found in the proviso to s 81(5) of the Road Traffic Act [*Chapter 13:11*] which states that an infringement by the said section is punishable under s 81(5)(i), which states:

> "*Subject to proviso (ii)*; no such penalty shall exceed a fine of level 5 or imprisonment for a period of six months or both such fine and such imprisonment" (my D emphasis).

Level five limits the fine to $200. A fine of US$200 is the maximum and should obviously be reserved for more serious and aggravated cases only.

In my considered opinion, the police are empowered and authorised to impose a fine not exceeding $200, depending on their Regulations. In my reading of E this piece of legislation, I have failed to find reference to the section which authorises the police to refer offenders of s 16B (1)(a) of SI 299/2002 to court for trial. The Attorney-General's Office has advised me that indeed there is no such section.

The next unavoidable question which follows is, what authority were the police relying on by referring mobile/cellular phone motorists' offenders F to court for the contravention of the section under discussion? Again, the Attorney-General's Office advised me that the practice was adopted after a meeting was held between the Provincial Police Command and Provincial Judicial Committee upon realisation of the continued escalation of these particular offences by motorists. This indeed is commendable as they are relevant stakeholders in the delivery of justice.

G However, in my view, this practice, despite its good intentions, is unlawful as a Provincial Judicial Committee or the Provincial Police Command has no legal authority to alter or amend the provisions of existing legislation. Such duty is the domain of the legislature or the designated Minister. The provincial structure cannot arrogate to themselves administrative or legislative powers H they do not have. To my knowledge, Zimbabwe presently has a National

---

Cheda J

Assembly and not a provincial one. Therefore, all Acts of Parliament are A enacted in Parliament and not anywhere else.

These two bodies, being public bodies, can only validly exercise powers within the limits conferred on them by either common law or statute. The existence of such powers have not been submitted to us. Therefore I can only conclude that there are none. Since the decision which culminated in B the reference of the offending motorists to the courts was outside the powers conferred to them by the statute or common law, that decision is, therefore, *ultra vires* and accordingly unlawful. As a result of its unlawfulness, by the very nature of the judicial functions of the courts, this court is therefore empowered to interfere with the trial court's decision.

The acts of any competent authority must fall within the four corners of the C powers given to it by the legislature. This is our correct legal position and so is the English legal position: *Carltona Ltd v Commissioner of Works & Ors* [1943] 2 All ER 560.

Therefore, it stands to reason that the Zimbabwe Republic Police has authority to assess fines on motorists if the said fines are in accordance with their D regulations. This should be in line with level 5, which stipulates the said fine.

There is no legal reason why the contravention of the section under discussion should be referred to court for sentence for an offender under this section unless the offender is a repeat offender or the circumstances under which the offence is committed is aggravated. E

For the avoidance of doubt, the following is the correct legal position which should be followed by the relevant authorities:

(1) where a motorist is caught using a mobile or cellular phone, he should be issued with a ticket to pay a fine as stipulated in level 5;

(2) the said ticket should give the motorist a reasonable time within which F to pay the fine in accordance with their regulations, unless the said offender elects to pay the fine on the spot;

(3) the police are however, empowered to use their powers as they deem fit depending on the motorist, e.g. if he or she is a foreigner, if he or she has no acceptable identification which will in turn make it difficult for G him or her to be traced in the event of a default in paying the fine.

(4) a police officer cannot and should not insist on a *spot fine* on the basis that he is not in possession of a ticket book which ticket book is a necessary administrative tool for executing his duties.

A police officer's failure to carry relevant stationery can not be used to curb and/or infringe people's rights. H

2012 (2) ZLR p131

Cheda J

A *In casu,* this offence should have been adequately handled by the police. In addition, it was improper for the magistrate to impose a custodial sentence without giving reasons for his decision as this is a legal requirement: *S* v *Ndebele* 1988 (2) ZLR 249 (H). The emphasis is that all courts of record are required to keep and maintain full and comprehensive records of all proceedings.

B In addition thereto, this offence is by any civilised standards not serious and at any rate attracts a fine as the appellant was a young, employed first offender. The appellant should not have been sentenced to either community service or imprisonment in the circumstances. In *S* v *Antonio* & *Ors* 1998 (2) ZLR 64 (H) Chinhengo J stated:

> C "In a non-serious case, if a fine is a permissible sentence for the crime in question, the court should consider first whether a fine with or without an alternative of community service should be imposed."

There was, therefore, a clear misdirection on the part of the magistrate in this case as this matter clearly falls within the jurisdiction of the police and not the court.

D The appellant indeed committed the offence and his guilt is therefore beyond doubt. What remains is the question of sentence.

In light of the above the following order is made:

(1) the conviction is confirmed. E

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

US$20 or in default of payment, 5 days' imprisonment.

KAMOCHA J concurred.

Moyo & Nyoni, appellant's legal practitioners

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

© 2015 Juta and Company (Pty) Ltd.

Document 20 of 60

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2012/Volume 2/MINING INDUSTRY PENSION FUND v DAB MKTG (PVT) LTD 2012 (2) ZLR 132 (S)

MINING INDUSTRY PENSION FUND v DAB MKTG (PVT) LTD 2012 (2) ZLR 132 (S)

Citation	2012 (2) ZLR 132 (S)
Case No	Judgment No. S-25-12
Court	Supreme Court, Harare
Judge	Ziyambi JA, Garwe JA & Makarau JA
Heard	6 March 2012; *CAV*
Judgment	8 August 2012
Counsel	*T Mpofu,* for the appellant *D Ochieng,* for the respondent
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Practice and procedure – *admission – binding nature of – court not entitled to ignore admission unless it is withdrawn – no need for plaintiff to prove admitted fact – absolution not competent if plaintiff fails to prove such* D *fact – when court may go behind admission – possible where admission contrary to facts*

Headnote

The respondent leased premises from the appellant, in which it conducted its various operations, including the manufacture of foodstuffs and E pharmaceuticals. Over the years in which the respondent was in occupation of the premises, leaks occurred in the roof and various aspects of the respondent's operations had to be curtailed or terminated. Because the respondent considered that the appellant was responsible for the upkeep and repair of the building and its roof, rentals were not paid. The appellant claimed an order for the cancellation of the lease, plus arrear rentals and F holding over damages.

The respondent, in its plea, admitted that it was indebted to the appellant on the grounds alleged and in the amount claimed, but it pleaded that it was excused from paying the amount of the appellant's claim because the appellant was indebted to it for damages which it claimed in the G

counter-claim filed with its plea. It prayed for judgment on the main claim to be stayed until there was judgment on the counter-claim. In the counter-claim, the respondent alleged that the appellant was required to maintain the external structure, including the roof of the premises, and that, in breach of its obligations, the appellant failed to repair the roof of the premises, forcing the respondent to shut down its operations. The H

A respondent claimed that, as a result of having to shut down its operations, it lost profit in a sum stated in the counter claim.

On the basis of the evidence before it, the trial court found that the appellant had breached the terms of the lease agreement by failing to keep the gutters in a good state of repair. Having established liability, the court found that the respondent had failed to show the nature of the loss that B it suffered and which flowed from the established breach and on that basis absolved the appellant from the instance on the counterclaim.

On the main claim, the court also absolved the respondent from the instance. Its reasoning was that the respondent was entitled to an abatement of rentals for the period during which the premises could not be used for C the manufacture of pharmaceuticals. It found that the respondent was entitled to pay reduced rentals during the period it had limited use of the premises and was further not obliged to pay any rentals for the period after it ceased production all together. On this basis, it held that the amount of rent due to the appellant was unknown and thus absolution should be granted.

D *Held*, that a formal admission made in pleadings cannot be ignored by the court before which it is made. Unless withdrawn, it prevents the leading of any further evidence to prove or disprove the admitted facts. It becomes conclusive of the issue or facts admitted. Thus, where liability in full is admitted, as happened here, no evidence is permissible to prove or disprove the defendant's admitted liability. In terms of s 36 of the Civil E Evidence Act [*Chapter 8:01*], it was not necessary for the appellant to prove the extent of the respondent's liability, as this had been admitted. The formal admission by the respondent was by law conclusive of the issue of liability and the amount, and no onus lay on the appellant to establish the amount. Absolution was therefore not competent. There F may be instances where a court may go behind an admission and give a finding of fact at variance with an admission made on the pleadings, but this would only be where it is clear, after a full investigation, that the admission is contrary to the facts and where injustice would result from an adherence to the admission. This was not such a case.

G *Held,* further, that with regard to the counter-claim, loss of profit following breach of contract is an assessable loss to be proved by evidence, and should not be confused with loss of future earning capacity, which calls for compensation for diminished earning capacity and is assessed as general damages. Damages for lost profit must be proved and cannot be presumed. They must be capable of some arithmetical calculation H and cannot be assessed from nothing. The evidence led tended to show

Makarau JA

general loss, not lost profit, and the court was right in ordering absolution A from the counter-claim.

Cases cited

Canaric NO v Shevil's Garage 1932 TPD 196

DD Tpt (Pvt) Ltd v Abbot 1988 (2) ZLR 98 B

Gordon v Tarnow 1947 (3) SA 525 (A)

Liqr, M & C Hldgs (Pvt) Ltd v Guard Alert (Pvt) Ltd 1993 (2) ZLR 299 (H)

Moresby-White v Moresby-White 1972 (1) RLR 199 (A); 1972 (3) SA 222 (RA)

Rance v Union Mercantile Co Ltd 1922 AD 312

Santam Ins co Ltd v Paget 1981 ZLR 73 (A) C

van Deventer v de Villiers 1953 (4) SA 72 (C)

Victoria Falls & Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd 1915 AD 1

Legislation considered

Civil Evidence Act [*Chapter 8:01*], s 36 (4) D

Case information

T Mpofu, for the appellant

D Ochieng, for the respondent

Judgment

Makarau JA: This is an appeal against the judgment of the High Court E sitting at Harare, handed down on 29 December 2010, in which the trial court absolved the defendant, now the respondent, from the instance, and also absolved the plaintiff, now the appellant, from the instance on the counter-claim, against which absolution the respondent has noted a cross appeal.

In its grounds of appeal, the appellant raised five grounds. These are:

1. That the learned judge erred in law and in fact by granting the respondent F absolution from the instance despite the fact that the respondent had already admitted the appellant's claim and such admission having been properly made by the respondent. The learned judge therefore erred in law and in fact by coming to a conclusion contradicting such admission. G
2. That the learned judge misdirected himself by holding that the gutters to the leased premises form part of the roof.
3. That the learned judge further erred at law and in fact in concluding that the appellant had a duty to keep the gutters to the leased premises in a state of good repair in light of the fact that the respondent had already admitted that it had the duty to keep the gutters free from blockages. H

Makarau JA

4. That A the learned judge erred at law by not dismissing the respondent's counter-claim after having found that the respondent had failed to lead evidence to show the nature of the loss it allegedly suffered.
5. That the learned judge erred in failing to appreciate that the respondent was never authorised by the appellant, which authority the respondent was obliged to seek in terms of the lease agreement, to carry on the B business of manufacturing pharmaceuticals and as such could not claim an abatement of rent when it ceased manufacturing pharmaceuticals.

On its part, the respondent raised four grounds in the cross-appeal. These are:

1. That the learned judge erred in finding that the respondent had failed to show the nature of the loss it suffered. C
2. That the learned judge further erred in finding that the respondent had not proven the quantum of its loss.
3. That, alternatively, having found that loss had in fact been suffered by the respondent on account of the appellant's breach, the learned judge erred in not proceeding to assess the quantum thereof after the respondent D had led all the evidence that it could.
4. That the learned judge erred in finding that the evidence of financial experts was necessary for the assessment of the respondent's loss, and further erred in presuming that such evidence was at the disposal of the respondent.

E **The facts**

The facts giving rise to this appeal are largely common cause. I summarise them as follows.

The respondent company was initially founded by one David Abraham Blumberg from whose initials it derives its name. Then it was operating F from Bulawayo. On a date not material to this appeal, the current directors of the respondent purchased the entire shareholding in the company and relocated the company to Harare where it operated from premises owned by the appellant, and which forms the subject matter of this appeal.

The company was initially a marketing business, marketing and importing G foreign goods. At some later stage, the respondent started purchasing small manufacturing businesses which it absorbed under the common roof to broaden the portfolio of the products it marketed. Thereafter, it continued as a manufacturing business. As at the date of the trial in the court *a quo*, it had a number of manufacturing units or divisions which however did not have separate accounts or labour force as these, together with the assets of these H operating units, belonged to the respondent. As at the time of the suit in the

court *a quo*, the respondent was in the business of manufacturing registered A medicines, cosmetics, toiletries, food products and confectionary. All these were manufactured from the leased premises.

The manufacture of registered medicines is done under the authority of the Medicines Control Authority of Zimbabwe. In the manufacture of medicines, the prevention of contamination during the manufacturing process is a B priority. It is part of the licensing conditions upon which one is permitted to manufacture licensed medicines. According to a floor plan of the leased premises, the area where medicines and cosmetics were manufactured was separated from the areas where food was processed by a dividing wall. This was deliberately done to minimise the possibility of contamination during the manufacture of the medicines and the processing of the food stuffs and C confectionary.

Certain issues arose relating to the maintenance of the leased premises. The first communication from the respondent to the appellant was in 2000 when the roof of the building developed some leaks. The leaks started after the appellant had engaged some workers to replace the guttering. The leaks soon D spread from the boardroom to the factory and into the administration block. Communication to the appellant over the issue did not, for various reasons, yield any result. The respondent, however, remained in occupation of the premises and worked its way round the problems as best it could. From 2007 the respondent would move its products and materials to areas that were not E leaking. The respondent also moved all its materials on pallets so that they could be fork- lifted to dry places easily and also be shielded from flooding.

On or about 8 February 2007, the respondent notified the appellant that the leaks were aggravated and that they were now predominantly in the warehouse and stores area. The first leaks emerged over the raw materials store area and the primary packaging area. As a result of these leaks, the F respondent wrote to the appellant advising it that the leaks had rendered a considerable portion of the rented premises unusable and had resulted in significant damage to products and raw materials. There was no response to this advice. By October 2007, the leaks had extended into the manufacturing area, particularly the drugs mixture manufacturing and tableting areas. The G respondent then demanded reconsideration of the rent payable for the premises as portions of the premises were now no longer usable due to the leaks and the potential damage to both products and raw materials.

In 2008, the parties met to discuss the issue of the repairs to the leaking roof and a review of the rentals payable for the premises. Once the leaks spread to areas that were meant to be sterile, the respondent stopped H

A manufacturing medicines in the premises in or about December 2008. Whilst it could have moved to other premises, this would have been a costly exercise and would have entailed fresh licensing by the Medicines Control Authority of Zimbabwe. It however continued with the processing of food and confectionary, using the same machinery. In July 2009, the respondent ceased manufacturing confectionary. At the beginning of 2010, repairs to B the leaking roof commenced.

In March 2010, the appellant issued summons against the respondent, claiming an order confirming the cancellation of the lease agreement between the parties, payment of the sum of US$58 021.94 representing arrear rentals, an order ejecting the respondent from the leased premises, holding over damages at C the rate of US$7 100 from 1 March 2010 to the date of ejectment, and costs of suit. It was alleged in the appellant's declaration that the respondent had breached the lease agreement between the parties by failing to pay rentals for the period December 2008 to February 2010, thereby accumulating the arrears claimed in the summons. It was further alleged that the

agreed rentals D for the leased premises was the sum of US$7 100 per month, also giving rise to the claim for holding over damages at that rate per month.

The suit was defended. In its plea, the respondent however admitted that it was indebted to the appellant on the grounds alleged and in the amount claimed. The respondent proceeded to plead that it was excused from paying E the amount of the appellant's claim because the appellant was allegedly indebted to it for damages which it claimed in the counter-claim filed with its plea. It prayed for judgment on the main claim to be stayed until there was judgement on the counter-claim.

In its counter-claim, the respondent alleged that in terms of the lease agreement, F the appellant was required to maintain the external structure, including the roof of the premises. In breach of its obligations, the appellant failed to repair the roof of the premises, forcing the respondent to shut down its operations in December 2008. The respondent further alleged that as a result of having to shut down its operations, it lost profit in the sum of US$196 250, which it claimed from the appellant.

G At the trial of the matter, the parties agreed that the onus to begin rested with the respondent in view of its plea, which was an admission of liability and in essence a consent to judgement. The respondent led evidence from three witnesses. In rebuttal, the appellant called the evidence of a single witness whose testimony was not accepted by the court wherever it conflicted with H that of the respondent's witnesses.

Makarau JA

On the basis of the evidence before it, the trial court proceeded to find that A the appellant had breached the terms of the lease agreement by failing to keep the gutters in a good state of repair. Having established liability, the court however agreed with counsel for the appellant that the respondent had failed to show the nature of the loss that it suffered and which flowed from the established breach. On the basis of that finding, the court proceeded to B absolve the appellant from the instance on the counterclaim. Regarding the main claim, the court also absolved the respondent from the instance.

During closing addresses, it was contended by counsel on behalf of the respondent that the respondent was entitled to an abatement of rentals for the period during which the premises could not be used for the manufacture of pharmaceuticals. The trial court, after citing in full the portion of the lease C agreement that provided for abatement of rent in the event of destruction or partial destruction of the leased premises, upheld the contention and held that the respondent was entitled to pay reduced rentals during the period it had limited use of the premises and was further not obliged to pay any rentals for the period after it ceased production alltogether. Based on this reasoning, D the trial court further found that consequently, the appellant was entitled to rentals in an amount "unknown" for the period that the respondent was entitled to a rebate in rentals. Thus, the reasoning of the trial court proceeded, absolution from the instance had to be ordered as the appellant had failed establish the amount of rentals that it was entitled to. E

The main appeal

As stated above, the appellant's claim was for the cancellation of the lease agreement, payment of the arrear rentals, holding-over damages, and the eviction of the respondent from the leased premises. To this claim, the respondent filed a plea in which it accepted liability in full. It is pertinent at this stage to record that during the trial, the appellant however conceded F that $14 200 of the arrear rentals was not due and payable as it represented rentals when only the local currency was legal tender. Judgment was thereafter sought in the remaining sum of US$72 221.94.

The issue that arises in this appeal is whether or not, where a claim has been admitted by a defendant in full, and the plea is not amended to withdraw the G admission, the defendant can be absolved from the instance on the basis of insufficient proof of the claim.

A formal admission made in pleadings cannot be ignored by the court before whom it is made. Unless withdrawn, it prevents the leading of any further evidence to prove or disprove the admitted facts. It becomes conclusive of the issue or facts admitted. Thus where liability in full, as *in casu*, is admitted, H

Makarau JA

A no evidence is permissible to prove or disprove the defendant's admitted liability. The importance of the admission is that it is thus seen as limiting or curtailing the procedures before the court in that where it is not withdrawn, it is binding on the court and in its face, the court cannot allow any party to lead or call for evidence to prove the facts that have been admitted. See *Rance v Union Mercantile Co Ltd* 1922 AD 312; *Gordon v Tarnow* 1947 (3) SA 525 (AD); B *van Deventer v de Villiers* 1953 (4) SA 72 (C); *Moresby-White v Moresby-White* 1972 (1) RLR 199 (A) at 203E-H; 1972 (3) SA 222 (RA) at 224; *DD Transport (Pvt) Ltd v Abbot* 1988 (2) ZLR 92 (S) and *Liquidator, M & C Holdings (Pvt) Ltd v Guard Alert (Pvt) Ltd* 1993 (2) ZLR 299 (H).

Section 36 of the Civil Evidence Act [*Chapter 8:01*] provides for admissions C in civil litigation as follows:

> "(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) Subject to subsection (3), in determining whether or not any fact in issue in civil proceedings has been proved, the court shall give such weight to any D admission proved to have been made in respect of that fact as the court considers appropriate, bearing in mind the circumstances and manner in which the admission was made.
>
> (3) *It shall not be necessary for any party to civil proceedings to prove any fact admitted on the record of the proceedings.*
>
> (4) *It shall not be competent for any party to civil proceedings to disprove any* E *fact admitted by him on the record of the 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 in which it was made and withdrawn" (the emphasis is mine).

F Applying the above provision and the cases cited to the facts of this appeal, it appears to me quite clearly that it was not necessary for the appellant to prove the amount of the arrear rentals as this had been formally and fully admitted by the respondent. Put differently, the appellant did not bear any onus to prove the amount of the arrear rentals and thus could not have failed G to discharge an onus that it did not bear. Absolution from the instance, which should only be granted when a party fails to establish a *prima facie* case, was thus not competent in the circumstances of this matter. In my view, the trial court erred by not only imposing an onus when the law provided for none, but by proceeding to hold that the appellant had failed to establish the amount of the arrear rentals when the formal admission by the respondent H was by law conclusive of the issue.

Makarau JA

It is clear from a reading of its judgment that the trial court was side-tracked A into inquiring whether or not the respondent had the obligation to keep the gutters to the building in a state of repair and whether or not it failed to do so, thus rendering the premises unsuitable for the purposes of manufacturing pharmaceuticals and confectionary. This was a wild goose chase. Having admitted the claim for arrear rentals in full, the respondent had cast away B its competence at law to disprove its liability. It was no longer competent for it to argue that it was entitled to abate the rentals for the period when it could not use the premises.

In summary, therefore, in terms of s 36(4) of the Civil Evidence Act, it was not competent for the respondent to lead any evidence to disprove an admission that it had made, without first withdrawing the admission. Such evidence, C being at law incompetent, was inadmissible. It was a further error on the part of the trial court to place any weight on incompetent and consequently inadmissible evidence and to use such as the basis of its decision to absolve the respondent from the instance.

In coming to the above conclusion, I am aware that in *Canaric NO* v *Shevil's* D *Garage* 1932 TPD 196, Greenberg J was prepared to assume that there are instances where and when a court may go behind an admission and give a finding of fact at variance with an admission made on the pleadings. The learned judge was of the view that a court may only do this where it is clear after a full

investigation that the admission is contrary to the facts and where injustice would result from an adherence to the admission. E

Whether or not the *obiter* remark by Greenberg J correctly reflects the law of this country is not an issue before me and is therefore not one that I need to decide. However, it is clear that the criteria he set out have not been satisfied in this case. In particular, it is noted that the trial court did not make any attempt to reconcile the admission made by the respondent in its pleadings F with the evidence that it purportedly relied on to grant absolution from the instance. Thus, there was no finding by the court that the admission was contrary to the facts and that to allow the admission to stand against the facts would lead to an injustice. It would appear to me, again with respect, that as it proceeded the trial court became oblivious of the admission made and G proceeded to determine the matter on the basis of the incompetent evidence before it and without in anyway attempting to assess whether adherence to the admission would result in an injustice.

On the basis of the above, there is therefore no basis *in casu* for disturbing the admission made by the respondent. Firstly, the parties proceeded to curtail the proceedings in the court *a quo* on the basis of the admission made by the H

Makarau JA

A respondent. By consent, the appellant was relieved of the duty to open the trial and of the need to lead any evidence to prove the respondent's indebtedness. Secondly, the respondent made a conscious choice to counterclaim for damages instead of specifically pleading abatement of rentals in terms of the lease agreement. No attempt was made to amend the pleadings to withdraw the admission that had been made before the trial ended, even after counsel B for the respondent had advanced the argument that the respondent was entitled to abate the rentals. Further, and more importantly in my view, the issue of the respondent's right to abate the rental was never pleaded. No evidence was led to show the degree to which the respondent was entitled to an abatement. The issue was not raised by the respondent in evidence, but C came in almost as an afterthought when counsel was addressing the court in response to a question that had been put to the appellant's counsel by the court on the meaning of a clause of the lease agreement that had neither been pleaded nor relied upon by any of the parties. It was then that the respondent's counsel submitted that because the leaks rendered most of the leased premises unusable, the respondent was entitled to a total remission D of rent until the leaks had been stopped.

The decision to upset a validly made admission on the basis of an after-thought submission by counsel for the respondent was in my view an error by the trial court warranting the setting aside of its judgment.

On the basis of the foregoing, the appellant's appeal must succeed on the first E ground of appeal. It thus becomes unnecessary in my view that I deal with the other grounds of appeal raised by the appellant in its notice of appeal. The order granting the respondent absolution must be set aside.

I note in passing that in view of the fact that the respondent voluntarily left the leased premises sometime in 2010, the appellant appears to be no longer F seeking an order cancelling the lease agreement and holding-over damages as these two prayers have been omitted from the notice of appeal.

The cross-appeal

The respondent sued the appellant in the court *a quo* for damages in the sum of US$196 250 arising out of breach of the lease agreement. It was G the respondent's contention that the appellant failed to keep the roof of the leased premises in a state of repair resulting in leaks developing, forcing the respondent to close down its operations. As a result of the cessation of its operations, the respondent alleges that it suffered loss of estimated profits in the sum claimed. During the trial the respondent abandoned part of the claim in the sum of $26 250 leaving the total amount claimed in the sum H of $170 000.

Makarau JA

The trial court found that the appellant was indeed in breach of the lease A agreement in that it failed to keep the roof in a state of repair. Its finding in this regard cannot be impugned.

Whilst not making a definitive pronouncement on the matter, the trial court appears to have made the further finding that the failure by the appellant to keep the roof in a state of repair led directly to the loss of profits suffered B by the respondent upon it ceasing to manufacture the licensed drugs or alternatively, that such a loss was in the contemplation of the parties when they concluded the lease agreement. The trial court, however, found that the amount claimed by the respondent and proved by the respondent through evidence, did not represent the lost profit but the total expenditure that the respondent would have incurred had it not ceased operations. Again I cannot C find a basis for faulting this finding.

It is trite that damages for breach of contract are calculated to place the plaintiff in the position that he or she would have been in had there be no breach. Put differently, where a party sustains loss by breach of a contract, he or she is, as far as money can do it, to be placed in the same position as D if the contract had been performed. The law in this regard has not changed since the decision in *Victoria Falls & Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd* 1915 AD 1 which has been followed ever since in this jurisdiction.

Applying this trite principle to the facts of the appeal, the respondent was E entitled to be placed in the position it would have been in had there been no leaks in the roof of the leased premises. In other words, the respondent was entitled to damages for loss of the income or profit it would have raised had its operations continued. This is essentially a claim for lost profit and not a claim for loss of earning capacity.

It further appears to me to be settled law that loss of profit following breach F of contract is an assessable loss to be proved by evidence and should not be confused with loss of future earning capacity, which calls for compensation for diminished earning capacity and is assessed as general damages. See *Santam Insurance Co Ltd* v *Paget (1)* 1981 ZLR 73 (A). Put differently, damages for lost profit following breach are to be proved and cannot be G presumed. They must be capable of some arithmetical calculation and cannot be assessed by the court from nothing.

The record shows that the respondent, in attempting to prove the lost profit, led evidence of the manufacture of every single batch of product that the respondent manufactured from the year 2000 to the date of trial, including confectionaries that could still have been manufactured in the "unsterile" H

Makarau JA

A premises. The evidence also included trial batches that could not have had any economic value as they were not meant for sale.

The nature of the evidence led on behalf of the respondent for lost profit is aptly described by the trial court in its judgment in the following terms:

> "Page 66 of exhibit 1 represents an extrapolation from the pharmaceutical batch book of seven products manufactured by the defendant at the leased premises B and at the new premises from 2000 to 2010 … Dr Deacon calculated the total batches for each product produced over the ten year period from 2000 to 2009 and divided it by ten to calculate a yearly average. He estimated the cost of production of each batch in United States dollars by interpolating the existing cost structure at its new premises of each product range and multiplied the estimated cost by the yearly average to calculate gross value of the lost production… C He then deducted the salvage value of work in progress to arrive at the loss suffered by the defendant. He calculated the loss from the seven products at US$197 925. He deducted the profit mark-up of 15% and arrived at an estimate of US $168 236.25 which he rounded off to US$170 000. While Dr Deacon equated this amount to the defendant's turnover, it seems to me that it would actually represent the defendant's total expenditure."

D From the above, it is clear that the respondent tendered evidence to prove the possible cost of lost production. What was required of it was to prove the lost profit over the years. With respect, it appears to me that the respondent's evidence was not led with an eye to the relevant law which requires actual proof of damages for lost profit. Evidence placed before the court tended to E show a general loss and not the actual lost profit.

I agree with the trial court that the respondent could have led evidence of the profit that it was making each month prior to the cessation of manufacturing due to the leaking roof and from such evidence, the court may have been better placed to assess damages which in its opinion, would meet the justice of the case.

F In the result, the cross–appeal by the respondent must fail. The respondent failed to discharge the onus on it to place before the court sufficient facts from which its loss could be calculated and the trial court, generously in my view, granted absolution from the instance.

Disposition

1. The G main appeal is allowed with costs.
2. Paragraph 1 of the order of the court *a quo* is set aside and the following substituted:
   "Judgment is entered for the plaintiff and against the defendant in the sum of US$72 221.94 together with interest thereon at the prescribed rate reckoned H from 1 March 2010 to date of payment in full".

Makarau JA

3. The cross–appeal is dismissed with costs. A

ZIYAMBI JA and GARWE JA concurred

Gill, Godlonton & Gerrans, appellant's legal practitioners

Coghlan, Welsh & Guest, respondent's legal practitioners B

© 2015 Juta and Company (Pty) Ltd.

Document 21 of 60

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2012/Volume 2/MARANATHA FERROCHROME v NYEMBA 2012 (2) ZLR 145 (S)

MARANATHA FERROCHROME v NYEMBA 2012 (2) ZLR 145 (S)

Citation	2012 (2) ZLR 145 (S)
Case No	Judgment No. S-28-12
Court	Supreme Court, Harare
Judge	Ziyambi JA, Garwe JA & Omerjee AJA
Heard	11 June 2012; *CAV*
Judgment	8 August 2012
Counsel	*L Uriri*, for the appellant *O Shava*, for the respondent
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Employment – *contract – terms – variation – when employer may vary terms of contract – when employer incurs liability to pay for duties not specified in contract of employment*

Headnote

D An employer may require an employee to carry out tasks which may be different but are closely related to the employee's duties without incurring any obligation to pay for those duties. An employee is under an obligation to obey the lawful orders given by the employer. As long as those tasks are not too remote in nature from the employee's normal duties, are carried E out during normal working hours and, in the absence of a suggestion that the employee had to engage in overtime to perform those duties, the employer would not be liable to pay for those duties. The employer has the right to unilaterally vary the terms of employment, such as the duties being done by the worker, the location of work or department or to facilitate disciplinary investigations, provided such variation is not F substantially different from the contract job description or does not result in substantial downgrading of the status and dignity of the employee or is in breach of a legitimate expectation of the employee or is not unlawful discrimination. Conversely, an employee can lawfully refuse to carry out an order where there has been substantial variation of the employment contract and, in particular, where the order is not closely G related to the duties of the employee.

Cases referred to

Matereke v CT Bowring & Associates (Pvt) Ltd 1987 (1) ZLR 206 (S)

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

H *ZCTU v Makonese* 2005 (1) ZLR 430 (S)

Garwe JA

Case information

L Uriri, for the appellant A

O Shava, for the respondent

Judgment

Garwe JA: This is an appeal against the judgment of the Labour Court dismissing an appeal by the appellant against an arbitral award granting the respondent a responsibility allowance for work done for a subsidiary B company of the appellant.

The background to this case is common cause. In January 2005, the appellant employed the respondent as its salaries supervisor. In terms of the contract of employment signed by the two parties, the respondent was to report to the finance manager, his principal duties being:

- monthly processing of salaries for the employees of the appellant. C
- preparation, on a monthly basis, of salaries, journals and reports and submission of the same to the finance manager.
- monthly processing and payment of all statutory returns.
- following up on debtors.
- reconciling deductions and deductions to the general ledger. D
- preparation of audit schedules.
- daily supervision of salaries clerks.

In October 2006, the respondent was further assigned the task of processing salaries for the appellant's subsidiary companies, namely Turfrate (Pvt) Ltd E and Conroc (Pvt) Ltd. These extra duties were performed during normal working hours for a period of 35 months. On 8 April 2009 the respondent wrote to the appellant requesting that consideration be given to him being paid a responsibility allowance. The appellant turned down the request, prompting the respondent to approach a labour officer for conciliation. As a settlement could not be reached, the matter was referred for arbitration. F The arbitrator reached the conclusion that although the assignment of duties was "done outside the confines of the employment contract" there was an implied term in the contract of employment that the appellant could ask the respondent to perform extra duties in return for payment of an allowance for that work. Consequently, he ordered that the appellant pays to the respondent G a responsibility allowance for eleven months. He further directed that the two

parties negotiate the quantum of the allowance and, failing agreement, the matter was to revert to him for quantification. Dissatisfied, the appellant appealed to the Labour Court. The Labour Court was of the view that the respondent had performed extra duties which were outside his contract of employment and that he was entitled to payment of an allowance. Accordingly H

2012 (2) ZLR p147

Garwe JA

A the court dismissed the appeal. Against that judgment the appellant has now appealed to this court.

Although the appellant, in its heads of argument, raised a number of issues, at the hearing of this matter it was agreed that there was only one issue that fell for determination by this court. That issue is whether the additional services B rendered by the respondent constituted an implied term of the contract of employment entitling the respondent to payment of a responsibility allowance as found by the court *a quo* and, before that, the arbitrator.

In its heads of argument, the appellant agrees with the finding by the arbitrator that there was an implied term in the contract of employment that the respondent could be called upon by the appellant to perform additional C duties. The appellant concedes that this finding, which is one of fact, has not been impugned. Whilst accepting that such an implied term existed the appellant submits that there was no implied term that such additional duties would entail additional payment.

In his heads of argument, the respondent has submitted that the additional D duties fell outside the ambit of the contract of employment. He has further submitted that by assigning the additional duties "the appellant created an implied term of contract" that the respondent would be remunerated for those duties. In other words, there was an unexpressed term that if he performed any additional duties he would be entitled to additional remuneration.

Both parties are therefore agreed that it was permissible for the appellant E to assign additional work to the respondent. Neither contend that the order was unlawful or that the respondent could have disobeyed it. In this regard see *ZCTU* v *Makonese* 2005 (1) ZLR 430 (S). Whether the order was unlawful and could therefore be disobeyed is not an issue before me. It is not one that falls for determination. The real issue, therefore, is whether F in the circumstances of this case the appellant was obliged to pay for such additional work. Having considered all the facts of this case, it seems to me that the answer must be that there was no such implied term.

It is common cause that the respondent carried out the additional duties during his normal working hours. At no stage was he required to engage in overtime in order to do those duties. It was never his case that he had to work under G considerably more pressure during this time in order for him to cope. The facts suggest that he was able to fit those additional duties into his normal daily schedule. He received his salary in full during the period in question.

In these circumstances, there would have been no basis in law upon which the respondent would have been entitled to payment of what has been termed H a responsibility allowance.

2012 (2) ZLR p148

Garwe JA

It seems to me to be the correct position in our law that an employer may A require an employee to carry out tasks which may be different but are closely related to the employees' duties without incurring any obligation to pay for those duties. It is part of our law that an employee is under obligation to obey the lawful orders given by the employer: *Matereke v CT Bowring & Associates (Pvt) Ltd* 1987 (1) ZLR 206 (S). As long as those tasks are not too B remote in nature from the employee's normal duties, are carried out during normal working hours and, in the absence of a suggestion that the employee had to engage in overtime to perform those duties, the employer would not be liable. I think this accords with common sense and reality. One or two examples would serve to illustrate this. For example, a person is employed as a driver, but, due a slump in business, his duties are such that the errands C he has to undertake are only performed in the morning, there being nothing further for him to do in the afternoon. In such a case, if the driver were to be asked to assist another driver who is involved in the repair of another company truck, such assistance would be an implied term of his contract of employment and, as long as such work is performed during normal working hours, no issue of additional remuneration would arise. If the same driver D were to be asked to drive the official vehicle of the managing director of the company

or one of its subsidiaries in order to take the latter's children from school to their residence, no issues would surely arise. If one were to ask one's gardener to assist, during normal working hours, a neighbour whose car has gone into ditch, no issues of remuneration would arise. E

The position is settled that:

> "At common law, the employer has the right to unilaterally vary the terms of employment such as the duties being done by the worker, the location of work or department or to facilitate disciplinary investigations, provided such variation is not substantially different from the contract job description or does not result in substantial downgrading of the status and dignity of the employee or is in breach F of a legitimate expectation of the employee or is not unlawful discrimination."

See Munyaradzi Gwisai *Labour and Employment Law in Zimbabwe, Relations of Work Under Neo-Colonial Capitalism*.

The position also seems settled that an employee can lawfully refuse to carry out an order where there has been substantial variation of the employment G contract and in particular where the order is not closely related to the duties of the employee. For this proposition, attention is drawn to the decision of this court in *Muchakata* v *Netherburn Mine* 1996 (1) ZLR 153 (S).

The facts in *Muchakata* v *Netherburn Mine (supra*) were that management had been irked by complaints from the appellant, a security sergeant, that cases requiring disciplinary action, which his department had reported H

Garwe JA

A to the personnel department, had gone unattended. Plagued with these insistent demands by the appellant for disciplinary action to be taken, the assistant personnel officer, whose duty it was to preside over cases which the security department referred to him, piqued by the appellant's accusation of incompetence or bias, turned on the appellant and, with the assistance of management, purported to appoint the appellant to preside over the very cases B which had been referred to him for discipline by the appellant's department. When the appellant refused to preside over those cases, he was suspended pending dismissal. The Labour Relations Tribunal came to the conclusion that the order given to the appellant was lawful and accordingly confirmed his dismissal from employment.

C In setting aside the order of dismissal, Korsah JA remarked at 157F-H – 158A-B:

> "It is true, as was found by the Tribunal, that the appellant, as the head of the security guards, was in a supervisory position. But he was in a supervisory role only *vis-à-vis* the guards under him. It was his responsibility to see to it that his subordinates performed efficiently. It was not proper to request him to preside D over cases which his department had referred to the assistant personnel officer for disciplinary action to be taken. He was the head of the department laying a complaint that required investigation and possible punishment. He was, as such, a party in the case requiring resolution. A salutary principle of justice is that no man shall be a judge in his own cause. The order requiring him to preside over cases reported by his department not only demonstrated bad faith, but was such E gratuitous interference with his rights, and the rights of those he was expected to preside over in respect of the company's disciplinary code, as could find no justification in the minds of reasonable men. The company's disciplinary code never gave authority to make such orders. The order was, therefore, unreasonable and *ultra vires* the code.
>
> I take the meaning of 'lawful' from Vol 3 of *Words and Phrases Judicially* F *Defined* to be:
>
> > 'Lawful is what is in conformity with (or frequently not opposed to) the principles or spirit of the law whether moral of judicial'.
>
> On the basis of the above definition, and from the aforegoing, the order which the appellant was requested to comply with was clearly not lawful."

The corollary seems to me to be that where an employee has been requested G to carry out duties that are not unlawful and has been paid his full salary, such an employee cannot, in the absence of a claim that he worked overtime, be entitled to any additional remuneration.

In any event, in the particular circumstances of this case, it would be very difficult, if not impossible, once it is accepted that the work was carried out H during normal hours and that the appellant received his full salary for that

---

Garwe JA

period, to assess what additional remuneration would be payable to such an A employee and the basis thereof.

In the circumstances therefore I would agree that the court *a quo* erred when it dismissed the appeal by the appellant. The appeal before this court must therefore succeed.

Accordingly it is ordered as follows: B

1. The appeal be and is hereby allowed with costs.
2. The order of the court a *quo* is set aside and the following substituted:

   "The arbitral award by ER Chitsa dated 15 July 2010 be and is hereby set aside in its entirety". C

ZIYAMBI JA and OMERJEE AJA concurred.

Kantor & Immerman, appellant's legal practitioners

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

© 2015 Juta and Company (Pty) Ltd.

Document 22 of 60

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2012/Volume 2/SWIMMING POOL & UNDERWATER REPAIR (PVT) LTD & ORS v RUSHWAYA & ANOR 2012 (2) ZLR 151 (S)

SWIMMING POOL & UNDERWATER REPAIR (PVT) LTD & ORS v RUSHWAYA & ANOR 2012 (2) ZLR 151 (S)

Citation	2012 (2) ZLR 151 (S)
Case No	Judgment No. S-32-12
Court	Supreme Court, Harare
Judge	Chidyausiku CJ (in chambers)
Heard	19 July 2012; *CAV*
Judgment	21 August 2012
Counsel	*F Girach,* with him *Mr Nyamasoka,* for the applicants *P Chitsa,* with him *V Masvaya,* for the respondents
Case Type	Chamber application
Annotations	Link to case annotations

Flynote

Appeal – *hearing – application for hearing on urgent basis – appeal against refusal to grant spoliation order – applicant must show reasonable prospects of success*

D **Company** – *legal proceedings – action by majority shareholders against minority shareholders – need to obtain company resolution to initiate proceedings*

Practice and procedure – *application – urgent – urgent application for spoliation – application dismissed – appeal against such dismissal –* E *whether should be heard on urgent basis – depends of prospects of success*

Property *and real rights – spoliation – order – refusal to grant – appeal against – when should be heard on an urgent basis*

Headnote

An application for a spoliation order in a court of first instance is heard on F an urgent basis because of the need to stop unlawful conduct and self-help urgently and to restore the *status quo ante* until the law has taken its course. Where, however, the applicant for a spoliation order has been unsuccessful in the court of first instance and wishes to appeal against that decision, the appeal will not necessarily be heard on an urgent basis. G Different considerations apply, in that a court of competent jurisdiction will have determined whether or not there was spoliation. Whether or not the appeal should be heard on an urgent basis should depend on the prospects of success of the appeal. Where there are good prospects of success on appeal, the appeal should be heard on an urgent basis so as to bring the unlawful conduct to an end. However, where the appeal has H no prospects of success, the appeal should not jump the queue.

Chidyausiku CJ

For a majority shareholder to succeed in an action to evict a minority A shareholder, it is necessary to allege and prove that the company resolved to evict the minority shareholder and that the majority shareholder has *locus standi* to initiate legal proceedings to enforce the company's resolution. It is not enough for the majority shareholder to simply say that as the majority shareholder it wants to evict and exclude from B the administration of the company the minority shareholder without a company resolution to that effect.

Cases cited

Fox & Carney (Pvt) Ltd v Sibindi 1989 (2) ZLR 173 (S)

Gundani v Kanyemba 1988 (1) ZLR 226 (S) C

Kanyada v Mazhawidza 1992 (1) ZLR 229 (S)

Setlogelo v Setlogelo 1914 AD 221

Case information

F Girach, with him *Mr Nyamasoka,* for the applicants

P Chitsa, with him *V Masvaya,* for the respondents

Judgment

Chidyausiku CJ: This is a chamber application in terms of r 58 of the D Supreme Court Rules, as read with r 244 of the High Court Rules, in which the applicants seek the relief set out in the draft order, which reads as follows in relevant part:

"IT IS ORDERED THAT E

1. The appeal filed by the appellants against the judgment of the High Court in case HC 3967/12 shall be heard on an urgent basis.
2. The applicants shall file their heads of argument in the appeal matter within fifteen days from (the) date of this order and the respondents shall file their heads of argument within ten days of being served with the applicants' heads of argument. F
3. The Registrar of this Honourable Court is hereby directed to set the appeal down for hearing on an urgent basis and to expedite the hearing of an appeal on the earliest available date.
4. Pending the determination of the appeal–
   4.1 The respondents, their assignees, proxies as well as their company Xelod Investments (Pvt) Ltd, be and are hereby interdicted from G commencing and conducting any mining operation and/or interfering with any administrative operations whatsoever at Glencairn Mine.
   4.2 The respondents and all their assignees be and are hereby ordered to vacate and return possession of Glencairn Mine to the applicants immediately upon service of this order, failing which the Sheriff or his lawful deputies, assisted by any member of the law enforcement H

Chidyausiku CJ

A agencies, as the case may be, are authorized to ensure and restore possession of Glencairn Mine to the applicants.

5. Costs of this application will be (costs) in the cause."

In brief, the applicants want the appeal against the judgment of Chatukuta J heard on an urgent basis and that, pending the hearing of that appeal, I issue the interim interdict set out in paras 4.1 and 4.2 of the draft order quoted B above. The application is opposed.

Generally speaking, an application for a spoliation order in the court of first instance is heard on an urgent basis. This is so because of the need to stop unlawful conduct and self-help urgently and to restore the *status quo ante* until the law has taken its course is self evident and needs no elaboration. Where, C however, the applicant for a spoliation order has been unsuccessful in the court of first instance and wishes to appeal against that decision, the appeal will not necessarily be heard on an urgent basis. Different considerations apply, in that a court of competent jurisdiction will have determined whether or not there was spoliation. Whether or not the appeal should be heard on an urgent basis should depend on the prospects of success of the appeal. Where D the appeal has good prospects of success on appeal, the appeal should be heard on an urgent basis so as to bring unlawful conduct to an end . However, where the appeal has no prospects of success, I do not see why the appeal should jump the queue. It follows, therefore, that for me to grant the first relief I need to be satisfied that the appeal has prospects of success.

E As regards the second relief, the interim interdict, for the applicants to succeed they must establish the essential elements for entitlement to such relief. I will consider the relief sought *seriatim*, but before doing that let me set out the background facts of this case.

The facts

F The facts of this case are succinctly set out by the learned judge in the court *a quo*. I will summarise them as follows. The parties to this matter are involved in a longstanding dispute over the control and ownership of Glencairn Mine in Kadoma ("the mine"). The fourth applicant ("Timba"), through the first applicant, and the first and second respondents ("the Rushwayas") are shareholders in the third applicant, which owns the mine G at the centre of the dispute.

On 11 October 2010 the magistrates court at Kadoma directed the first, third and fourth applicants to co-exist with the Rushwayas at the mine pending resolution of a dispute over the shareholding in the third applicant. The Rushwayas moved onto the mine in terms of the magistrates court's ruling. H It would appear that that ruling is extant and has never been set aside. On

---

Chidyausiku CJ

3 May 2011, following a series of law suits, the Rushwayas entered into an A agreement of sale ("the Agreement") with Timba in terms of which they sold to the latter their rights and interest in Tolrose Investments (Pvt) Ltd and Aepromm Resources (Pvt) Ltd, in contemplation of a clean break between the parties. The Agreement was meant to end all law suits between the parties.

However, following the signature by the parties of the Agreement, disputes B between the parties persisted. In particular, the Rushwayas, on or about 6 June 2011, wrote to the mining engineer concerning the appointment of Mr E Mudimu as the mine manager and complaining that, as a claim holder, they were not consulted on that appointment. The mining engineer, by letter dated 20 June 2011 addressed to "The Operator (whoever that is), Glencairn Mine", cancelled the appointment of Mr Mudimu as the mine manager and suspended C all operations at the mine pending a proper manager's appointment. This prompted the application, which appears to me to all intents and purposes to be an application for the review of the mining engineer's decision. The applicants were successful. The Rushwayas appealed to the Supreme Court against that judgment. The appeal was heard and judgment handed down on D 16 July 2012. I was handed a copy of the judgment during submissions in this matter. The Rushwayas' appeal was dismissed, on the grounds that they had appealed against that part of the judgment which affected the mining engineer and not them. It was for the mining engineer to appeal against that part of the judgment. It was held that the Rushwayas could only appeal against the interim interdict. However, the judgment, in my view, has no E bearing on what transpired at the mine on 5 April 2012, which events form the basis of the applicants' application for a spoliation order.

The events of 28 March 2012 are established by the evidence on a balance of probabilities. The learned judge's finding in this regard cannot be faulted. The messenger of court's return of service, which is on record, shows that F on 28 March 2012, in pursuance of the order of the magistrates court, the messenger of court reinstated the Rushwayas at the mine. The return of service reads in the relevant part as follows:

> "Placed Mr Jameson Rushwaya and Mrs Annie Rushwaya at Tolrose Mine to co-exist with Mr Patterson F Timba and others, with assistance of Constables Kasero and Chikwature accompanied by Madzivanyika and Simoni – Support G Unit ZRP."

Thus, it is quite clear that the Rushwayas' return onto the mine on 28 March 2012 was in pursuance of the lawful magistrates court order and cannot constitute spoliation. Indeed, it would appear that the applicants did not argue that the events of 28 March 2012 constituted spoliation. It is, however, the events of 5 April 2012 that form the basis of the application for spoliation. H

Chidyausiku CJ

A Timba, in the founding affidavit in the court *a quo*, makes the following averments upon which the application for spoliation is founded:

> "13. Regrettably, in a calculated move, the first and second respondents through the assistance of the third and fourth respondents (the messenger of court and Commissioner Mufandaedza) and in the company of a mob of about 40 to50 youths invaded Glencairn Mine on 5 April 2012. The third respondent B confirmed that he was armed with instructions of the fourth respondent to stop at nothing in ensuring the first and second respondents' access to the mine, changed all locks at the premises, inserted a new set of locks and subsequently handed the keys over to the first respondent. I struggle to comprehend how this matter may involve a commissioner of police unless the commissioner is involved in a hazy and clearly unlawful crusade. I have never understood the position of the law to be that a commissioner of the C Zimbabwe Republic Police can have the lawful entitlement to issue orders to a messenger of court. …"

The Rushwayas deny that a messenger of court ever visited the mine on 5 April 2012. They only admit a visit by the messenger of court to the mine on 28 March 2012. Thus there is a dispute of fact as to what occurred at the D mine on 5 April 2012. Chatukuta J decided to adopt a robust approach and resolved the dispute of fact in favour of the Rushwayas. This is what she had to say in this regard at pp 5-6 of the judgment (HH-239-12):

> "The applicants submitted that the first, second and third respondents did not deny in the opposing affidavits that the third respondent replaced the keys at the mine and gave the new keys to the first and second respondents. The first E and second respondents deny that the third respondent ever visited the mine on 5 April 2012 and alleged that, if he did so, it was not on their instructions. The third respondent denied ever visiting the mine on 5 April 2012. The submissions by the parties clearly raise a dispute of fact whether or not the third respondent visited the mine on 5 April (2012) and conducted himself as alleged by the applicants. I am, however, of the view that I can adopt a robust approach and resolve the dispute on the papers filed of record. I am inclined to adopt the robust F approach in view of the fact that an application stands or falls on the papers filed of record. The applicants were well represented and an advocate was briefed to represent them. Therefore it can be assumed that they were satisfied with the adequacy of their pleadings.
>
> It is trite that the *onus* to prove dispossession rests with the applicants. The *onus* is different from other urgent chamber applications where an applicant must G establish a *prima facie* case. In the case of applications for spoliatory relief, the *onus* is on a balance of probabilities, given that the relief is final in effect. It is therefore not enough for an applicant to make bare allegations.
>
> The applicants in the present matter appear to me to have made bare allegations of wrongful or unlawful dispossession. It is alleged that the third respondent 'invaded' the mine in the company of a mob of 40 to 50 youths. The mob must H therefore have been rowdy and caused mayhem. There also must have been

Chidyausiku CJ

> representatives of the applicants on the mine who witnessed the invasion, 5 April A being a week day. The fourth applicant, who deposed to the founding affidavit, does not state that he was at the mine when the third respondent is alleged to have locked out the applicants. It would have been helpful, if not imperative, for the applicants to file supporting affidavits of those who witnessed the alleged invasion and therefore dispossession. However, the applicants did not consider it necessary to do so. B

Mr *Mpofu* submitted that the first, second and third respondents did not dispute that locks were broken and (that) this amounts to acceptance of the applicants' allegations. The applicants, however, overlook that the third respondent insisted that he only visited the mine on 13 and 28 March 2012. He filed the returns of service dated 13 and 28 March 2012 as proof of his visits to (the) mine on those days. The conclusion that can be arrived at is that if the third respondent states C that he never visited the mine on 5 April 2012, he cannot be said to be accepting that he removed and replaced locks on the mine on 5 April 2012.

The first and second respondents maintained that if the third respondent went to the mine on 5 April 2012, it was not on their instructions. The first respondent observed on page(s) 10 to 11 of his opposing affidavit that:

> 'According to the returns of service in our possession, the third respondent D served the co-existence order on 13 March 2012 and the said Return of Service indicates that the applicants were given seven days to comply with the court order. The third respondent only went back fifteen days later on 28 March 2012 and he remarked:
>
> > "Placed Mr Jameson Rushwaya and Mrs Annie Rushwaya at Tolrose Mine to co-exist with Mr Patterson F Timba …".
>
> He never mentioned that he evicted the applicants and indeed he did not E do that.'

The respondents further denied in para 21 of the first respondent's opposing affidavit (that) a mob invaded the mine. They in fact accused the applicants of bringing youths from Harare to cause commotion at the mine and refer to the police reference of the complainant (the complaint?) that they made to the police. It is therefore clear that the first and second respondents have denied that the F third respondent ever visited the mine on 5 April 2012."

In resolving the dispute of fact in favour of the Rushwayas, the learned judge *a quo* relied on the well established principle that the messenger of court's return of service is *prima facie* proof of the contents therein, and that the *prima facie* case can only be rebutted by clear and satisfactory evidence. For G the above proposition she relied on *Gundani* v *Kanyemba* 1988 (1) ZLR 226 (S); *Fox & Carney* v *Sibindi* 1989 (2) ZLR 173 (S) at 175E-F; and *Kanyada* v *Mazhawidza* 1992 (1) ZLR 229 (S) at 232C-D.

In my view, the reasoning and conclusions of the learned judge *a quo* in this respect cannot be faulted. The probability of an appeal court coming to a different conclusion from that of the court *a quo* is very remote. H

2012 (2) ZLR p157

Chidyausiku CJ

A It is apparent from evidence elsewhere in the record that Timba did appoint a manager, who was resident at the mine, and also had an agent who was resident at the mine. These are people whom one would have expected to depose to affidavits with firsthand information in support of Timba's version of what transpired at the mine on 5 April 2012. However, Timba chose not to make available firsthand evidence of what transpired at the mine on 5 April B 2012. The affidavit of W Magweregwede, as the complainant in a criminal investigation, is totally inadequate, in that it does not corroborate the hearsay averments of Timba. The affidavit simply avers that he was assaulted. Timba, who was not present at the mine, chose not to explain how he came to be knowledgeable of the events which he alleges in his founding affidavit. He C was content to make bold and bare allegations when he could easily have obtained firsthand evidence on what transpired at the mine on 5 April 2012. Similarly, the statement by Samuel Gwavava, which is a statement to the police, is not even an affidavit and its admissibility is doubtful. Timba did not explain to the court why it was difficult for him to provide firsthand evidence of an occurrence that must have been witnessed, if indeed it did D occur, by a lot of people.

In the result, I hold the view that the probabilities of an appeal court coming to a different conclusion from that of the court *a quo* on the issue of spoliation of the applicants are very remote.

For the foregoing reasons, the prospects of success against the court *a quo's* E refusal to grant spoliation are minimal. For that reason I dismiss the application to have the appeal heard on an urgent basis.

I now turn to deal with the application for interim relief, to stop the Rushwayas from conducting mining operations and their eviction from the mine pending the hearing of the appeal. This relief is at the core of the ownership wrangle F between the parties, who are shareholders and directors of the company that owns the mine.

A similar application was made to Musakwa J in case no. HC 6007/11. The learned judge had this to say at pp 5-6 of the judgment:

> "It is not in dispute that when the first respondent made the decision that is being challenged, he did not hear the applicants. Based on the complaint he G received from the third respondent, he made the drastic decision of closing mining operations without hearing the other side. That is not in conformity with principles of natural justice.
>
> There is also the additional factor that the first respondent's decision amounts to a determination of a contractual dispute between the feuding parties. There does not appear to have been a basis for the first respondent to entertain a contractual H dispute between the parties.

2012 (2) ZLR p158

Chidyausiku CJ

> The requirements for an interdict as set out in *Setlogelo* v *Setlogelo* 1914 AD A 221 are –
>
> (a) A *prima facie* right, even if it is open to doubt.
>
> (b) An infringement of such right by the respondent or a well-grounded apprehension of such an infringement.
>
> (c) A well-grounded apprehension of irreparable harm to the applicant. B
>
> (d) The absence of any other satisfactory remedy.
>
> (e) That the balance of convenience favours the granting of the interlocutory interdict.
>
> All the above requirements are met in the present application. As evidenced by the memorandum of agreement of sale that was entered into between the parties, it is noted in clause 2.2 thereof that the assets constituting the subject C matter of the sale, including the gold mining claims, were to be immediately transferred to the third applicant before payment. Therefore it cannot be the case that the fourth applicant who has interests in the third applicant has no rights to protect. The parties to this agreement must seek proper ways of enforcing the contractual obligations arising from that agreement without needlessly involving the first respondent. D
>
> In the result, the application is granted in terms of the amended draft order."

I agree with the learned judge's statement of the law. In particular, I agree with the essential elements for the entitlement to an interim interdict set out in *Setlogelo's* case *supra*.

I, however, respectfully disagree with the conclusion of the learned judge E that the applicants are entitled to an interim interdict. I have not had access to the record of proceedings in case no. HH 6007/11 as I am sitting in chambers and not as an appeal court. It may well be that the facts before the learned judge justified such a conclusion. It would appear, however, that the judgment of Musakwa J is seriously flawed, in that there is no link between the interim relief granted and the final relief to be granted on the return day. F The final order sought by the applicants on the return day is that the order of the mining engineer suspended in the interim should be confirmed. There is nothing in the judgment itself to indicate that the issue of the contractual rights of the respective parties will be determined on the return day. The issue of the contractual rights of the respective parties appears to me determinable G only after a proper trial dealing with the issue of the contractual rights of the parties. This raises the question of whether the interim interdict evicting the Rushwayas and excluding them from the management of the company is an interim interdict pending what and when.

I am unable to grant the interim interdict sought in paras 4.1 and 4.2 of the draft order for the following reasons: H

2012 (2) ZLR p159

Chidyausiku CJ

(a) There A is no averment that the company that owns the mine (the issue of who owns the mine appears to be in dispute) has resolved, proof of which is usually in the form of a company's resolution, that the respondents be stopped from being involved in the mining and administration of the mine and be evicted from the mine. The averments and arguments seem to centre on *locus standi*.

(b) At B the hearing of the appeal the Supreme Court will be seized with the issue of spoliation and not the litigants' respective rights of ownership of the mine and the right to administer and operate the mine.

(c) An agreement of sale, purporting to define the respective rights of the parties, was produced during submissions by the applicants' counsel. The C applicants' case stands or falls on the

founding affidavit. The applicants' case in the founding affidavit was predicated on the averments that they were despoiled and not on a breach of the agreement of sale. In fact there was no reference to the breach of the agreement of sale in the cause of action. Even if I were to accept that the applicants' rights in terms of the agreement of sale were pleaded by implication and therefore D provide a basis of the *prima facie* right entitling the applicants to the interim interdict, I am not satisfied that the agreement of sale is valid and enforceable for the following reasons:

(i) for an agreement of sale to be valid and enforceable, the parties have to be *ad idem* on the *merx*, the price and method of payment. In E the agreement of sale *in casu*, the parties are *ad idem* on the *merx*, the shares that are being sold. There is no agreed price. The parties agree to agree on the price;

(ii) the method of payment is equally uncertain;

(iii) apart from the above, there is no averment that the conditions F precedent have been fulfilled to activate the agreement of sale;

(iv) there is no averment that the parties seeking to enforce the agreement of sale have performed their part of the bargain.

In my view, the agreement of sale produced by counsel does not provide a *prima facie* right for any of the parties.

G Having concluded that the applicants have no *prima facie* case and that the Supreme Court will not be seized with the issue of ownership and administration of the mine on appeal, I have come to the conclusion that the applicants are not entitled to the interim interdict sought in the draft order.

For a majority shareholder to succeed in an action to evict a minority H shareholder, it is necessary to allege and prove that the company resolved

---

Chidyausiku CJ

to evict the minority shareholder and that the majority shareholder has A *locus standi* to initiate legal proceedings to enforce the company's resolution. It is not enough for the majority shareholder to simply say that, as the majority shareholder, it wants to evict and exclude from the administration of the company the minority shareholder without a company resolution to that effect.

I would have been inclined to order a cessation of all mining operations B pending the resolution of the dispute over the control and ownership of the mine. That course has not been ventilated in this application and could have serious consequences for both parties, as the mine would, according to the applicants, simply flood with water and a considerable number of workers would lose their jobs. This mine appears to be a going concern with a production history that can be used to assess damages to whichever party C may prove the damages in future. I accordingly do not think that the issue of irreparable harm arises.

In the result, the application is dismissed with costs.

Atherstone & Cook, applicants' legal practitioners D

Mkushi, Foroma & Maupa, respondents' legal practitioners

© 2015 Juta and Company (Pty) Ltd.

Document 23 of 60

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2012/Volume 2/CREMPTON TRADING (PVT) LTD v MATEKENYA 2012 (2) ZLR 161 (H)

CREMPTON TRADING (PVT) LTD v MATEKENYA 2012 (2) ZLR 161 (H)

Citation 2012 (2) ZLR 161 (H)

Case No	Judgment No. HH-332-12
Court	High Court, Harare
Judge	Dube J
Heard	30 August 2012
Judgment	30 August 2012
Counsel	Details not Supplied
Case Type	Civil application
Annotations	No case annotations to date

Flynote

C **Company** – *winding up – by the court – winding up at the petition of the company on grounds set out in s 206 of Companies Act [Chapter 24:03] – notice to employees and consultation – requirement to give such notice to and consult employees – failure by company to consult with its workers in terms of s 25A of Labour Act [Chapter 28:01] – such failure* D *fatal to the application*

Employment – *Labour Act [Chapter 28:01] – s 2A(3) – effect on provisions of Companies Act [Chapter 24:03] – provisions of any section of latter act inconsistent with former to be overridden*

Employment – *workers – rights of – plan by employer to wind up company –* E *requirement for employees to be consulted before High Court can accede to application for company to be wound up*

Headnote

In terms of s 206 of the Companies Act [*Chapter 24:03*], the applicant, by a special resolution, resolved that it be wound up by the High Court and petitioned the court to do so. It was the applicant's case that its F liabilities exceeded its assets and was unable to pay its debts. The High Court thereupon granted a provisional order of liquidation. However, on the return day of the provisional order, its confirmation was opposed by the respondent, who was the chairman of the works council. He argued that in terms of s 25A(5)(c), as read with subs (6), of the Labour Act G [*Chapter 28:01*], the applicant was obliged to consult the employees works council about any proposal to relating plant closures. It was common cause that no such consultation had taken place. He refuted the allegation that the business had struggled just because of hyperinflation and dollarization; he said that the business was being mismanaged by its directors and that there was sufficient work for the employees to engage H in, instead of subcontracting work to another company. He said that the

Dube J

company had good prospects of recovery if properly managed and that A the appropriate remedy required was judicial management rather than winding up. He submitted that the proper course was for the applicant to be placed under judicial management rather than being wound up, which would involve the closure of the business.

Held, that winding up may either be voluntary or by the court. Voluntary B winding up is carried out in terms of ss 242 and 243 of the Companies Act. This application came as an application for winding up by the court. The circumstances under which a company may be wound up by the court are listed under ss 206 and 207. A company undergoing voluntary winding up is required in terms of s 243 to give notice of the winding up, in particular to "the company's workers' committee or, where the C company has no workers' committee, to the company's employees". There is no similar provision requiring the company to give notice of winding up or consultation where the winding up is by the court. The issue was, therefore, whether subss (5) and (6) of s

25A of the Labour Act, more particularly in the light of s 2A(3) of that Act (which provides D the Labour Act shall prevail over any other enactment inconsistent with it), applied to the situation of winding up by the court.

Held, further, discharging the provisional order, that the effect of s 2A(3) of the Labour Act [*Chapter* 28:01] was to override the provisions of the Companies Act [*Chapter 24:03*] inconsistent with the provisions of the former Act. The general provisions of s 25A of the Labour Act E must, therefore, apply to the situation. The intention of the legislature in enacting that section was clearly to ensure that workers are consulted about proposals relating to partial or total plant closure. As no such consultation had taken place, the applicant's failure to comply with the requirements of s 25A(5) and (6) of the Labour Act was fatal to the F application.

Legislation considered

Companies Act [*Chapter 24:03*], ss 206, 207, 210 & 243

Labour Act [*Chapter 28:01*], ss 2A(3), 25A(5) & 25A(6)

Judgment

Dube J: This application initially came as an application for a provisional G order for the company's voluntary winding up. A provisional liquidation order was granted on 22 June 2011. On 27 July 2011 the respondent filed its notice of opposition. The matter is here today for the confirmation of the provisional liquidation order granted on 22 June 2011. The terms of the order sought are as follows; H

Dube J

"1. The A applicant, CREMPTON TRADING (PVT) LTD t/a DAROLYN, WINTERS & CONTRACTORS, is provisionally wound up, pending the grant of an order in terms of para 3 or the discharge of this order.

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

3. Any interested party may appear before the court sitting at Harare on 17 August 2011, to show cause why a final order should not be made placing the applicant's company in liquidation and ordering that the costs of these proceedings shall be costs of liquidation.

4. This order shall be published once in the Government *Gazette* and once in *The Herald* newspaper in a Friday edition. Publication shall be in the short C form annexed to this order.

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

5.1 Give due notice to the applicant at Dhlakama B. Attorneys, Legal Practitioners, 105A King George Road, Avondale, Harare, Ref B. Dhlakama. D

5.2 Serve on the applicant a copy of any affidavit which he files with Registrar of the High Court.

6. Pending the return day, this order shall operate as a provisional order of winding up."

The applicant is Crempton Trading (Pvt) Ltd, ("the company"). On 19 May E 2011 the company passed a resolution in favour of the winding up of the company. The company resolved that the company be wound up by the court. Robert Moyes was authorised to sign all documents necessary to wind up the company. Theresa Grimmel was recommended to be appointed as the liquidator of s 207 of the Companies Act [*Chapter 24:03*], (hereinafter F referred to as the act.)

The background to the matter is that the company was incorporated in the year 2000.It states in its founding affidavit that it carried on the business of repairing and maintaining electric motors. The company carried on its business well until the country's economy weakened. As the costs increased, culminating in high overheads and reduced sales, the company began to G face stiff competition resulting in it battling to pay wages and rentals for the business premises. The applicant avers that running costs of the company are high and there is no business: that applicant is insolvent and there is no prospect of recovery for the applicant: that a resolution was passed which resolved that the applicant company be wound up and further, that the H company's liabilities exceed its assets.

Dube J

The respondent is Edwin Matekenya and he is the chairperson of the works A council. He opposes the application and he raised two points *in limine* which he requested the court to deal with. The court directed the parties to proceed and argue the matter on the merits. I indicated that I would deal with the points *in limine* in the main judgment.

The first point *in limine* relates to the procedure laid down is s 25A(5)(c) B of the Labour Act [*Chapter 28:01*]. The respondent submitted that it is mandatory that an employer should consult the works council about proposals relating to plant closures. That the works council was not consulted before the application was filed with the court for a provisional order. The second challenge relates to the existence of material disputes of fact which counsel for the respondent argued existed on the papers filed and he submitted that the C disputes required the calling of oral evidence. He urged the court to dismiss the petition for the winding up of the company with costs.

The respondent refutes that the business has struggled as a result of just hyperinflation and dollarization but that the business is being mismanaged by its director. He contended that there is sufficient work for the employees D to engage in but that the applicant is subcontracting the work to another company. The respondent insists that the applicant company has good prospects of recovery if properly managed. The respondent suggested that the appropriate remedy required is one of judicial management rather than winding up the company.

The court will deal first with the point *in limine* related to consultation of E the workers' committee. The point related to the existence of disputes of fact will be dealt with when the merits of the matter are considered.

It is common cause that the works council was not consulted regarding this process of winding up.

Section 25A (5) and (6) of the Labour Act [*Chapter 28:01*] provide as follows, F

> "(5) Without prejudice to the provisions of any collective bargaining agreement that may be applicable to the establishment concerned, a works council shall be entitled to be consulted by the employer about proposals relating to any of the following matters –
>
> (a) …
>
> (b) … G
>
> (c) partial or total plant closures and mergers and transfers of ownership;
>
> (d) …
>
> (e) …
>
> (6) Before an employer may implement a proposal relating to any matter referred to in subsection (5), the employer shall – H

Dube J

(a) afford A the members of the works council representing the workers committee a reasonable opportunity to make representations and to advance alternative proposals;

(b) consider and respond to the representations and alternative proposals, if any, made under paragraph (a) and, if the employer does not agree with them, state the reasons for disagreeing; B

(c) generally, attempt to reach consensus with the members of the works council representing the workers committee on any matter referred to in subsection (5)."

Winding up may either be voluntary or by the court. Voluntary winding up is carried out in terms of s 242 and s 243 of, the Companies Act [*Chapter 24:03*], C (hereinafter referred to as the act.) This application came as an application for winding up by way of petition to the court. The circumstances under which a company may be wound up by the court are listed under ss 206 and 207. The sections provide as follows;

"206 Circumstances in which company may be wound up by court D

A company may be wound up by the court –

(a) if the company has by special resolution resolved that the company be wound up by the court;

(b) if default is made in lodging the statutory report or in holding the statutory meeting;

(c) if the company does not commence its business within a year from its E incorporation or suspends its business for a whole year;

(d) if the company ceases to have any members;

(e) if seventy-five *per centum* of the paid-up share capital of the company has been lost or has become useless for the business of the company**;**

(f) if the company is unable to pay its debts; F

(g) if the court is of opinion that it is just and equitable that the company should be wound up.

207 Petition for winding up company

(1) An application to the court for the winding up of a company shall be by petition presented, subject to this section, by the company or by any creditor or creditors, including any contingent or prospective creditor or creditors, G contributory or contributories or by all or any of those parties together or separately or, in a case falling within subsection (2) of section *one hundred and sixty-two*, by the Minister, accompanied, save in the case of a petition by the Minister, by a certificate of the Master, Assistant Master or a magistrate that due security has been found for payment of all fees and charges necessary for the prosecution of all proceedings until the appointment of a liquidator

H Provided that – ..."

2012 (2) ZLR p166

Dube J

The company resolved that it be wound up by court in terms of a special A resolution of the shareholders and directors passed on 19 May 2011.The company relies on the following circumstances for the petition:

i. the company's liabilities exceed its assets;
ii. the company is unable to pay its debts;
iii. the company has resolved, by special resolution, to wind up its affairs; B
iv. that it is just and equitable that the company be wound up, so that the assets of the company can be liquidated to provide for some equitable distribution to creditors.

A company undergoing voluntary winding up is required in terms of s 243 to give notice of the winding up in particular to "the company's workers' C committee or, where the company has no workers' committee, to the company's employees". There is no similar provision requiring the company to give notice of winding up or consultation where the winding up is by the court.

The issue is whether s 25A applies to a situation of winding up by the court.

Section 25A(5)(c) and 6 of the Labour Act imposes a duty on an employer D to consult the works council about proposals relating to any partial or total plant closures before the employer may implement a proposal relating to such closure and allow the works council to make representations and to advance alternative proposals This requirement is echoed in s 243 of the Companies Act which provides as follows: E

"243 Notice of Resolution for voluntary winding up

1. …

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

(a) … F

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

There is some inconsistency in the Act as the requirement to give notice is only in respect of a voluntary winding up in terms of s 243 and not a winding up by court in terms of ss 206 and 207. Section 2A(3) of the Labour Act G provides that the Act shall prevail over any other enactment inconsistent with it. Even if the Companies Act does not provide in s 206 and 207 for such consultation in cases of winding up by the court, the Labour Act prevails over the Companies Act. This means that s 25 imposes the requirement to consult the works council and afford them a reasonable opportunity to make representations and to advance alternative proposals in a winding up by the H

2012 (2) ZLR p167

Dube J

A court. Section 25 is of general application and the intention of the legislature in enacting this provision is clearly to ensure that workers are advised and consulted about proposals relating to partial or total plant closures carried out at the establishment. I am not persuaded by the applicant's argument that an application to this court for a provisional winding up order does not amount to the implementation of such a proposal and that therefore the need B to consult the works

council had not arisen. The duty placed on the employer in terms of s 25A(5) is to consult about proposals relating to any partial or total plant closures. This. in my view. covers all steps taken in relation to the proposed closure. There are two stages involved. The first is to consult them in terms of s 5 concerning proposals relating to the closure. This would C be at the resolution stage and during preparatory stages. One would expect the company to consult about the proposed winding up. It is expected that consultation would take place before a resolutions is passed. When the resolution is passed the winding up process would have commenced. The stage at which the process is at now is way past the stage at which the works council should have been consulted about these developments as the winding D up has already commenced. Subsection (6) deals with the need to afford the works council a reasonable opportunity to make representations so that they may advance alternative proposals. Subsection (6) seems to cover the implementation stage. Section 210 provides that winding up commences with the passing of the resolution. The section provides as follows:

> **"210 Commencement of winding up by court** E
>
> (1) Where, before the presentation of a petition for the winding up of a company by the court, a resolution has been passed by the company for voluntary winding up, the winding up of the company shall be deemed to have commenced at the time of the passing of the resolution.
>
> (2) In any other case, the winding up of a company by the court shall be deemed to commence at the time of the presentation of the petition for the winding up."

F In my view the implementation stage starts with the passing of the resolution.

The failure by the applicant to comply with the requirements of subss (5) and (6) of s 25 of the Labour Court Act is fatal to its case.

In the result, it is ordered as follows:

> The provisional order granted on 22 June 2011 is discharged.
>
> G The costs of this application shall be borne by the applicant.

B Dhlakama, applicants' legal practitioners

H *Guni and Guni*, respondent's legal practitioners

© 2015 Juta and Company (Pty) Ltd.

Document 24 of 60

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2012/Volume 2/PORTNET HOLDINGS (PVT) LTD v MALISENI 2012 (2) ZLR 168 (H)

PORTNET HOLDINGS (PVT) LTD v MALISENI 2012 (2) ZLR 168 (H)

Citation	2012 (2) ZLR 168 (H)
Case No	Judgment No. HH-450-12
Court	High Court, Harare
Judge	Mutema J
Heard	3 September 2012
Judgment	3 September 2012
Counsel	*S Kachere*, for the applicant *T Marume*, for the respondent
Case Type	Opposed application

Annotations No case annotations to date

Flynote

Arbitration – *award – setting aside of – grounds – award contrary to public policy – allowing party to be unjustly enriched from an illegal transaction – when may be contrary to public policy*

Arbitration – *proceedings – notice of – where notice of proceedings must be sent – notice sent to party's place of business sufficient unless parties had agreed to different method of communication* D

Contract – *illegality – par delictum rule – departure from – relaxation of rule where party would be unjustly enriched at expense of other*

Headnote

The applicant employed the respondent. Shortly before the introduction of the multi-currency system, the parties agreed to the termination of the E respondent's employment. The agreement included a cash pay out in US dollars. The applicant paid a portion but left well over half outstanding. The respondent caused the dispute to be referred for conciliation. Following a stalemate, the dispute was referred to compulsory arbitration. The arbitrator gave an award in the absence of the applicant, ordering it to pay the respondent the balance. The arbitrator found that the applicant F was in default.

The applicant sought to have arbitration proceedings set aside on two grounds, namely, that the applicant was not given proper notice of either the appointment of the arbitrator or the arbitral proceedings and that the award was in conflict with the public policy of Zimbabwe. In respect G of the first ground, the applicant alleged that notice of the proceedings had not been delivered to its legal practitioners; and in respect of the second, it argued that the agreement by the parties to have the respondent paid her terminal benefits in foreign currency at a time when that was illegal or unlawful in the country was contrary to the public policy of Zimbabwe and that the *in pari delicto* rule should be invoked. H

A *Held*, that in terms of art 3(1)(a) of the Schedule to the Arbitration Act [*Chapter 7:15*], unless otherwise agreed between the parties, any written communication is deemed to have been received if it is delivered to the addressee personally or if it is delivered at his place of business. There was no evidence that the parties had agreed that the applicant would be notified of either the appointment of the arbitrator or of the arbitral B proceedings via delivery of the notice upon its legal practitioners. The applicant did not dispute that service was effected at its place of business. Accordingly, the first ground fell away.

Held, further, that in seeking to set aside an arbitral award on the grounds that it is contrary to public policy, the applicant had to show that some C fundamental principle of the law or morality or justice was violated. Here, apart from this particular agreement, the applicant was trading in foreign currency. It was remunerating its employees – the respondent included – in foreign currency. All these transactions by the applicant were in contravention of the Exchange Control Regulations. The applicant was therefore trading and paying salaries illegally. It now wished to D resile, on grounds of public policy, from an illegal agreement in which it had discharged the bulk of its obligations. The respondent was still entitled to be paid her terminal benefits. The balance of those benefits could not be paid in local currency, which had been rendered moribund. To allow the applicant to benefit from such illegality by way of unjust E enrichment would constitute a palpable inequity that was so far reaching and outrageous in its defiance of logic or accepted moral standards that a sensible and fair minded Zimbabwean would be intolerably hurt by the setting aside of the award. It would surely be contrary to public policy not to set it aside. The concept of public policy is not immutable. It must conform to changing times and suit existing circumstances. Even if the F *in pari delicto* rule applied, given the applicant's conduct *in casu*, the case called for the relaxation of the rule on grounds of justice and equity.

Cases referred to

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

G *Harare, City of v Harare Municipal Workers' Union* 2006 (1) ZLR 491 (H)

Jajbhay v Cassim 1939 AD 537

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

Legislation considered

Arthitration Act [*Chapter 7:15*], First Schedule, arts 3(1)(a), 34(2)(b) H & 36(1)(b)

Mutema J

Exchange Control Regulations 1996 (SI 109 of 1996), s 4(1)(a)(ii) A

Case information

S Kachere, for the applicant

T Marume, for the respondent

Judgment

Mutema J: The respondent was an employee of the applicant. On 30 B January 2009 the parties concluded a mutual agreement to terminate the respondent's contract of employment. The agreement was reduced to writing and the respondent was awarded the following as terminal benefits:

- a Dell Latitude laptop
- a Mitsubishi Lancer motor vehicle
- US$16 000. C

Thereafter the respondent was paid US$6 600 in two batches, leaving a balance of US$9 400. When the applicant dragged its feet in liquidating the balance owed, the respondent caused the dispute to be referred for conciliation on 28 February 2011. Following a stalemate, the dispute was referred to compulsory arbitration. On 25 August 2011 the arbitrator gave an award, in D the absence of the applicant, ordering it to pay the respondent the US$9 400. The arbitrator found that the applicant was in default.

On 6 September 2011 the applicant filed this application to have the arbitral award set aside on two grounds, *viz*. that the applicant was not given proper notice of either the appointment of the arbitrator or the arbitral proceedings E and that the award is in conflict with the public policy of Zimbabwe. According to the court application, the relief sought is said to be in terms of art 36(1)(a)(ii) and 36(1)(b)(ii) of the Arbitration Act [*Chapter 7:15*]. That article deals with grounds for refusing recognition or enforcement of awards. Article 34 is the one that deals with application for setting aside arbitral awards. The correct citation therefore should have been art 34(2)(a) F (ii) and 34(2)(b)(ii), respectively, of the Arbitration Act. This is so despite the fact that the grounds provided for in art 36(1)(a)(ii) and 36(1)(b)(ii) are respectively the same as the proof provided for in art 34(2)(a)(ii) and 34(2)(b)(ii). There is a distinction between the procedure of having an arbitral award set aside and grounds upon which a court can refuse to recognise or G enforce an arbitral award.

Be that, as it may, the gist of the application is that, firstly, by not being given proper notice of the appointment of the arbitrator or the arbitral proceedings, the applicant was denied the right to be heard, which constitutes a breach of natural justice; secondly, the alleged agreement by the parties to have the respondent paid her terminal benefits in foreign currency at a time when H

Mutema J

A that was illegal or unlawful in the country is contrary to the public policy of Zimbabwe and the *in pari delicto* rule should be invoked.

The respondent raised two points *in limine*, *viz*:

(a) that this application is not properly before the court in that the applicant should have applied for rescission of the default award before the B arbitrator; and

(b) that the High Court had no jurisdiction to entertain the matter. It being an employment/labour matter, the court's jurisdiction was ousted by s 89(1) of the Labour Act [*Chapter 28:01*].

Both these points *in limine* are idle and should not detain me. I dismiss C them on the simple reason that the applicant's contention is that because it was not given proper notice of either the appointment of the arbitrator or of the arbitral proceedings and that the award is contrary to the public policy of Zimbabwe, it is accordingly entitled to apply to this court for the setting aside of that award in terms of art 34(2)(a)(ii) and (2)(b)(ii) respectively. D That provision reads:

> **"ARTICLE 34**
>
> Application for setting aside as exclusive recourse against arbitral award
>
> (1) …
>
> (2) An arbitral award may be set aside by the High Court only if – E
>
> (a) the party making the application furnishes proof that –
>
> (i) …
>
> (ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
>
> (iii) … F
>
> (iv) ……
>
> or
>
> (b) the High Court finds that –
>
> (i) … G
>
> (ii) the award is in conflict with the public policy of Zimbabwe".

In view of the foregoing provision, it goes without saying that neither of the points raised *in limine* by the respondent is imbued with any semblance of merit.

I will proceed to deal with the two grounds upon which the application for H the setting aside of the arbitral award is premised.

Mutema J

That the applicant was not given proper notice of the appointment A of the arbitrator or of the arbitral proceedings

Article 3(1)(a) of the First Schedule to the Arbitration Act provides that:

> "(1) Unless otherwise agreed by the parties –
>
> (a) any written communication is deemed to have been received if it is delivered to the addressee personally or if it is delivered at his place of business …" B

Annexure "B" to the applicant's founding affidavit gives the applicant's name and address as

> "The HR Manager,
>
> Portnet Holdings (Pvt) Ltd
>
> 32 Shepperton Road C
>
> Graniteside
>
> Harare".

The same annexure has the arbitrator's record of proceedings which recorded that: "Respondent was in default. Respondent was invited to take part in the arbitration proceedings but did not turn up."

While I remain alive to the fact that the most ideal mode of proving service D of communication or a document is a return of service, as is the case with court process, that stringent method of effecting service in respect of arbitral proceedings is not provided for anywhere in any of the relevant statutes. Article 3(1)(a) cited *supra* is the recognised mode of proving service of any written communication in respect of arbitral proceedings. E

On the strength of annexure "B" above, I have not been persuaded that the arbitrator lied when he recorded that the respondent was invited to take part in the arbitration proceedings but did not turn up on 11 August 2011.

There is no evidence that the parties had agreed that the applicant would be notified of either the appointment of the arbitrator or of the arbitral F proceedings via delivery of the notice upon its legal practitioners in order to buttress the applicant's contention that no such proper notice was served upon its legal practitioners. The seeming misapprehension can be gleaned from the somewhat confusing paras 5 and 6 of the applicant's founding affidavit which are worded thus:-

> "5. At all material times and during the conciliatory proceedings, the applicant G was legally represented and had chosen its present legal practitioners' principal place of business as its address for service.
>
> 6. However, notwithstanding the above and upon the appointment of Mr T Vareta as an arbitrator, no proper notice was served upon the applicant's erstwhile legal practitioners' offices, the applicant's chosen address for service". H

Mutema J

A The confusion is engendered by the use of the word "erstwhile" in para 6 above. That word denotes "former". If the applicant had chosen its present legal practitioners' principal place of business as its address for service, why then would it desire that the notice be served upon its former legal practitioners' offices as its chosen address for service.

B Putting aside the confusion alluded to *supra*, what the applicant is insinuating in the contention is that, while it is not disputing that service was effected at its place of business, that service should have been effected at its legal practitioners' principal place of business. Apart from the absence of proof of its choice of its address for service as alleged, the fact that notice was delivered at the applicant's place of business deems the communication to C have been received pursuant to art 3(1)(a) of the Arbitration Act.

The question that begs the answer is: was there knowledge by the applicant of the arbitral proceedings? The answer must certainly be in the affirmative, for the applicant cannot be heard to say it had no knowledge of the arbitral proceedings because the notice ought to have been served, not on its HR D Manager at its place of business, but upon its legal practitioners' principal place of business.

It is telling to note that annexure "A" to the applicant's founding affidavit is a company resolution dated 21 June 2011 authorising the HR Manager, who is the deponent to the founding affidavit, to attend to all court processes for E and on behalf of the company. This resolution was made more than a month before the arbitral hearing. In the founding affidavit, he does not specifically deny ever receiving the notification of the arbitral hearing.

In terms of art 34(5)(b), a breach of the rules of natural justice in connection with the making of the award makes such award to be in conflict with the public policy of Zimbabwe. In *ZESA* v *Maposa* 1999 (2) ZLR 452 (S) it F was held that the approach to be adopted is to construe the public policy defence restrictively in order to preserve and recognise the basic objective of finality in all arbitrations and to hold such defence applicable only if some fundamental principle of the law or morality or justice is violated.

In casu, over and above the need to employ the restrictive approach in G construing the public policy defence connected to the *audi alteram partem* rule, I have not been able to find that the applicant was not given proper notice of either the appointment of the arbitrator or of the arbitration proceedings. That ground of complaint accordingly falls away.

That the agreement by the parties to pay respondent terminal H benefits in foreign currency when such was illegal for want of

---

Mutema J

exchange control authority is contary to the public policy of A Zimbabwe and the in pari delicto rule should apply

The contention here is that, since Zimbabwe only adopted the multicurrency regime in February 2009, any transactions prior to that date that were concluded without exchange control authority are illegal for breaching s 4(1)(a)(ii) of the Exchange Control Regulations 1996 (SI 109 of 1996) which provides: B

> "Subject to subsection (3), unless permitted to do so by an exchange control authority –
>
> (a) no person shall, in Zimbabwe –
>
> (i) …
>
> (ii) borrow any foreign currency from, lend any foreign currency to or C exchange any foreign currency with any person other than an authorised dealer".

The applicant also placed reliance on *Maposa supra*, *Delta Operations (Pvt) Ltd* v *Origen Corp (Pvt) Ltd* 2007 (2) ZLR 81 (S) and *City of Harare* v *Harare Municipal Workers Union* 2006 (1) ZLR 491 (H).

It is now settled law that, in seeking to set aside an arbitral award on the D grounds that it is contrary to public policy, it is for the applicant to show that some fundamental principle of the law or morality or justice was violated. In the instant case, over and above the common cause facts stated in the opening paragraphs of this judgment, the following are also common cause: the applicant was in the business of trading in computers. It was trading E in foreign currency. It was remunerating its employees – the respondent included – in foreign currency. All these transactions by the applicant were in contravention of s 4(1)(a)(ii) of the Exchange Control Regulations 1996, quoted above. The applicant was therefore trading and paying salaries illegally. It now wishes to resile from an illegal agreement in which it has discharged F the bulk of its obligations, on grounds of public policy.

What no one can deny is that, whatever the case, the respondent is still entitled to be paid her terminal benefits. Can the balance of those benefits to be paid today in Zimbabwe dollars? I think not. That currency has for now been rendered moribund and cannot transact.

In *Zesa* v *Maposa supra* at 466E-G Gubbay CJ said: G

> "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 uphold it." H

Mutema J

A These are salutary guiding *dicta*. However, conversely, where, such as *in casu*, to allow an applicant to benefit from such illegality by way of unjust enrichment would constitute 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 Zimbabwean would be intolerably hurt by the setting aside of the award, then it would surely be contrary to public policy to set it aside. B The concept of public policy is not immutable. It must conform to changing times and suit existing circumstances.

Even if the *in pari delicto potior est conditio possidentis* rule applied, given the applicant's conduct *in casu*, the case calls for the relaxation of the rule on grounds of justice and equity. The *locus classicus* on the relaxation of the C rule is the South African case of *Jajbhay* v *Cassim* 1939 AD 537 at 544-545 where Stratford CJ said:

> "… Courts of law are free to reject or grant a prayer for restoration of something given under an illegal contract, being guided in each case by the principle which underlies and inspired the maxim. And in this last connection I think a court should not disregard the various degrees of turpitudes in delictual contracts. And when the delict falls within the category of crimes, a civil court can reasonably D suppose that the criminal law has provided an adequate deterring punishment and therefore, ordinarily speaking, should not by its order increase the punishment of the one delinquent and lessen it on the other by enriching one to the detriment of the other. And it follows from what I have said above, in cases where public policy as not foreseeably affected by a grant or a refusal of the relief claimed, that a court of law might well decide in favour of doing justice between the E individuals concerned and so prevent unjust enrichment."

In casu both parties were deliquent but I am constrained, on the facts, to find that the applicant was the more deliquent. There is need to prevent unjust enrichment of the applicant to the detriment of the respondent.

In the result, the application cannot succeed and is accordingly dismissed F with costs.

Musarira Law Chambers, applicant's legal practitioners

G *Matsikidze & Mucheche*, respondent's legal practitioners

© 2015 Juta and Company (Pty) Ltd.

Document 25 of 60

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2012/Volume 2/NEHOWA v BAREP INVESTMENTS (PVT) LTD 2012 (2) ZLR 176 (H)

NEHOWA v BAREP INVESTMENTS (PVT) LTD 2012 (2) ZLR 176 (H)

Citation	2012 (2) ZLR 176 (H)
Case No	Judgment No. HH-357-12
Court	High Court, Harare
Judge	Makoni J
Heard	1 March 2012; 21 June 2012; *CAV*
Judgment	5 September 2012
Counsel	*M Jera,* for the applicant *K Chirenje,* for the respondent
Case Type	Opposed application
Annotations	No case annotations to date

Flynote

Practice and procedure – *heads of argument – purpose of – what they should contain – evidence annexed to or contained in heads of argument – not properly before the court and will be disregarded*

Headnote

In motion proceedings, the parties proceed by way of filing affidavits, namely D the founding affidavit, the opposing affidavit and the answering affidavit. These are the foundation papers in which the parties lay the basis upon which they seek to rely. In terms of r 235 of the High Court Rules 1971, after the answering affidavit has been filed, no further affidavits may be filed without leave. Thereafter, if a party is to be represented by a legal E practitioner, he files heads of argument in terms of r 238. The heads of argument must clearly outline the submissions the practitioner intends to rely on and set out the authorities, if any, which he intends to cite. Heads of argument constitute persuasive argument, making reference to issues and evidence already placed before the court by the parties at F the founding stage.

The courts are increasingly coming across heads of argument which fall short of the definition prescribed in the rules of court. This issue should be well established and trite, but the courts are increasingly being confronted with heads of argument where annexures, which should have been part of the pleadings, are attached to the heads. In some instances new G issues in the form of facts, as distinct from points of law, are raised in heads of argument.

Any process filed in violation of the rules will not take the party's case any further. It constitutes deceit on the part of any party seeking to introduce further pleadings or evidence through the back door. A legal practitioner who pursues such a course of action prejudices his client, both by failing H

A to present evidence before the court at the appropriate stage and by failing to use effectively the opportunity to present to the court heads of argument which will assist the client in its cause. Annexures attached to heads of argument and containing evidence will be disregarded as they are improperly before the court.

Cases cited B

Kingdom Bank Workers Committee v *Kingdom Bank Financial Holdings* 2012 (1) ZLR 93 (H)

Mvududu v ARDA 2011 (2) ZLR 449 (H)

Supline Investments Pvt Ltd v Forestry Company of Zimbabwe 2007 (2) ZLR 280 (H) C

Legislation considered

High Court Rules, 1971 (RGN 1047 of 1971), rr 226, 229, 235 & 238

Labour Act [*Chapter 28:01*], s 98

Case information

D *M Jera,* for the applicant

K Chirenje, for the respondent

Judgment

Makoni J: The applicant approached this court seeking the registration of an arbitral award in terms of s 98(14) of the Labour Act [*Chapter 28:01*].

E The application is opposed mainly on three grounds which were raised as points in *limine.* Firstly, the respondent argues that the applicant proceeded by way of a chamber application instead of a court application. Secondly, that the award was granted in default and the respondent has applied for the rescission of the award. Thirdly, the matter is *lis pendens*.

F **Points** *in limine*

(1) Form of application

It was submitted on behalf of the respondent that the applicant adopted the wrong procedure by approaching the court through a chamber application. The application does not meet the criteria set in the rules.

G It was submitted on behalf of the applicant that the procedure he adopted is in terms of the rules, correct as the relief that the applicant seeks is procedural.

Order 32 r 226(2) of the High Court Rules 1971 provides:

"An application shall not be made by a chamber application unless –

(a) the matter is urgent and cannot wait to be resolved through a court application; H or

(b) the rules or any other enactment so provide; or A

(c) the relief sought is procedural or for a provisional order where no interim relief is sought only;

(d) the relief sought is for a default judgment or a final order where:

(i) the defendant or respondent, as the case may be, has previously had due notice that the order will be sought and in default; or B

(ii) there is no other interested party to the application; or

(iii) every interested party is a party to the application; or

(iv) there are special circumstances which are set out in the application justifying the application."

In my view, this application falls under r 226(c). The relief being sought is procedural. This court is being asked to register the award and not determine C the merits of the matter. The function of this court is merely to give effect to the award so that it can have the force of a judgment of this court.

Even assuming that the applicant had adopted the wrong procedure, the respondent has not established that it has been prejudiced by the applicant's failure to institute the application in the proper form. See r 229(c). I will D therefore dismiss the point in *limine.*

(2) Application for rescission of the arbitral award

It was submitted on behalf of the respondent that the arbitral proceedings have not been finalised. The award cannot be registered as there is no final decision. A default judgment is not a final judgment. Further the respondent E has applied for the rescission of the default award. That application must be determined before the registration of the award. It was submitted on behalf of the applicant that once an award has been granted, quantified and certified that marks the conclusion of the arbitral stage. The award can be registered. The application for rescission was filed to buy time and it has no merits.

In *Mvududu v ARDA* 2011 (2) ZLR 449 (H) it was held that in order to qualify F for registration, all that an applicant has to do is to satisfy the court that (a) he is a party to the arbitral proceedings; (b) the award relates to him; and (c) the copy he is presenting for registration has been duly certified by the arbitrator in terms of s 98(13) of the Labour Act [*Chapter 28:01*].

As was rightly submitted by Mr *Jera*, the applicant has satisfied the above G requirements. He is therefore entitled, as of right, to have the award registered. The argument advanced by the respondent will not stand in his way. An application for rescission of judgment does not stay the judgment the subject matter of the application. In this case the application does not stay or prevent the applicant from proceeding to have the award registered. In view of the above, I will dismiss the point in *limine.* H

2012 (2) ZLR p179

Makoni J
A Lis pendens

The applicant once filed a chamber application and withdrew it after the respondent had filed a notice of opposition. He did not tender the respondent's wasted costs. He then filed the present application on the same facts. It was submitted on behalf of the respondent that the fact that the applicant did B not tender the wasted costs means that the case is still to be finalised and can only be deemed to have been concluded upon payment of wasted costs.

I want to agree with the submissions by the applicant that the issue of the propriety of the notice of withdrawal was never raised by the respondent upon its filing. It is only raising it now as a defence to the present application. The respondent had other remedies to pursue, such as communicating the C irregularity of the notice of withdrawal to the applicant and having the matter set down for argument on the issue of costs. In any event, the raising of a plea of *lis alibi pendens* is not a bar for this court to determine the present application. See *Supline Investments Pvt Ltd v Forestry Company of Zimbabwe* 2007 (2) ZLR 280 (H) where it was held:

> " D It is trite that the plea of *lis alibi pendens* is not a complete bar to the bringing of proceedings in this court. It is merely a plea to the court for the court to stay the proceedings before it to allow the other proceedings to be completed. As is made clear in *Mhungu* v *Mtindi* 1986 (2) ZLR 171 (S) at 172E-H, where a plea of *lis alibi pendens* is raised, the court has a discretion as to whether or not it should stay the proceedings."

E *In casu,* I will exercise my discretion in favour of the applicant, for to exercise the discretion in favour of the respondent will unnecessarily deny the applicant to obtain the relief that it seeks to obtain. What is outstanding in HC 7567/11 is just the issue of costs, which the respondent can still pursue if it is so inclined. It is not the substantive issue for determination in the F matter. I will therefore dismiss the point *in limine.*

Appeal pending

The respondent also submitted that the award cannot be registered as it has noted an appeal against the award at the Labour Court. It is not clear what the respondent has appealed against to the Labour Court, as the respondent G argued that the matter is still pending before the arbitrator for an application for rescission. Even assuming that there was an appeal pending, this court in *Kingdom Bank Workers Committee* v *Kingdom Bank Financial Holdings* 2012 (1) ZLR 93 (H) held that an appeal from an arbitrator's decision to the Labour Court does not suspend the decision being appealed against. The H respondent cannot, therefore, succeed in that argument.

Makoni J

Heads of argument A

The applicant also raised the point that it was improper for the respondent to attach evidence to its heads of argument. The issue raised by the applicant is an important one as the courts are increasingly coming across heads of argument which fall short of the definition as is prescribed in the Rules. I have deemed it necessary to devote part of this judgment to deal with an B issue which should ordinarily be treated as well established and trite. Our courts are increasingly being confronted with heads of argument where annexures, which should have been attached to pleadings, are attached to the heads of argument. In some instances, new issues, in the form of facts as distinct from points of law, are raised in heads of arguments.

In motion proceedings parties proceed by way of filing affidavits *viz.* the C founding affidavit, the opposing affidavit and the answering affidavit. These are the foundation papers where the parties lay the basis upon which they seek to rely on. Rule 235 provides that:

> "After the answering affidavit has been filed, no further affidavits may be filed without the leave of the court or Judge". D

Thereafter, if a party is to be represented by a legal practitioner, it files heads of argument in terms of r 238. The rules set out that the heads of argument must clearly outline the submissions he intends to rely on and set out the authorities, if any, which he intends to cite. Heads of argument constitute persuasive argument, making reference to issues and evidence already placed E before the court by the parties at the founding stage. Any process filed in violation of the rules will not take the party's case any further. It constitutes deceit on any party seeking to introduce further pleadings or evidence through the back door. A legal practitioner who pursues such a course of action prejudices their client by failing to present evidence before the court at the appropriate stage, and by failing to effectively use the opportunity to present F to the court heads of argument which will assist their client in its cause.

In casu*,* the court will not have regard to the annexures attached to the heads of argument as they are improperly before the court. The legal practitioner for the respondent should have utilized the channel provided by r 235 if he felt that there was need to respond to issues raised by the applicant in the G answering affidavit.

Costs

Both parties argued to be awarded costs on a higher scale. As is clear from the above, the applicant has succeeded in all respects. Costs follow the cause. The question is on which scale. The applicant has not established a basis H

Makoni J

A for this court to award costs on a higher scale. The costs will be awarded on the ordinary scale.

Order

In the result I will make the following order:

(1) The arbitral award granted by the arbitrator M Chimhuka on 12 July B 2011 be and is hereby registered as an order of this court.

(2) The respondent to pay costs of suit.

Chirenje Legal Practitioners, respondent's legal practitioners

Jakachira & Co, applicant's legal practitioners

© 2015 Juta and Company (Pty) Ltd.

Document 26 of 60

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2012/Volume 2/VOTETI TRADING (PVT) LTD v HANCOCK & ANOR 2012 (2) ZLR 182 (H)

VOTETI TRADING (PVT) LTD v HANCOCK & ANOR 2012 (2) ZLR 182 (H)

Citation	2012 (2) ZLR 182 (H)
Case No	Judgment No. HH-330-12
Court	High Court, Harare
Judge	Patel J
Heard	9 February 2012; 3 July 2012; *CAV*
Judgment	6 September 2012
Counsel	*H Zhou*, for the plaintiff *D Ochieng,* for the first defendant
Case Type	Civil trial
Annotations	No case annotations to date

Flynote

Agency – *estate agent – position of – broker between the parties to the sale of a property – any specific agency vested in an estate agent must be clearly established*

Contract – *estoppel – reliance upon terms of a written agreement – conduct of* D *seller in accepting payment inconsistent with written agreement – reliance on such conduct by purchaser – potential prejudice to purchaser – seller estopped from insisting upon compliance with terms of agreement of sale to prejudice of purchaser*

Contract – *interpretation – reference to warranties, representations and conditions made by the parties before or at time of agreement – no* E *relevance to any warranty representation or condition made thereafter*

Estate *agent – authority – acceptance of payment on behalf of seller – when estate agent so authorised – authority may be actual or implied – amendment of agreement of sale – estate agent having no authority to amend agreement unless instructed by both parties* F

Headnote

In the absence of specific instructions, an estate agent stands in the unique position of being a broker between the parties rather than as an agent of either. Thus, any specific agency vested in an estate agent must be clearly established from the conduct of the parties, the relevant documentary G evidence and the circumstances of the case. As a general rule, in the absence of agreement, an estate agent with authority to sell has no residual or concomitant authority to accept payment of the purchase price on behalf of the seller. Nevertheless, there will be

instances when the estate agent is in fact authorised to receive payment and to receive it in a particular form. It is necessary to consider the general principles H

A of contract to determine whether an agent has authority to perform a particular act. Thus, actual authority may be conferred on an agent expressly, impliedly or tacitly. Implied authority may be evidenced by a single act or by a course of dealing. On a similar but somewhat different footing, apparent or ostensible authority to receive payment can be inferred if the seller, by words or conduct, holds out his agent B as having such authority. Again, the principal may be estopped from denying that he has conferred a particular authority on the agent where a third party dealing with the agent is prejudiced by having acted on the principal's representations.

In a contract of sale, the time and mode of payment stipulated therein are C usually of the essence and must be exactly complied with, failing which the seller is entitled to cancel the contract. Furthermore, an estate agent does not have the power or authority to amend an agreement concluded by the prospective seller and purchaser unless instructed to do so by the parties.

In terms of a written agreement of sale entered into by the parties in August D 2009, the plaintiff purchased a property in Harare from the first defendant. The plaintiff alleged that the purchase price had been paid in full and sought transfer of the property into his name, alternatively, repayment of the purchase price. The defendant, however, denied having received payment in the manner agreed and counterclaimed for an order declaring E the agreement to have been validly cancelled and for an order for the eviction of the plaintiff. The court found that the plaintiff made two payments in respect of the purchase price, totalling just under half the price. The first payment was paid into the estate agent's bank account, and the second into the first defendant's lawyers' trust account. Both such payments were made to the satisfaction of the first defendant. F Excluding the estate agent's commission which the plaintiff also paid, the outstanding balance was $65 000. It was this sum which was the subject of a major point of dispute between the parties. It was the plaintiff's case that, as instructed by the estate agent, it had paid the outstanding balance to him, who, the plaintiff alleged, was the first defendant's agent. The first defendant, on the other hand, while conceding that the G plaintiff had paid in entirety the full purchase price, denied that the estate agent was her agent for the purpose of accepting payment thereof. For her contention that payment had not been made in the manner agreed, she relied upon the written agreement, which provided for payment into her bank account, less those commission which were to be paid to H the estate agent. She also relied upon a clause of the agreement which

recorded that the " … agreement of sale constitutes the entire contract A between the seller and the purchaser and no warranties, representations or conditions…. not recorded… shall be binding on… the parties…". No agreement authorizing payment to the estate agent had been made. However, the evidence disclosed that the person who had signed the agreement on her behalf, gave vacant possession of the property to the B plaintiff. This was recorded in a memorandum of understanding, upon her behalf, with the estate agent. Also recorded therein was the fact that the estate agent had been paid the full purchase price by the plaintiff. Details were set out in the memorandum of the arrangements for weekly payments to be made by the estate agent into the first defendant's lawyers' trust account. The estate agent did not make these payments and it was C his failure to do so which motivathe ted first defendant into seeking the cancellation of the agreement of sale.

Held, that, on the facts, the estate agent was the agent of the first defendant for the purpose of accepting payment of the purchase price.

Held, further, that the clause of the written agreement of sale did not assist D the first defendant in seeking to cancel it. That clause was concerned only with "warranties, representations or conditions" made by the parties before or at the time the agreement was concluded and not, as *in casu*, made thereafter.

Held, further, that in any event, on the facts of the case, the first defendant and her agent were estopped from insisting upon exact compliance E in terms of the written agreement of sale. The first two payments had been paid to the first defendant to her satisfaction through the estate agent and thereafter, through her agent, she had allowed the plaintiff to take occupation of the

property. Having paid the full purchase price, the plaintiff would be greatly prejudiced if it had to forfeit the balance thereof and then to relinquish the property. F

Held, further, that the plaintiff was entitled to the relief it sought. It was entitled to take transfer of the property, alternatively to the repayment of the purchase price.

Cases cited

Baker v Probert 1985 (3) SA 429 (A) G

Belzun v O' Hara & Ors 1964 (3) SA 1 (T)

Bowmaker (CA) (Pvt) Ltd v Benn 1960 R & N 364

Chikoma v Mukweza 1998 (1) ZLR 541 (S)

Earlie Home Ests v Miller 1977 (4) SA 288 (C)

Glasson v Peace Real Est (Pty) Ltd 1969 (3) SA 113 (D) H

Patel J

A *Mbayiwa v Chitakunye & Anor* 2009 (1) ZLR 314 (S)

Roberts v Bryer Bros 1931 OPB 197

Runatsa v Rumani Ests (Pvt) Ltd & Ors 2009 (2) ZLR 286 (S)

Seniors Svc (Pvt) Ltd v Nyoni 1986 (2) ZLR 293 (S); 1987 (2) SA 762 (ZS)

Case information

H Zhou, for the plaintiff

B *D Ochieng,* for the first defendant

Judgment

Patel J: The plaintiff herein claims the transfer of a property in Groombridge, Harare, pursuant to an agreement of sale concluded in August 2009. Alternatively, it claims cancellation of the agreement and repayment of the C sum of US$145 000 from the first defendant. The latter denies having received payment of the purchase price in the manner agreed. She counterclaims for an order declaring the agreement to have been validly cancelled together with an order for the eviction of the plaintiff.

The principal issue for determination is whether Midstar Properties (Pvt) Ltd ("Midstar") was the plaintiff's agent or the first defendant's agent. If it was D the first defendant's agent, did it have authority to receive payment on its behalf? Conversely, if it was the plaintiff's agent, has the latter discharged its obligations under the agreement of sale? As regards the claim in reconvention, the question for determination is whether the agreement was validly cancelled and, if so, what amount is to be tendered to the plaintiff?

E **The evidence**

Alex Makamure is a director and part-owner of the plaintiff, which is a property holding company. His evidence was as follows. The property in question was advertised for sale by Midstar. The plaintiff made an offer to purchase the property in August 2009. The offer was made to Midstar acting for an unnamed seller. Midstar was representing the seller as her agent throughout F the dealings between the parties. The agreement of sale was entered into on 25 August 2009 and was signed by his wife, on behalf of the plaintiff, and by Vivian de Villiers on behalf of the first defendant, who was based in the United Kingdom. The agreed purchase price was US$145 000. Payment was to be made into the seller's account as advised by Midstar. The first US$50 000 was payable on signature, of which US$10 000 was to be paid to G Midstar and US40 000 into the first defendant's named account in the United Kingdom. The balance of US$95 000 was to be paid within two weeks. Upon signature of the agreement, the plaintiff's bank advised that the transfer of funds required exchange control clearance. On 26 August the witness went back to Midstar and spoke to

its managing director, Andrew Magirazi. The H latter telephoned de Villiers and said that de Villiers wanted payment to be

---

2012 (2) ZLR p186

Patel J

made into Midstar's account and that de Villiers and Midstar would deal with A the externalisation of funds. On 27 August the witness effected payment of US$50 000 into Midstar's account. Midstar then transferred US$40 000 to the first defendant's foreign account and retained US$10 000 as commission. Subsequently, he was told by Magirazi that payment of the balance of US$95 000 was to be effected in the same way. On 2 September 2009, B within the stipulated two weeks, the balance was transferred into Midstar's account. Soon thereafter, the first defendant came to Zimbabwe for a short period to clear the house. She accepted that the plaintiff had paid the full purchase price and did not question the method of payment. In September and October 2009, the plaintiff sought transfer of the property and was informed that the custodian of the title deeds, Lofty and Fraser, refused to C release them. The witness then contacted de Villiers who assured him that there was no problem. On 28 October Midstar transferred US$30 000 into the custodian's trust account and promised to pay the balance in weekly batches of US$20 000. On 30 and 31 October de Villiers sent two e-mails to the plaintiff and Midstar proposing the way forward. On 1 November de Villiers handed over occupation of the property to the plaintiff in terms D of the sale agreement. Thereafter, on 3 November, de Villiers and Midstar concluded a memorandum of understanding (MOU) providing for payment of the outstanding balance of US$65 000 by Midstar. The MOU, which was proposed and drafted by de Villiers and to which the plaintiff was not a party, refers to Midstar as the seller's agent. Magirazi is presently being prosecuted E in a theft case relating to the disposition of that balance. De Villiers is the complainant in that case.

Vivian John de Villiers represents the first defendant by virtue of a general power of attorney executed on 10 January 2009. He has known the first defendant for 30 years. His evidence was that he advertised the property in question on the internet. In August 2009 he received a telephone call from F Magirazi who said that he had a signed offer from his client to purchase the property. He had never met or heard of Magirazi or Midstar before that. He met with Magirazi at the property and was shown the written offer stating the purchase price of US$145 000, including the agent's commission of US$10 000. He then e-mailed the first defendant and accepted the offer after G obtaining her approval. On 25 August 2009 he signed the agreement of sale which had been prepared by Midstar. He did not fix the payment terms in the agreement. The account for payment nominated by the first defendant was in the name of her niece in Ireland. The details were furnished to Mrs. Makamure at the time of signature. A few days later he was called by Midstar and told that there was a transfer charge of US$2 000 and that Mrs. H

2012 (2) ZLR p187

Patel J

A Makamure wanted the purchase price reduced by that amount. He declined and asked that the bank charges be queried. Subsequently, he telephoned Magirazi who said that that the money had been paid into Midstar's account because his bank would only charge a fee of US$200. The transfer of US$40 000 to the first defendant's nominated account was then effected on 2 September 2009. The witness was not consulted about this arrangement B but went along with it because it was already a *fait accompli*. In October 2009 Midstar paid US$30 000 into Lofty and Fraser's trust account and promised to pay US$20 000 per week as from the beginning of November 2009. The MOU of 3 November 2009 was brought to him by Magirazi. The witness e-mailed Makamure who agreed to proceed with the MOU. C Midstar paid the first month's rent of US$600 in terms of the MOU but did not pay any further rentals. In November 2009 the plaintiff's lawyers lodged a complaint about Midstar to the Estate Agents Council. Midstar responded in December 2009 stating that the plaintiff had breached the agreement by making payments into its account instead of the first defendant's account. However, the witness accepted that Magirazi himself had probably asked D for the payments to be made into Midstar's account. In January 2010 the witness instructed his lawyers to write to the plaintiff's lawyers giving notice of the seller's intention to cancel the agreement if the purchase price was not received in full. Later, in mid-2010, he lodged a complaint to the police against Magirazi. He and Makamure testified as State witnesses at the criminal trial. He is the informant referred to in Magirazi's warned and E cautioned statement dated 23 August 2010. Apart from this fact, the contents of that statement are absolutely incorrect.

Under cross-examination, the witness reiterated that Midstar prepared the MOU of November 2009 and that Midstar was not the seller's agent as stated in the MOU. He was tricked into signing the MOU. As regards the warned F and cautioned statement of August 2010, he could not explain why the police drafted the preamble to state that Magirazi was mandated by him to sell the property on behalf of the first defendant. He conceded that he accepted the plaintiff's first payment of US$40 000 through Midstar even though this was not in accordance with the agreement of sale. The total amount received by the first defendant was US$80 000. He was agreeable to refunding this G amount to the plaintiff from the proceeds of resale of the property.

At the end of March 2012, after the conclusion of the trial, the court was furnished with the magistrates court's rulings in CRB No. R813/10, bearing upon the present matter. Counsel for both parties were subsequently directed to file the full record of proceedings in that case, as well as further submissions H on the evidence given and findings made at those proceedings.

Patel J

Whether Midstar plaintiff's or first defendant's agent A

In the absence of specific instructions, an estate agent stands in the unique position of being a broker between the parties rather than as the agent of either. See Christie *Business Law in Zimbabwe* 2 ed 1998 at pp 332-336. Thus, any specific agency vested in an estate agent must be clearly established from the conduct of the parties, the relevant documentary evidence and the B circumstances of the case.

Makamure's undisputed evidence was that the property in question was advertised for sale by Midstar, following which the plaintiff made an offer to purchase it. De Villiers stated that he advertised the property on the internet and that Magirazi contacted him with a signed offer to purchase it. On balance, it seems less likely that Midstar would have, of its own initiative, advertised C the property for sale without some prior instruction to do so. Although there is no clear evidence in this regard, the probability is that it was de Villiers who gave Midstar the initial mandate to sell the property.

The documentary evidence in this matter is contained in the following: the offer to purchase made in August 2009, the agreement of sale concluded D in August 2009, the MOU executed in November 2009, Magirazi's warned and cautioned statement of August 2010, and the record of proceedings in CRB No. R813/10.

The offer to purchase is undated and does not identify the seller by name. Arguably, the seller's name was not inserted because Midstar did not know E who the seller was. However, it is equally plausible that the seller was not identified so as to pre-empt the possibility of the purchaser approaching the seller directly to avoid having to pay any agent's commission.

It is common cause that Midstar prepared the agreement of sale, on its own letterhead, for signature by the parties. According to clause 1, transfer is to be effected by the purchaser's conveyancers, on behalf of the seller, and the F costs of transfer are to be borne by the purchaser. This is a little unusual and seems to suggest that Midstar might have been acting for the plaintiff. On the other hand, clause 2 provides that the agent's commission is to be paid by the seller as a first charge on the purchase price. This is strongly indicative of Midstar having been the first defendant's agent.

The MOU between de Villiers and Midstar expressly describes the latter G as the seller's agent. The MOU is somewhat inelegant and contains several typographical errors. These include the misspelling of the names of de Villiers and Hancock in the citation of parties and the name of Fraser in clauses 2 and 6. In this regard, counsel for the first defendant cites *Chikoma* v *Mukweza* 1998 (1) ZLR 541 (S) at 543, where it was observed that the courts H

Patel J

A should be astute to give effect to the manifest intention of the parties rather than impede their ends by miring them in subtleties and technicalities. He accordingly submits that the flaws in the MOU render it questionable that Midstar was the seller's agent. De Villiers asserted in his evidence that the MOU was instigated and drafted by Midstar, and that he was tricked into signing it.

However, this is clearly contradicted by his own e-mails of 30 B and 31 October 2009, addressed to Magirazi and Makamure respectively, in which he presented the draft MOU for acceptance by Midstar and the plaintiff. As regards the errors in the final MOU, I note that de Villiers' draft MOU does not contain any citation of parties and also misspells the name of Fraser. What all of this indicates is that de Villiers himself initiated C the original draft MOU and that Magirazi simply prepared the final draft in accordance with the original draft. In the premises, it is fairly clear that de Villiers was the initiator and author of the original MOU and that he fully understood and accepted the implications of Midstar being described as the seller's agent in the final MOU.

This position is positively confirmed by the contents of Magirazi's warned D and cautioned statement. The preamble to the warned and cautioned statement explicitly states that Magirazi was mandated by de Villiers to sell the property *in casu* for US$145 000 on behalf of the property owner, Kathleen Hancock. In his reply, Magirazi does not deny this mandate but raises an entirely unrelated defence. (It should be noted that de Villiers' E statement to the police is dated 26 June 2010 and does not acknowledge Midstar as his agent. Counsel for the first defendant falls into the error of arguing that Magirazi's statement predates de Villiers' statement and would therefore have been prepared without the benefit of the latter. This is patently incorrect. Although the initial criminal report was lodged on 13 June 2010, Magirazi's statement was only recorded much later on 23 August 2010, well F after de Villiers' statement).

In CRB No. R813/10, Magirazi was charged with two counts of theft of trust property. He pleaded guilty on one count but not guilty to the charge involving the property *in casu*. Both de Villiers and Makamure testified at the trial which commenced in December 2011 and appears to have been completed G in February 2012. Both disowned any agency relationship with Magirazi or Midstar and attributed that relationship to the other. The reason for their taking this stance seems fairly obvious. At that stage, the present matter was ready for trial and they must have been fully aware of the contractual and financial implications of admitting any agency relationship with Midstar. Magirazi's defence, in keeping with his warned and cautioned statement, was H that whilst he was in the process of remitting the balance of US$55 000 to

---

the seller, de Villiers interfered by asking for that amount to be paid to him at A the Botswana border post. The court, having heard evidence from de Villiers, referred to him as "the diaspora seller's local agent, who in turn engaged accused's Midstar Properties – an estate agent – to transact the sale for a commission". In the event, Magirazi was acquitted on this count following his application for discharge at the close of the State case. The reason cited B for his acquittal was that the MOU of November 2009 between him and de Villiers made the matter a civil one and not subject to criminal jurisdiction.

Having regard to all of the foregoing and on a preponderance of probabilities, I am satisfied that Midstar was the first defendant's agent specifically mandated by de Villiers to sell the property in question. C

Whether Midstar had authority to receive payment

As a general rule, in the absence of agreement, an estate agent with authority to sell has no residual or concomitant authority to accept payment of the purchase price on behalf of the seller. See *Balzun* v *O'Hara & Others* 1964 (3) SA 1 (T) at 5; *Glasson v Peace Real Estate (Pty) Ltd* 1969 (3) SA 113 (D) D at 119; *Earlie Homes Estates* v *Miller* 1977 (4) SA 288 (C) at 290. Nevertheless, there will be instances when the estate agent is in fact authorised to receive payment and to receive it in a particular form. As is explained by Christie *op cit* at pp 336-339, it is necessary to consider the general principles of contract to determine whether an agent has authority to perform a particular act. Thus, actual authority may be conferred on an E agent expressly, impliedly or tacitly. As was observed in *Roberts* v *Bryer Bros* 1931 OPD 197 at 199, implied authority may be evidenced by a single act or by a course of dealing. On a similar but somewhat different footing, apparent or ostensible authority to receive payment can be inferred if the seller, by words or conduct, holds out his agent as having such authority. F See *Seniors Service (Pvt) Ltd* v *Nyoni* 1986 (2) ZLR 293 (S) at 300; 1987 (2) SA 762 (ZS) at 767. Again, the principal may be estopped from denying that he has conferred a particular authority on the agent where a third party

dealing with the agent is prejudiced by having acted on the principal's representations. See generally *Bowmaker (Central Africa) (Pvt) Ltd* v *Benn* G 1960 R&N 364 at 369.

In a contract of sale, the time and mode of payment stipulated therein are usually of the essence and must be exactly complied with, failing which the seller is entitled to cancel the contract. See *Mbayiwa* v *Chitakunye & Anor* 2009 (1) ZLR 314 (S) at 319. Furthermore, an estate agent does not have the power or authority to amend an agreement concluded by the prospective H

Patel J

A seller and purchaser unless instructed to do so by the parties. See *Runatsa* v *Rumani Estates (Pvt) Ltd & Ors* 2009 (2) ZLR 286 (S) at 290.

The payment terms stipulated in the agreement of sale herein are as follows:

> "The purchaser promises to pay USD50 000 upon acceptance of the offer and signing of this agreement. Payment will be made to the seller's account less commissions which will be made to Midstar Properties (Pvt) Ltd Trust Account B the balance of $95 000 to be paid within fourteen days (14) after signing of the agreement."

As I read this clause, its provisions are unclear and ambiguous in two respects. Firstly, the seller's account is not expressly identified and, secondly, the reference to Midstar's trust account suggests that Midstar is to be the C intermediate vehicle for the remittance of payments to the seller. However, taken in its entirety, it seems reasonably clear that payment of the purchase price is to be made directly into the seller's account. In this regard, cause 9 of the agreement becomes relevant. It provides that:

> "This agreement of sale constitutes the entire contract between the seller and the purchaser and no warranties, representations or conditions, made expressly D or by implication not recorded herein shall be binding on either of the parties unless incorporated herein signed by the parties."

It is common cause that that there was no written alteration of the payment terms. Arguably, therefore, any oral variation of the mode of payment would be legally incompetent and not binding on the seller. Consequently, any payment E made by the *purchaser*, otherwise than into the seller's nominated account, would be in breach of the agreement. Nevertheless, for the reasons given below, I do not think that the first defendant is entitled to rely on this apparent breach in order to avoid the plaintiff's claim and secure her counterclaim.

In my assessment of the evidence adduced at the trial, I am inclined to accept Makamure's testimony of what transpired between the parties. His version F was more consistent and certainly more credible than the contradictory version presented by de Villiers. According to Makamure, he was unable to immediately remit the initial payment of US$40 000 to the account nominated by the first defendant. He then immediately approached Magirazi, who telephoned de Villiers and was instructed by the latter to receive the G payment into Midstar's account. Subsequently, Makamure was advised by Magirazi that he should effect payment of the balance of US$95 000 in the same way. It is common cause that the plaintiff made both payments into Midstar's account within the stipulated period of two weeks. On 2 September 2009 Midstar remitted US$40 000 to the nominated account, and then paid US$30 000 into Lofty and Fraser's trust account in October 2009, leaving H an unpaid balance of US$65 000. At some point in September or October

Patel J

2009, the first defendant came to Zimbabwe for a short period, after the A plaintiff had made both payments into Midstar's account. Her dealings with the plaintiff appear to have been entirely cordial and, on 1 November 2009, de Villiers gave vacant possession of the property to the plaintiff. Two days later, de Villiers concluded the MOU with Midstar. This MOU was initiated by de Villiers and does not involve the plaintiff as a party, except B to record that Midstar had received US$145 000 from the plaintiff and that the seller would allow the plaintiff to take occupancy as from 1 November 2009. There is no denial of the plaintiff having fulfilled its obligations and no mention of the plaintiff having to make any payments or comply with any other conditions. Rather, the agreed weekly instalments of US$20 000 were to be "disbursed" by Midstar into Lofty and Fraser's trust account. C What the MOU in its entirety conveys is that Midstar, as the seller's agent, had duly received the full purchase price from the plaintiff and was then required to disburse the outstanding balance in weekly instalments to the seller until the full amount had been settled. At this stage, neither the

first defendant nor de Villiers questioned the mode of payment followed by the plaintiff. It was only in January 2010, after the payments promised by D Midstar did not materialise, that the plaintiff was given notice of the seller's intention to cancel the sale. Taking the totality of this evidence together, it is reasonably clear that Midstar was not only the first defendant's agent in transacting the sale but was also invested with the requisite implied and/or apparent authority to receive the purchase price on her behalf. E

In my view, the conduct of the parties that I have alluded to does not constitute any *deviation* from the agreement of sale as envisaged in clause 9 thereof. Strictly construed, this clause is only concerned with "warranties, representations or conditions" which were made by the parties before or at the time when the agreement was concluded and which were not recorded in it. They are not binding unless they were subsequently incorporated and F signed by the parties. The clause applies to oral as well as written warranties, representations or conditions not originally embodied in the agreement itself. However, it does not specifically refer or extend to any amendment, alteration or variation of the agreement, whether verbal or written, made after the agreement was executed. Any such modification may or may not G be binding on the parties, having regard to their actions and intentions.

Even if I am wrong in my interpretation of clause 9, it seems to me that the *particular* circumstances of this case preclude the first defendant from relying on its provisions. My findings are that de Villiers engaged and mandated Midstar as the first defendant's agent to sell the property and later authorised it to receive the purchase price on her behalf. This latter authorisation was a H

A variation of the payment terms contained in the agreement. The plaintiff then *effected* full payment of the purchase price of US145 000 to Midstar, which in turn remitted part of that payment to the first defendant and subsequently failed to account for the remaining balance of US$65 000. The plaintiff was obviously prejudiced by having parted with the full purchase price with the intention of acquiring ownership of the property. On these facts, it would B constitute a palpable inequity for the plaintiff to be ordered to forfeit the balance and relinquish the property because of the misconduct of the first defendant's own agent. I accordingly take the view that by dint of their own actions, *i.e.* by having accepted the first two payments through Midstar and thereafter by allowing the plaintiff to take occupation of the property C without any conditions, de Villiers and the first defendant are estopped from insisting upon payment in exact compliance with the agreement of sale. They must therefore accept the consequences of the varied mode of payment that they have authorised. They cannot rely on their own conduct to deprive the plaintiff of the property that it has fully paid for.

Disposition

D *The* plaintiff has duly performed his payment obligations under the agreement of sale and is consequently entitled to the decree of specific performance for transfer of title that he claims from the defendants. He is also entitled to his alternative claim for cancellation of the agreement and repayment of the full purchase price. As was clearly recognised in *Baker v Probert* 1985 (3) SA 429 (A) E at 438, the purchaser's right to claim repayment from the seller obviously exists where payment of the purchase price was made, not to the seller in person, but to his duly authorised agent, since payment to an agent is equivalent in law to payment to the principal. Moreover, this right is unaffected by the failure or inability of the agent to pay over the purchase F price to the seller.

The first defendant, on the other hand, having received full payment through her agents, was not entitled to cancel the agreement for alleged non-payment. Her counterclaim for a declarator to that effect and for the eviction of the plaintiff cannot succeed. Her recourse lies exclusively against her agents, de Villiers and Midstar and/or Magirazi, for their failure to perform their G respective obligations. Her counterclaim is accordingly dismissed with costs.

As regards costs, although the plaintiff's claim as against the first defendant was for an *award* of costs on a higher scale, nothing was put forward by counsel for the plaintiff to justify any such award.

In the result, judgment is granted in favour of the plaintiff as against the H *defendants* as follows:

Patel J

1. The first defendant is ordered to take all necessary steps to pass transfer A of Lot 4 of Stand 31A, Groombridge Township 2, Harare, to the plaintiff within 14 days of the date of service of this order upon her, failing which the Deputy Sheriff be and is hereby authorised and directed to take the necessary steps to pass transfer of the said property to the plaintiff.
2. Alternatively, the agreement of sale between the parties is hereby B cancelled and the first defendant is ordered to pay the plaintiff the sum of US$145 000.
3. The second defendant is interdicted from transferring the aforesaid property in the appropriate Deeds Register to any third party pending compliance with the terms of this order.
4. The first defendant shall pay the costs of suit. C

Dube, Manikai & Hwacha, plaintiff's legal practitioners

Atherstone & Cook, first defendant's legal practitioners D

© 2015 Juta and Company (Pty) Ltd.

Document 27 of 60

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2012/Volume 2/KARIMATSENGA v TSVANGIRAI & ANOR 2012 (2) ZLR 195 (H)

KARIMATSENGA v TSVANGIRAI & ANOR 2012 (2) ZLR 195 (H)

Citation	2012 (2) ZLR 195 (H)
Case No	Judgment No. HH-369-12
Court	High Court, Harare
Judge	Guvava J
Heard	12 September 2012
Judgment	12 September 2012
Counsel	*E Samkange,* for the applicant *T Mpofu,* for the first and second respondents *A M Guwuriro,* for the third respondent No appearance for the fourth respondent
Case Type	Urgent application
Annotations	No case annotations to date

Flynote

Court – *High Court – jurisdiction – inherent jurisdiction – court not given jurisdiction to exercise powers given to another court or official in terms of a statute*

Family law – *husband and wife – marriage – objection to by third party – how should be made*

Headnote

The applicant and the first respondent were lovers. The applicant became pregnant by him. She claimed that thereafter he sent his representatives to the applicant's family and married her in terms of customary law. The applicant proceeded to the first respondent's rural home where E she stayed with the latter's mother for two months. When the applicant was 7½ months pregnant she suffered a miscarriage and lost the baby. Subsequently, she learned that the first respondent was going to marry the second respondent in accordance with the Marriage Act [*Chapter 5:11*]. Fearing that if the first respondent were to marry the second respondent in terms of the general law she would cease to be his wife by operation of F law, the applicant sought an urgent order to stop the proposed marriage. The first respondent, although admitting a relationship with the applicant, denied having married her in terms of customary law. The respondents raised a number of defences, the first of which was that the court had no jurisdiction to give the order applied for. Their argument was that the G legislature had appointed through statute the persons who should deal with an objection to a marriage. The applicant's argument was that the High Court had inherent jurisdiction to deal with all matters.

Held, that each court is a creature of statute, and its powers are created and defined by statute. If one court were to claim that it has same inherent power to overrule another court, instead of a power specifically created H by statute, in effect it would be claiming the power to nullify the body of

---

Guvava J

statute law which specifically relates to the establishment and powers of A each of the civil courts in the country. The High Court cannot invoke its inherent powers to take away powers which have been given to another court or person in an Act of Parliament.

Held, further, that s 19 of the Marriage Act [*Chapter 5:11*] sets out the procedure to be adopted by a person who wishes to object to a marriage. B An objection must be lodged with the person publishing banns of marriage, the magistrate who issues a marriage licence, or the marriage officer who is to solemnise the marriage. Once the applicant became aware of the intended marriage, she should have lodged her objection in writing with the marriage officer who was to solemnise the marriage. As a magistrate had issued a marriage licence, she could also have lodged an objection C with the magistrate. It was not for the High Court to usurp the powers of the magistrate and the marriage officer and take over their functions. If the court were to use its inherent powers to take over the functions of the lower courts, that would be tantamount to amending legislation through the back door. D

Cases cited

Courtesy Connection (Pvt) Ltd & Anor v Mupamhadzi 2006 (1) ZLR 479 (H)

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

Nel v Waterberg Landbouwers Ko-operatieve Vereeniging 1946 AD 597 E

Nyaguwa v Gwinyayi 1981 ZLR 25 (G)

Legislation considered

Constitution of Zimbabwe 1980, s 89

Customary Marriages Act [*Chapter 5:07*], s 3 F

Marriage Act [*Chapter 5:11*], s 19(1)

Case information

E Samkange, for the applicant

T Mpofu, for the first and second respondents

A M Guwuriro, for the third respondent

No appearance for the fourth respondent G

Judgment

Guvava J: This matter once again brings to the limelight the lack of harmony in the marriage laws and the unfortunate consequences of the application of two parallel laws with one legal system and for the same group of people. The issue begs for urgent legislative intervention which has been sadly lacking despite numerous calls by this court and women's groups for a resolution. H

Guvava J

A The applicant has approached this court on an urgent basis seeking the following relief:

"(a) that the first and the second respondents are interdicted from marrying each other in terms of the Marriage Act [*Chapter 5*:*11*] on 15 September 2012 or any other day.

(b) that the third respondent and any other priests in his church are interdicted B from marrying the first and second respondents on 15 September 2012 or any other date.

(c) that the fourth respondent be interdicted from issuing a marriage certificate to the first and second respondents".

The basis of her claim is set out in her founding affidavit and may be C summerised as follows: The applicant and the first respondent were lovers. In August 2011 the applicant advised the first respondent that she was pregnant. On 21 November 2011 the first respondent sent his representatives to the applicant's family and married her in terms of African customary law. The applicant proceeded to the first respondent's rural home in Murambinda where she stayed with the latter's mother for two months. When the applicant was D seven and a half months pregnant she suffered a miscarriage and unfortunately lost the baby.On 6 September 2012 she learnt that the first respondent was going to marry the second respondent in accordance with the Marriages Act [*Chapter 5:11*] on 15 September 2012. She states that although she was aware of the customary marriage of the first respondent to the second respondent E she had not been unduly worried as under customary law a man can have more than one wife.She seeks the urgent intervention of the court in stopping the ceremony on 15 September because she has no other remedy. She states that in the event of the first respondent marrying the second respondent in terms of the general law she will cease to be his wife by operation of law. The application was opposed by the first, second and third respondents. The first F respondent, whilst not disputing the relationship with the applicant, denies that he paid lobola and married the applicant in terms of customary law. He states that he sent emissaries to pay damages for having impregnated the applicant. He denies that there is a valid reason to stop his marriage to the second respondent. The first and second respondents raised five preliminary G points which I have set out as follows:

1. that this court has no jurisdiction to deal with the matter.
2. that the matter has disputes of facts which cannot be resolved on the papers.
3. that the relief sought by the applicant is defective as the interim relief H sought is the same as the final order.

Guvava J

4. that the applicant has no valid cause of action to bring an application A for an interdict
5. that the matter is not urgent.

The third respondent opposed the application on the basis that he had been improperly cited, firstly as a Bishop of the Methodist Church and secondly in his personal capacity, when in fact he should have been cited in an official B capacity. He also denied that he is scheduled to conduct the marriage ceremony between the first and second respondents. He further stated that as a reverend in the church he was a priest like any other and would not have the mandate to stop any other priest from conducting the service. He applied for dismissal of the case against him and claimed costs on a legal practitioner and client C scale. I propose to deal with the third respondent's case first before delving into the issues raised by the first and the second respondents. It is common cause that the third respondent is a minister in the Methodist Church. He has been a minister of religion and a man of cloth for the past 34 years. He is also a lecturer at the United Theological College of the Methodist Church. At the commencement of the proceedings, after having had sight of the third D respondent's opposing affidavit, I enquired from the applicant's counsel whether he was still persisting with the case against the respondent, as it was quite apparent that they had cited the wrong person. Mr *Samkange* indicated that he was. It was only during argument that he saw the

light and withdrew the claim. He also tendered costs on an ordinary scale. Mr *Guwuriro,* who E appeared for the third respondent, submitted that the applicant should pay costs on a legal practitioner and client scale as the applicant had maliciously cited the respondent. He submitted that a diligent search would have alerted her to the fact that the third respondent was not a bishop in the Methodist Church and neither was he conducting the marriage ceremony. As the third respondent was cited in his personal capacity he has had to incur the costs F of this application personally which was totally unnecessary.

In my view, the citation of the third respondent was extremely reckless as a simple phone call or enquiry would have answered the applicant. The third respondent does not head the Methodist Church of Zimbabwe and would not have the mandate to stop other priests fron conducting the ceremony. G I am of the view that this case deserves special consideration meriting an award of costs on a higher scale such that the third respondent will not be out of pocket in respect to his expenses in this litigation. See *Nel v Waterberg Landbouwers Ko-operatieve Vereeniging* 1946 AD 597 at 607.

I turn now to the preliminary points raised by the first and second respondents. Whilst several preliminary points have been raised by the first and second H

Guvava J

A respondents I hold the view that this matter may be resolved on the very first point on jurisdiction.

Jurisdiction

Mr *Mpofu* submitted that this court had no jurisdiction to deal with the objections raised by the applicant as the legislature has appointed through B statute the persons who should deal with an objection to a marriage. It was quite apparent that Mr *Samkange*'s argument was that this court has inherent jurisdiction to deal with all matters. He argued that the applicant only became aware of the marriage licence at the hearing and therefore seeking to file an objection with the magistrate at this late stage would not assist her and mighy lead to a injustice as the first and the second respondents mighy get C married before the inquiry is finalised. In *Nyaguwa* v *Gwinyayi* 1981 ZLR 25 (G) at 27, Pittman J stated as follows when he dealt with this very point:

> "I was of the opinion that, in this country, each court is a creature of statute, and its powers are created and defined by statue … If one court were to claim that it has aome inherent power to overrule another court, instead of a power specifically created by statute, in effect it would be claiming the power to nullify D the body of statute law…"

The principle as espoused by Pittman J has been adopted in a plethora of other cases in this court and in the Supreme Court. Thus it is clear to me that where the legislature has intentionally and by statute set out a procedures and remedies for certain acts these must be followed. This court cannot invoke E its inherent powers to take away powers which have been given to certain persons in an act of parliament.

The applicant states in her papers that she has no remedy available to her to lodge her objection to the marriage of the first and second respondent save to come to this court to seek an interdict. However, s 19 of the Marriage Act [*Chapter 5:11*] ("the Act") sets out the procedure to be adopted by a person F who wishes to object to a marriage.

Section 19(1) states as follows:

> "Any person desiring to raise any objection to any proposed marriage shall lodge such objection in writing with –
>
> (a) the person who makes publication of the relevant banns of marriage or G notice of intention to marry:
>
> Provided that, in the case of banns published in terms of paragraph (a) of subsection (2) of section *eleven*, any person desiring to raise any objection may do so orally, and such objector shall, if so required by the person making the publication, confirm such objection in writing; or
>
> (b) the magistrate who issues a marriage licence in respect of such proposed H marriage; or

---

Guvava J

(c) the marriage officer who is to solemnize such marriage." A

It is my view that, once the applicant became aware of the intended marriage, she should have lodged her objection in writing to the marriage officer who was to solemnise the marriage. That was the remedy that was available to the applicant on 6 September when she confirmed that the marriage would take place. At the hearing it became apparent that the first and second respondent B had obtained a marriage licence from a magistrate in terms of s 16 of the Act. This document was attached to the respondent's opposing affidavit as an annexure. Once again, the remedies of how to deal with a marriage licence are set out in s 19(3) of the Act. It is not for this court to usurp the powers of the magistrate and the marriage officer and take over their functions. If this court were to use its inherent powers to take over the functions of the lower C court it would be tantamount to amending legislation through the back door. See *Courtesy Connection (Pvt) Ltd & Anor* v *Mupamhadzi* 2006 (1) ZLR 479 (H) at 482-483. Although Mr *Samkange* argued most persuasively on an issue which affects thousands of other women in the same situation, I was not persuaded that it was the function of the court to amend a statute properly D promulgated by law. It is for these reasons that I accepted the arguments by the first and second respondents. In the event that I am wrong in making a finding on the basis of this preliminary point I will proceed to deal with the other preliminary issues raised.

Disputes of fact

The central dispute which has been raging in this case is whether or not the E first respondent paid *roora* for the applicant and thus married her in terms of customary law. The applicant states inrher founding affidavit that *roora* was paid but this is denied by the first respondent. The applicant at the hearing applied for leave to produce a DVD recording of the events that took place when the first respondent sent his representatives to the applicant's family F on 21 November 2011. The applicant submits that this evidence will lay to rest the argument of whether or not the applicant and the first respondent married under customary law.

The first respondent in the opposing affidavit attached a statement which he made soon after the purported marriage. He totally denies such a marriage G to the Press. The applicant was aware of this statement as it was published in all the national newspapers. Thereafter the first respondent paid *roora* for the second respondent and they had an engagement party in April 2012 which was again published in the media.

A party stands or falls on the papers they have filed in application procedure. Surely in this case the applicant should have known at the very least that it H

Guvava J

A was incumbent upon her to place sufficient evidence in her founding affidavit to show that a marriage did indeed exist between her and the first respondent. If she was in possession of a DVD recording of the proceedings she should have referred to it in her evidence or at the very least attached the usual list upon which *roora* is paid.I thus find that there is a clear dispute of fact which the applicant should have been aware of when the proceedings were B instituted, and the applicant failed to file sufficient evidence to deal with this dispute and it cannot be resolved on the papers.

Interim relief sought is the same as the final relief

The papers filed by the applicant sought an interdict stopping the marriage C of the first and second respondents. The interim relief was however the same as the final relief sought.

This issue, in my view, was dealt with decisively in the well-known case of *Kuvarega* v *Registrar-General & Anor* 1998 (1) ZLR 188 (H) where Chatikobo J held that it was incompetent to claim such final relief by way of an urgent chamber application.

D The applicant, in argument, sought to amend the terms of the final order by deleting para (b) thereof and substitutine it as follows:

"That the applicant's rights as a customary law wife be determined definitely."

It was submitted that by making this amendment the defect complained of E in the Order had been cured.

The difficulty I had with this submission was firstly, that the applicant had not laid out a basis in the founding affidavit for the relief which was now being sought. The founding affidavit does not set out the declaration which the applicant perceives as her right as would have been expected. It seemed to me that this was an afterthought on the part of the applicant in view of F the difficulties that her application had encountered. I would thus again uphold the point in *limine* as raised.

Urgency

The respondents submitted that this matter was not urgent at all as the applicant has an alternative remedy and will not suffer irreparable harm. The applicant G submitted that the matter is urgent as the applicant would suffer irreparable harm as a customary law wife if the first and second respondents were to wed on 15 September 2012, as she would be divorced by operation of law. In my view, the applicant has failed to satisfy the requirement for urgency. Firstly, as I have already explained, she has an alternative remedy in s 19 H of the Act. The powers granted to a magistrate or marriage officer are such

that they can cancel a marriage licence or refuse to solemnize the marriage A if they are satisfied that there is valid ground to do so.

The applicant may not have been aware that the first and second respondent had been issued with a marriage licence until yesterday but this nevertheless does not in any way take away her rights to file an objection even at this stage. The applicant submitted that she would not have access to the marriage B officer so that she can make an oral objection at the wedding but the Act clearly provides for written objections which can be made before the wedding. The plaintiff will not suffer irreparable harm as there is still time for her to lodge an objection with the magistrate, should she wish to do so, as she is now aware that there is a marriage licence in existence. I therefore find that there is no urgency in this matter. C

Cause of action

The final point which was raised by the respondents relates to whether or not the applicant has a cause of action to seek an interdict in this court. It was submitted by Mr *Mpofu* that as her claim was based in customary law she had no basis to claim a remedy under the general law. It was submitted by D Mr *Samkange* that the applicant's cause of action arises from the recognition of customary law in terms of s 89 of the Constitution and the fact that the applicant is a customary law wife.

Section 89 of the Constitution provides as follows:

> "Subject to the provisions of any law for the time being in force in Zimbabwe E relating to the application of African customary law, the law to be administered by the Supreme Court, the High Court and by any courts in Zimbabwe subordinate to the High Court shall be the law in force in the Colony of the Cape of Good Hope on 10th June, 1891, as modified by subsequent legislation having in Zimbabwe the force of law."

A reading of s 89 of the Constitution clearly makes the recognition of F customary law subject to any other law. Section 3 of the Customary Marriages Act [*Chapter 5*:*07*] provides that a customary marriage which has not been solemnised is not a valid marriage. The legislature recognised the marriage for certain purposes as set out in s 5(5) of that Act and s 68(3) of the Administration of Estates Act [*Chapter 6*:*01*]. It is clear to me that in order for the applicant to approach this court for an interdict she must do G so based on a recognised principle of general law. I agree entirely with the submissions by Mr *Mpofu* that the applicant has failed to lay this legal basis.

Costs

On the issue of costs, it was submitted by the respondents that the applicant must pay costs on a punitive scale for a number of reasons: Firstly, the language H

A used in the applicant's founding affidavit was not temperate. She falls just short of calling the first respondent insane. Secondly, the applicant failed to concede in areas where it was quite apparent that she should have done so.

The applicant in response submitted that she should not be visited with costs on a higher scale as she has been courageous enough to fight for the rights B of women who are married under customary law. Mr *Samkange* further submitted that the application was not filed for an ulterior motive other than to allow a court to determine the rights of women married under customary law. He submits that as the case raised issues of national interest each party should bear their own costs. The general rule is that costs follow the cause, and a successful litigant should be entitled to recover their costs.

C As was stated by L Rubin *Law of Costs in South Africa* (Juta & Co, 1949) at p 190:

> "Punitive costs are awarded at the discretion of the court where there has been dishonest, or malicious conduct, vexatious or reckless or frivolous proceedings".

At the commencement of this judgment I lamented the problems that have D arisen due to the parallel legal system in this country and the problems faced by women due to the non- recognition of unregistered customary law unions except for specified purposes. It is not in dispute that a very large number of marriages in Zimbabwe are in terms of an unregistered customary law unions. It is also not in dispute that legislature has not done anything to try and rationalize the marriage laws of this country so that problems, such as E the one that presents itself in this case, are dealt with.

I was also of the view that the first respondent could have taken a number of steps to circumvent this litigation had he wished to do so. The applicant too could have conducted her litigation in a less abrasive manner. Thus, whilst I am not in any way condoning the language properly complained of F 1by the respondents, I do not consider that an award of costs should be made against her. She was fighting for her man and it is known that emotions tend to run high in such cases. At the commencement of this matter the applicant applied to lead evidence through a DVD of what transpired when the first respondent went to the applicant's home on 21 November 2011. I reserved my decision on the matter pending my hearing of the preliminary matters G raised. As I have found for the first and second respondents on the preliminary points, it is my view that it is not necessary for me to make a ruling on the admissibility of this evidence as it would have been more relevant on the merits which I have not determined.

I thus make the following order: H

1. The application be and is hereby dismissed.

Guvava J

2. The applicant shall pay the third respondent's costs on a legal practitioner A and client scale.
3. There shall be no order as to costs in respect to the first and second respondents.

Venturas & Samkange, applicant's legal practitioners B

Atherstone & Cook, first and second respondents' legal practitioners

© 2015 Juta and Company (Pty) Ltd.

Document 28 of 60

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2012/Volume 2/RUKUNI v MIN OF FINANCE & ANOR 2012 (2) ZLR 205 (H)

RUKUNI v MIN OF FINANCE & ANOR 2012 (2) ZLR 205 (H)

Citation 2012 (2) ZLR 205 (H)

Case No	Judgment No. HH-340-12
Court	High Court, Harare
Judge	Patel J
Heard	31 July 2012; *CAV*
Judgment	13 September 2012
Counsel	*T Mpofu*, for the applicant *R H Goba*, for the first respondent *D Ochieng*, for the second respondent
Case Type	Opposed application
Annotations	No case annotations to date

Flynote

Administrative law – *administrative decisions and acts – decision adverse to applicant – relief under Administrative Justice Act [Chapter 10:28] – unreasonable decision – degree of unreasonableness required to set aside decision – unreasonableness must show mala fides or ulterior motive*

D **Stock exchange** – *Securities Commission – appointment and removal of commissioners by Minister of Finance – grounds for removal of commissioner – occupation inconsistent with office of commissioner – commissioner a director in company listed on stock exchange – Minister entitled to remove commissioner even if had been aware at time of* E *appointment of commissioner's directorship – need for Minister to act fairly and on reasonable grounds*

Headnote

The applicant was appointed in 2008 as a commissioner of the Securities Commission of Zimbabwe by the Minister of Finance. In May 2011 the Minister terminated her tenure as commissioner. At the time of her F appointment, when asked to declare her assets and business interests, she disclosed that she was a member of the board of a company listed on the Zimbabwe Stock Exchange. One other commissioner was also in the position of holding office in a listed entity. In February 2010 the Commission resolved that there was a potential conflict between the office of commissioner and tenure on the board of a listed entity and told the G Minister of its views. The Minister told the two affected commissioners that they should choose between their office as commissioners and their tenure on the boards of listed entities. The applicant refused to comply and said that she would only resign if compensated for the loss of fees for the remaining period of her office on the Commission. The H Minister then formed the view that the applicant's office as commissioner

Patel J

was inconsistent with her tenure on the board of the company. He A consequently wrote to the Commission directing the applicant and the other commissioner to vacate their office as commissioners. The applicant claimed compensation from the Commission for the remaining term of her office. This claim was declined by the Chairman of the Commission on the ground that the Securities and Exchange Act [*Chapter 24:25*] did B not provide for such compensation.

The applicant argued that the Minister's decision was contrary to s 3(1)(a) of the Administrative Justice Act [*Chapter 10:28*], in that he failed to act lawfully, reasonably and fairly. The Minister argued that he was entitled to so act in terms of s 10(2)(e) of the Securities Act because the prevailing circumstances justified his decision. Moreover, he exercised C his discretion reasonably after giving the applicant ample time to elect which post she wished to retain. The Commission took the stance that the purpose of disqualifying dual tenure is to ensure transparency and integrity and that there was a conflict a interest in the applicant's tenure on the Commission as well as the board of the company because of her D access to information through these posts and

the fiduciary duties that she owed to both. Such a situation would undermine the purpose of the Securities Act and the integrity and independence of the Commission. In reply, the applicant argued that the provision of the Act relied upon by the Minister only applied to a material change of circumstances that occurs during a commissioner's tenure of office, not to her situation as E she was appointed to the Commission after full scrutiny and disclosure of her position on the company's board. Paragraph (e), taken in the context of section 10(2) as a whole, had to be construed prospectively. The provision was concerned with changed circumstances, not a pre-existing situation that had been specifically approved by the Minister. There had been no change in the applicant's circumstances, nor had F any actual conflict of interest materialised as envisaged in s 16(5), that entitled the Minister to act as he did.

One of the ancillary issues raised in argument at the hearing of this matter pertained to the full-time versus part-time status of commissioners.

Held, that there was no distinction in s 9 of the Securities Act between part G -time and full-time appointments to the Commission. Every commissioner must devote himself to the work of the Commission and is expressly precluded from engaging in any other occupation, unless permitted to do so by the Minister. In this case, the applicant was so authorised prior to her appointment, with specific reference to the corporate interests and positions that she had declared at that time. H

2012 (2) ZLR p207

Patel J

A *Held*, further, that the Minister was perfectly entitled to invoke s 10(2)(e), which could not be interpreted so as to be confined to changed circumstances. It is a perpetual provision with infinite effect. The fact that the Minister had previously approved the applicant's position did not preclude him from forming the opinion at a later stage, provided of course that he did so fairly and on reasonable grounds, that her B continued tenure on the company board was inconsistent with her duties as a commissioner. The proper exercise of this discretion would not only accord with the intrinsic objects of the Act, *viz.* integrity and transparency in the regulation of the securities market, but would also be incumbent upon the Minister in the fulfilment of his statutory duties. C The exercise of his discretion in that regard could not be set aside as having been unlawful. The remaining question was whether or not this discretion was exercised reasonably and fairly.

Held, further, that in deciding the reasonableness or otherwise of an administrative action, the court is enjoined to consider, *inter alia*, whether the action taken is so unreasonable that no reasonable person D would have taken it, whether there is any evidence or other material which provides a reasonable or rational foundation to justify the action taken, and whether an irrelevant matter has been taken into account or a relevant matter has not been taken into account. The traditional approach under the common law is to require gross irrationality, as E opposed to mere unreasonableness, as a ground of review. The degree of unreasonableness must be such that something else can be inferred from it, *viz.* that the administrative authority was actuated by *mala fides* or some ulterior motive or that it failed to apply its mind to the matter. The threshold of reasonableness required by s 3(1)(a) of the Administrative Justice Act has not been modified to any degree beyond the parameters F of the common law.

Held, further, that the power to remunerate or compensate a commissioner for his remaining tenure on the Commission was not reasonably necessary or incidental to the Minister's power to appoint commissioners and fix their terms and conditions of office under s 5(1) and 9(4) of the Act. G Even if this power were to be necessarily implied, it is a fundamental principle of our law that no State official can expend public moneys or commit himself to any such expenditure unless this is expressly provided for by or under statute.

Held, further, on the facts, that there was nothing unreasonable or unfair in the Minister's decisions or actions. The court could not interfere simply H because it might have arrived at a different decision on the same facts,

---

2012 (2) ZLR p208

Patel J

nor could it usurp the Minister's functions and substitute his opinion and A discretion with its own. The applicant had not shown that the Minister was actuated by *mala fides* or some ulterior motive or that he failed to apply his mind to the matter. In all the circumstances, the decisions

impugned by the applicant were not so unreasonable that no reasonable person in the Minister's position would have made them. As to the alleged B unfairness of the Minister's actions, he afforded the applicant ample and adequate opportunity to make representations. He fully considered the representations that the applicant did put forward. The only issue that he did not address was the applicant's claim for compensation. However, the question of compensation was collateral and consequential to the decision as to whether or not the applicant should continue in office. C The decision to terminate her tenure stood on its own.

Cases referred to

Admin, Tvl & The Firs Invstms (Pty) Ltd v Johannesburg City Council 1971 (1) SA 56 (A) D

Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1947] 2 All ER 680; [1948] 1 KB 223 (CA)

Chapfika v RBZ 2007 (2) ZLR 337 (H)

Dombodzvuku & Anor v Sithole NO & Anor 2004 (2) ZLR 242 (H)

Masiyiwa v TM Supermarkets 1990 (1) ZLR 166 (S)

Union Government v Union Steel Corp (SA) Ltd 1928 AD 220 E

Legislation considered

Administrative Justice Act [*Chapter 10:28*], s 3(1)(a)

Interpretation Act [*Chapter 1:01*], ss 11, 24(1) & 24(2) F

Securities and Exchange Act [*Chapter 24:25*], ss 9 & 10(2)(e)

Case information

T Mpofu, for the applicant

R H Goba, for the first respondent

D Ochieng, for the second respondent G

Judgment

Patel J: The applicant in this matter was appointed in 2008 as a commissioner of the second respondent, the Securities Commission of Zimbabwe (the Commission), by the first respondent, the Minister of Finance (the Minister). She seeks an order setting aside the decision of the Minister taken in May 2011 terminating her tenure as commissioner. Both respondents resist the H

Patel J

A application on the ground that the applicant's removal from office was lawful under the governing enactment.

Background

The salient facts *in casu* are not in dispute. They emerge fairly clearly from the relevant correspondence between the parties. The applicant was appointed B to the Commission on 1 September 2008. At the time of her appointment, she was asked to declare her assets and business interests. Among other things, she duly disclosed that she was a member of the board of OK Zimbabwe Ltd (OK Zim), a company listed on the Zimbabwe Stock Exchange. One other commissioner was also in the position of holding office in a listed entity. Subsequently, on 19 January 2010, her term of office was fixed for C four years and was set to expire on 31 August 2012.

Thereafter, her status as commissioner was not questioned until 1 February 2010, when it was discussed by the full Commission. The latter resolved (by a majority of three to two) that there was a potential conflict between the office of commissioner and tenure on the board of a listed entity. The D Chairman of the Commission then wrote to the Minister on 23 February 2010 setting out its position. The Minister wrote back on 24 May 2010 directing that the two commissioners should elect between their office as commissioners and their tenure on the boards of listed entities. The

applicant replied by refusing to comply with this directive and stating that she would only resign upon being compensated for the loss of fees for the remaining E period of her office on the Commission. The Minister then formed the view, citing a specific instance of conflict involving another listed entity, that the applicant's office as commissioner was inconsistent with her tenure on the board of OK Zim. He consequently wrote to the Commission on 12 May 2011,directing the applicant and the other commissioner in question F to vacate their office as commissioners. Eventually, on 21 June 2011, the applicant wrote to the Commission claiming compensation in the sum of US$80 707 for the remaining term of her office. This claim was declined by the Chairman of the Commission on the ground that the Securities Act did not provide for such compensation.

G The applicant avers that the Minister's decision is contrary to s 3(1)(a) of the Administrative Justice Act [*Chapter 10:28*], in that he failed to act lawfully, reasonably and fairly. She accordingly seeks an order setting aside his decision to terminate her term of office. The Minister's defence is that he was entitled to so act in terms of s 10(2)(e) of the Securities and Exchange Act [*Chapter 24:25*] because the prevailing circumstances justified H his decision. Moreover, he exercised his discretion reasonably after giving

the applicant ample time to elect which post she wished to retain. The A Commission takes the stance that the purpose of disqualifying dual tenure is to ensure transparency and integrity. There was a conflict of interest in the applicant's tenure on the Commission as well as the board of OK Zim because of her access to information through these posts and the fiduciary duties that she owed to both. If a commissioner were allowed to sit on the B board of a listed entity, this would undermine the purpose of the Securities Act and the integrity and independence of the Commission as a regulator of the securities and investment sector. In response, the applicant avers that the provision of the Act relied upon by the Minister only applies to a material change of circumstances that occurs during a commissioner's tenure of office. It does not apply to her situation as she was appointed to the Commission C after full scrutiny and disclosure of her OK Zim position.

Relevant provisions of the Securities and Exchange Act

Section 9 of the Securities Act regulates the terms of office and conditions of service of commissioners. In particular, subss (3) and (4) stipulate as follows:

> "(3) Every commissioner shall give his or her whole time to the service of the D Commission and shall not engage in any other occupation unless the Minister, on the Commission's recommendation, has permitted any commissioner to do so.
>
> (4) Subject to subsection (3), commissioners shall hold office on such terms and conditions as the Minister may fix for commissioners generally."

Section 10 of the Act governs the vacation of office by commissioners and, E by virtue of subs (1)(d), a commissioner shall vacate office if he or she is required to do so in terms of subs (2) or (3). The latter subsection deals with the situation of absence without leave from three consecutive meetings of the Commission. Subsection (2) provides that:

> "The Minister may require a commissioner to vacate office if –
>
> (*a*) the commissioner has been guilty of conduct which renders him or her F unsuitable to continue to hold office as a commissioner; or
>
> (*b*) the commissioner has failed to comply with any condition of his or her office fixed in terms of section *nine*; or
>
> (*c*) the commissioner is mentally or physically incapable of efficiently performing his or her duties as a commissioner; or G
>
> (*d*) the commissioner contravenes section *sixteen*; or
>
> (*e*) the commissioner or his or her spouse engages in any occupation, service or employment, or holds any asset, which in the Minister's opinion is inconsistent with his or her duties as a commissioner."

Also pertinent for present purposes is s 16 of the Act, which enjoins commissioners to disclose relevant interests, assets and connections, including H

A every occupation, service or employment which a commissioner or his or her spouse engages in for remuneration. Subsection (2) requires such disclosure before a commissioner performs any function as such, while subss (3) and (4) call for disclosure after appointment to office. Subsection (5) prohibits a commissioner from taking part in the consideration or discussion of any matter involving a conflict of interest or from voting on any such question B before the Commission. Subsection (6) makes it an offence for any person to contravene subs (2), (3), (4) or (5).

Whether power to remove from office exercised lawfully

One of the ancillary issues raised in argument at the hearing of this matter pertains to the full-time versus part-time status of commissioners. Mr C *Mpofu* took the position that all the present incumbents were engaged on a part-time basis and that s 9(3) of the Act is only applicable to full-time commissioners and therefore did not apply to the applicant. In this regard, I agree with Mr *Goba* that the applicant and her colleagues could only have been appointed under s 9 of the Act. Subsections (1) and (2) provide for the appointment of every commissioner for a term of four years, with the D possibility of reappointment for a further four year period. Thereafter, by dint of subs (3), every commissioner must devote his or her whole time to the service of the Commission, unless otherwise authorized by the Minister either before or after his or her appointment. Again, subs (4) also applies to all commissioners, so that they hold office on such terms and conditions as E the Minister may fix for commissioners generally. In short, I am quite unable to perceive in these provisions any distinction between part-time and full-time appointments to the Commission. In my view, every commissioner must devote himself or herself to the work of the Commission and is expressly precluded from engaging in any other occupation, unless permitted to do so by the Minister. In the instant case, the applicant was so authorised prior F to her appointment, with specific reference to the corporate interests and positions that she had declared at that time.

The real issue at hand is not whether the applicant was a part-time appointee but whether she was lawfully required to vacate her office as commissioner. In this regard, it is common cause that the Minister proceeded to act under G s 10(2)(e) of the Act. The applicant contends that the Minister was not so empowered to act. On her behalf, Mr *Mpofu* submits that para (e), taken in the context of s 10(2) as a whole, is to be construed prospectively. The provision is concerned with changed circumstances and not the pre-existing situation that was specifically approved by the Minister. There was no change in the applicant's circumstances, nor had any actual conflict of interest materialised H as envisaged in s 16(5), that entitled the Minister to act as he did.

Patel J

For the respondents, it is submitted that s 10(2)(e) is couched in the present A or future continuous tense and may be applied at any time in order to give effect to the provisions of the Act. It is further argued that the Minister also acted impliedly under s 10(2)(b) as read with subss (3) and (4) of section 9. In other words, the applicant's failure to comply with her altered conditions of service entitled the Minister to demand that she vacate her office. B

It is not in dispute that the Minister initially approved the applicant's appointment to the Commission being fully cognisant of her post on the board of OK Zim. He only changed his position after receiving the Commission's recommendation on the matter. He then applied his mind to the situation and, having concluded that there was a potential conflict of interest, he called upon the applicant to elect between the two posts. When she failed to do C so, he invoked s 10(2)(e) of the Act and required her to vacate her office on the Commission. In my view, he was perfectly entitled to do so. I do not think that s 10(2)(e) can be interpreted so as to be confined to changed circumstances. It is a perpetual provision with infinite effect. I am fortified in this construction by ss 11 and 24(1) of the Interpretation Act [*Chapter 1:01*] which restate the common law position as follows: D

> "11. Every enactment shall be construed as always speaking, and if anything is expressed in the present tense it shall be applied to the circumstances as they occur so that effect may be given to each enactment according to its true spirit, intent and meaning."
>
> "24(1). Where an enactment confers a power, jurisdiction or right, or imposes E a duty, the power, jurisdiction or right may be exercised and the duty shall be performed from time to time as occasion requires."

In the instant case, the fact that the Minister had previously approved the applicant's position did not preclude him from forming the opinion at a later stage, provided of course that he did so fairly

and on reasonable grounds, that her continued tenure on the board of OK Zim was inconsistent with F her duties as a commissioner. The proper exercise of this discretion would not only accord with the intrinsic objects of the Securities Act, *viz.* integrity and transparency in the regulation of the securities market, but would also be incumbent upon the Minister in the fulfilment of his statutory duties. In short, it would be necessary to effectuate the provisions of the Act. G

In light of the foregoing conclusion, it does not seem necessary for me to deal with the additional argument proffered by both counsel for the respondents. However, it may be as well to do so for the sake of completeness. The argument proceeds on the basis that, by accepting the Commission's recommendation to avoid any conflict of interest as contemplated in s 9(3) of the Act, the Minister altered the applicant's conditions of service in terms of s 9(4). The effect of H

A this alteration was to prohibit any commissioner from sitting on the board of a listed entity. Thereafter, when the applicant failed to relinquish her post on the board of OK Zim, he acted under s 10(2)(b) and required her to vacate her office on the Commission. It does not matter that he did not specifically cite that provision or that he cited the wrong provision. This does not invalidate the exercise of his power to remove from office, so long as authority for his B action exists in any one or more of the five grounds enumerated in s 10(2). Reliance for these propositions is placed upon Baxter *Administrative Law*, at p. 366, and the decision in *Masiyiwa* v *TM Supermarkets* 1990 (1) ZLR 166 (S) at 170-171. However, in the quotation from Baxter referred to by Mr *Goba*, the learned author is concerned more with the form in which an C administrative decision is communicated to the person or persons affected rather than its substance or the reasoning behind it. As for *Masiyiwa's* case, I cannot see any authority for the argument propounded by Mr *Ochieng* in the passage that he cites.

I agree with Mr *Ochieng* that s 9(4) of the Act is "always speaking" and that the powers thereunder are exercisable from time to time as exigency and D discretion may dictate. This approach accords with ss 11 and 24(1) of the Interpretation Act cited earlier. I also accept that the power to fix conditions of service would by necessary implication include the power to alter those conditions, subject to such limitations as would apply to the exercise of any statutory power. However, it is arguable whether the Minister did in fact alter E the conditions of office for commissioners generally in the manner envisaged by s 9(4). His letters to the Commission in that regard do not purport to do so in clear terms and make no specific reference to s 9(4). Be that as it may, it seems to me that there is considerable merit in Mr *Mpofu's* objections to this additional argument on behalf of the respondents. The Minister's letters and, more significantly, his opposing affidavit make no mention whatsoever F of s 10(2)(b). They are explicitly confined to s 10(2)(e) as the legal basis for requiring the applicant to relinquish her post. Moreover, the applicant has come to court specifically to challenge the Minister's exercise of this power. I accordingly take the view, in keeping with the intention behind s 3(1)(c) of the Administrative Justice Act, that the Minister's defence must be limited to the reasons that he has cited. It cannot be extended to encompass G provisions of the Act not relied upon in his opposing papers.

To conclude this aspect, I am satisfied that the circumstances expressly relied upon by the Minister, *viz.* the potential conflict of interest giving rise to inconsistency with the applicant's duties as a commissioner, entitled him to invoke s 10(2)(e) of the Act as a proper basis for requiring the applicant to H vacate her office. It follows that the exercise of his discretion in that regard

cannot be set aside as having been unlawful. What remains to be considered A is whether or not this discretion was exercised reasonably and fairly.

Reasonableness and fairness under the Administrative Justice Act

Subsections (1) and (2) of s 3 of the Administrative Justice Act prescribe the duties of administrative authorities generally, as follows:

> "(1) An administrative authority which has the responsibility or power to take B any administrative action which may affect the rights, interests or legitimate expectations of any person shall –
>
> (a) act lawfully, reasonably and in a fair manner; and

(b) act within the relevant period specified by law or, if there is no such specified period, within a reasonable period after being requested to take the action by the person concerned; and C

(c) where it has taken the action, supply written reasons therefor within the relevant period specified by law or, if there is no such specified period, within a reasonable period after being requested to supply reasons by the person concerned.

(2) In order for an administrative action to be taken in a fair manner as required by paragraph (*a*) of subsection (1), an administrative authority shall give a person D referred to in subsection (1) –

(a) adequate notice of the nature and purpose of the proposed action; and

(b) a reasonable opportunity to make adequate representations; and

(c) adequate notice of any right of review or appeal where applicable."

Subsection (3) of s 3 permits an administrative authority to depart from any of E the requirements referred to in subs (1) or (2) under specified circumstances, including the need to promote efficient administration and good governance as well as the public interest. Section 4 of the Act sets out the forms of relief that are available against non-compliance with s 3. In this regard, s 5 delineates the diverse factors that the court may have regard to for the purposes of determining whether or not an administrative authority has failed F to comply with the provisions of s 3. In the context of the reasonableness or otherwise of an administrative action, the court is enjoined to consider, *inter alia*, whether the action taken is so unreasonable that no reasonable person would have taken it, whether there is any evidence or other material which provides a reasonable or rational foundation to justify the action taken, and G whether an irrelevant matter has been taken into account or a relevant matter has not been taken into account.

A point that was raised and argued at the hearing of this matter relates to the degree of unreasonableness that must be shown in order to render an administrative action or decision reviewable. The traditional approach under the common law is to require gross irrationality, as opposed to mere H

Patel J

A unreasonableness, as a ground of review. The degree of unreasonableness must be such that something else can be inferred from it, *viz.* that the administrative authority was actuated by *mala fides* or some ulterior motive or that it failed to apply its mind to the matter. See *Union Government v Union Steel Corp (SA) Ltd* 1928 AD 220 at 237; B *Administrator, Transvaal & The Firs Investments (Pty) Ltd* v *Johannesburg City Council* 1971 (1) SA 56 (A) at 79-80. The position in England is precisely the same and is aptly captured in the celebrated case of *Associated Provincial Picture Houses Ltd* v *Wednesbury Corporation* [1947] 2 All E R 680 (CA); [1948] 1 KB 223 (CA).

There is some basis for the proposition that s 3(1)(a) of the Act goes beyond C the common law to embrace mere unreasonableness as a proper ground for review. Firstly, there is the decision in *Dombodzvuku & Anor* v *Sithole NO & Anor* 2004 (2) ZLR 242 (H) at 247, where it was suggested, *obiter* and without further analysis, that a decision can be reviewed even if it is only unreasonable *simpliciter*. Secondly, s 2(2) of the Act defines its scope in D the following terms:

> "The provisions of this Act shall be construed as being in addition to, and not as limiting, any other right to appeal against, bring on review or apply for any other form of relief in respect of any administrative action to which this Act applies."

In my view, this interpretive aid does not really take the matter further. E Even if the provisions of the Act are to be construed as being additional or supplemental to any other right of review, it does not follow that they operate to override or modify the common law. This is particularly so in light of the time-honoured presumption against any ouster or modification of the common law in the absence of express provision or necessary intendment F to that effect. I am unable to read the injunction in s 3(1)(a) to "act lawfully, reasonably and in a fair manner" as having any such effect. My view is emboldened by the factors set out in s 5 illustrating non-compliance with s 3. These factors are perfectly consonant with common law grounds of reviewability. This applies equally to the criteria relating to reasonableness G prescribed in paragraphs (j) to (m) of s 5. Indeed, the criterion in paragraph (j), *viz.* "the action taken is so unreasonable that no reasonable person would have taken it" is virtually *ad idem* with the test expounded by Lord Greene MR in the *Wednesbury Corporation* case, *supra*, at 683. In the result, I am firmly of the view that the threshold of reasonableness required by s 3(1)(a) of the Act has not been modified to any degree beyond the parameters H of the common law.

Patel J

Whether removal from office effected reasonably and fairly A

Mr *Mpofu* submits that the Minister acted unreasonably and unfairly for several reasons. He changed his perception of the applicant's tenure on the Commission and proposed that she make an election between her posts on the Commission and the board of OK Zim. The applicant then made a counter-proposal for compensation. The Minister did not deal with that proposal and B his failure to do so was both unreasonable and unfair. It was clearly adverse to the applicant's interests and contrary to her legitimate expectations. It was also contrary to statute because the power to remunerate the applicant for her remaining term of office, although not expressly provided for in the Securities Act, was necessary or incidental to the Minister's express powers under that Act. C

While I accept that the Minister enjoys powers correlative to those expressly vested in him under the enabling Act – as is clearly contemplated in s 24(2) of the Interpretation Act – I do not accept that the power to remunerate or compensate a commissioner for his or her remaining tenure on the Commission is reasonably necessary or incidental to his power to appoint D commissioners and fix their terms and conditions of office under ss 5(1) and 9(4) of the Act. Even if this power were to be necessarily implied, it is a fundamental principle of our law that no State official can expend public moneys or commit himself to any such expenditure unless this is expressly provided for by or under statute. See *Chapfika* v *Reserve Bank of Zimbabwe* 2007 (2) ZLR 337 (H) at 343-344. E

In the instant case, after receiving the Commission's recommendation that commissioners should not sit on the boards of listed entities, the Minister decided that this practice was contrary to good governance because of its inherent conflict of interest. At the same time, he gave the two commissioners concerned the option to remain on the Commission or relinquish their posts F in the listed entities. The applicant did not comply with that directive and insisted that she would only resign from the Commission after receiving compensation for her remaining term of office. In response, the Minister extended the deadline for the commissioners to make their election. Again, the applicant did not heed that directive. Eventually, almost one year after his G initial decision on the matter, the Minister directed that the two commissioners vacate their office in terms of s 10(2)(e) of the Act.

On these facts, which are common cause, I am unable to find anything unreasonable or unfair in the Minister's decisions or actions. As regards his appreciation of the potential conflict of interest and the principles of good governance, this court cannot interfere simply because it might have H

Patel J

A arrived at a different decision on the same facts. The court cannot usurp the Minister's functions and substitute his opinion and discretion with its own. As for the Minister's decision to remove the applicant from office, she has not demonstrated that he was actuated by *mala fides* or some ulterior motive or that he failed to apply his mind to the matter. Having regard to all of the relevant circumstances, I am satisfied that the decisions impugned by the B applicant were not so unreasonable that no reasonable person in the Minister's position would have made them.

Turning to the alleged unfairness of the Minister's actions, it seems to me that he afforded the applicant ample and adequate opportunity to make representations. Furthermore, he fully considered the many representations C that the applicant did put forward. The only issue that he did not address was the applicant's claim for compensation. In principle, an administrative authority has a duty to make a determination on every relevant issue and a duty to give reasons for his decision. However, as I see it, the question of compensation was collateral and consequential to the decision as to whether or not the applicant should continue in office. The decision to terminate her D tenure stands on its own and it is that decision that the applicant seeks to overturn. In any event, as I have already stated, there was no legal basis upon which the Minister could have lawfully compensated the applicant in the absence of any statutory provision therefor. Thus, the question of compensation becomes irrelevant to the fairness or otherwise of the Minister's decision E to remove the applicant from office. It follows that the Minister cannot be said to have acted in an unfair manner.

Disposition

To summarise all of the foregoing, the applicant has failed to establish that the Minister contravened s 3(1)(a) of the Administrative Justice Act in any F way by acting unlawfully, unreasonably or in an unfair manner. Consequently, her claim to set aside the Minister's decision terminating her tenure of office cannot succeed.

As regards costs, it must be accepted that the applicant's removal from office cannot be attributed to any fault or misconduct on her part. Moreover, I take G the view that this application raises matters of significant public importance warranting a departure from the ordinary rule that costs should follow the cause.

In the result, the application is dismissed with each party bearing its own costs.

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

---

2012 (2) ZLR p218

Patel J

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

Coghlan Welsh & Guest, second respondent's legal practitioners

---

© 2015 Juta and Company (Pty) Ltd.

Document 29 of 60

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2012/Volume 2/S v MAZANGWA 2012 (2) ZLR 219 (H)

S v MAZANGWA 2012 (2) ZLR 219 (H)

2012 (2) ZLR p219

Citation	2012 (2) ZLR 219 (H)
Case No	Judgment No. HH-370-12
Court	High Court, Harare
Judge	Mutema J
Heard	13 September 2012
Judgment	13 September 2012
Counsel	Details not supplied
Case Type	Criminal review
Annotations	No case annotations to date

Flynote

C **Court** – *magistrates court – court of record – meaning of "record" – record indecipherable because of magistrate's poor handwriting – not a record which can be used as basis for reasoning or discussion – judgment – what it should consist of – should be a process of reasoning, showing why conclusions were drawn*

D **Criminal procedure** – *meaning of – record indecipherable because of magistrate's poor handwriting – not a record which can be used as basis for reasoning or discussion – judgment – what it should consist of – should be a*

process of reasoning, showing why conclusions were drawn

Headnote

E Section 5(1) of the Magistrates Court Act [*Chapter 7:10*] provides that the magistrates court shall be a court of record. The word "record" denotes a "collection of data". The term "data" can be defined as "factual information used as a basis for reasoning, discussion or calculation". If the record of proceedings is indecipherable because the magistrate's handwriting is so bad, it means that it cannot pass the definition of "record", neither F can unreadable data be called factual information to be used as a basis for reasoning or discussion to enable the trier of fact in a court of law to analyse and arrive at an informed or correct decision.

Judgment writing is a process of reasoning, giving reasons why and how a particular finding was arrived at. A trier of fact is not expected simply to waffle or regurgitate what witnesses said and then, out of the blue, G baldly and boldly conclude that the State managed to prove its case beyond reasonable doubt and convict an accused person. A trier of fact is enjoined to deal with the credibility of the witnesses and justify why the evidence of a particular witness is to be preferred to that of the accused and why that of the accused is being rejected.

2012 (2) ZLR p220

Mutema J

Legislation considered A

Criminal Procedure and Evidence Act [*Chapter 9:07*], ss 271 & 272

Magistrates Court Act [*Chapter 7:10*], ss 5 & 114

Judgment

Mutema J: The record of proceedings in this case is redolent of irregularities. These are they: B

The accused was arraigned before a provincial magistrate sitting at Bikita facing a charge of contravening s 114 of the Criminal Law (Codification and Reform) Act, [*Chapter 9:23*] on 27 September 2011, it being alleged that he had stolen two head of cattle.

The record of the proceedings goes something like this:

"Court –	Put the charge C
Interpreter –	charge put to the accused.
Court–	how do you plead?
A.	Guilty

Facts put to the accused and understood.

Provisions of s 188 and 189 of the code explained to the accused and understood.

Defence outline …" D

Thereafter a full trial was conducted with the State leading evidence from three witnesses and accused giving his own evidence in his defence.

The legal position in our law is that where an accused pleads guilty, as indicated *in casu*, the court proceeds in terms of s 271(2)(a) or (b) of the Criminal Procedure and Evidence Act [*Chapter 9:07*], depending on the E gravity of the offence being admitted. In the instant case that procedure was not embarked upon. Only a plea of guilty was entered. The record does not indicate whether the guilty plea was ever altered to not guilty in terms of s 272 of [*Chapter 9:07*] to warrant delving into a trial. It indicates only that a plea of guilty was entered, followed by a trial. F

I was unable to take up this issue with the trial magistrate because the handwritten notes were indecipherable, hence I ordered that the proceedings be typed and resubmitted – another

irregularity I shall advert to below. I found it futile to again refer the record back for the trial magistrate's comment.

The bottom line is that it was an irregularity for the trial magistrate to enter G a plea of guilty and not proceed in terms of s 271(2)(a) or (b) of [*Chapter 9:07*] or s 272 and go on to hold a trial as he did.

As stated above, the handwriting was so unreadable that I directed, on 24 February 2012, that the proceedings be typed and the record be resubmitted for review. The resident magistrate at Bikita (who is not the trial magistrate) wrote to the provincial magistrate for Masvingo that: H

Mutema J

> A "The Clerk of Court has also failed to decipher the handwriting. The record of proceedings is being forwarded to your good office for further directives"

This was on 11 May 2012. On 5 June 2012 the Masvingo provincial magistrate had the record redirected to Zaka magistrates court "for the clerks there to assist transcribe the record".

B The presumption is that the trial magistrate was now stationed at Zaka.

Whilst the proceedings were duly typed, it appears from the typed notes that the clerks too had difficulty in deciphering the handwriting for there are a number of omissions as well as grammatical errors.

Section 5(1) of the Magistrates' Court Act [*Chapter 7:10*] provides that the magistrates' court shall be a court of record. According to *Wikipedia*, *the* C *Free Encyclopedia*, the word "record "denotes a "collection of data". And the term "data" is defined as "factual information used as a basis for reasoning, discussion or calculation".

Now, if the record of proceedings is indecipherable, it means that it cannot pass the definition of record, neither can that unreadable data be called factual D information to be used as a basis for reasoning or discussion to enable the trier of fact in a court of law to analyse and arrive at an informed or correct decision.

The story is often told of a former magistrate who was discharged from service for his indecipherable handwriting which he himself failed to read!

E In the instant case, it cannot be argued that a record let alone a proper one was kept as required by the Act.

The judgment that was written by the trial magistrate can at best be described as an epitome of a bad judgment bordering on incompetence. It is a half page judgment in these words:

> F "The accused is facing a charge of stock theft. In trying to present its case the stock had (*sic*) (supposed to read the State led) the evidence of the complainant who had missed two beast (*sic*) a black ox and the brown ox with a white patch on the face. The second witness Abigail Mbengo testified that he (*sic*) had seen a stranger who hides (*sic*) in a bush with the two beasts fitting complainant's destination (*sic*) (supposed to read description). The second witness testified that the stranger later on found (*sic*) with accused. Accused is saying to have told G (*sic*) Abigail Mbengo that he know (*sic*) the stranger. Abigail went on to testify that the accused told her not to worry of (*sic*) the stranger and ever want (*sic*) his wife to tell her to keep quiet about the stranger (supposed to read – even sent his wife to tell her to keep quiet about the stranger).
>
> On being put to his defence accused denied knowing the stranger who had the cattle saying that he did not know anything of (*sic*) this. Upon analysing this H case if (*sic*) can be seen that accused was not faithful over his relations with

---

Mutema J

> the strange (*sic*) who had the cattle he could not explain only the …. (*sic*) the A stranger. The State managed to prove its case beyond reasonable doubt in finding …. (*sic*) the accused guilty as charged for stock theft"

Even a lay person cannot say that the foregoing is anywhere near a reasoned judgment. Judgment writing is a process of reasoning, giving reasons why and how a particular finding (if of fact) was arrived at. A trier of fact is not B expected to simply waffle or regurgitate what witnesses said and then out of the blue baldly and boldly conclude that the State managed to prove its case beyond

reasonable doubt and convict an accused person. A trier of fact is enjoined to deal with the credibility of the witnesses and justify why the evidence of a particular witness is to be preferred to that of the accused and why that of the accused is being rejected. *In casu* no jot or tittle of analysis of C the various witnesses' evidence, including that of the accused, was ever done.

In the event I am not persuaded that the accused was correctly convicted. The conviction not being safe, should not be allowed to stand.

The hapless accused was sentenced as follows:

> "14 years imprisonment of which 2 years imprisonment is suspended for D 3 years on condition you do not within that period commit any offence involving dishonesty to which you would be sentenced to prison (*sic*) without the option of a fine".

That the wording is inelegant goes without cavil. Materially, it is sad to note that the trial magistrate had no clue about the issue of special circumstances E when it came to sentence. Section 114(2)(e) provides that:

> "(e) if the stock theft involved any bovine or equine animal stolen in the circumstances described in paragraph (a) or (b), and there are no special circumstances in the particular case as provided in subsection (3), to imprisonment for a period of not less than nine years or more than twenty-five years;" F

Subsection (3) provides as follows:

> "(3) If a person convicted of stock theft involving any bovine or equine animal stolen in the circumstances described in paragraph (a) or (b) of subsection (2) satisfies the court that there are special circumstances peculiar to the case, *which circumstances shall be recorded by the court*, why the penalty provided under paragraph (e) of subsection (2) should not be imposed, the convicted person G shall be liable to the penalty provided under paragraph (f) of subsection (2)" (emphasis supplied).

In casu the purported record of proceedings does not reveal, either at mitigation stage or even in the reasons for the sentence, that an allusion to special circumstances was ever made, let alone explained to the accused what they entail and inviting him to proffer them if any. If the accused had H

Mutema J

A such special circumstances, he was hamstrung in advancing them because, he being a lay unrepresented person, the trial magistrate did not accord him the room and help to articulate the same. This constitutes a serious misdirection on the part of the trial magistrate.

This last misdirection, coupled with the other three alluded to *supra*, behoves B me to set aside both the conviction and sentence and order that accused's warrant of liberation be issued forthwith.

Mathonsi J agrees

© 2015 Juta and Company (Pty) Ltd.

Document 30 of 60

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2012/Volume 2/TSVANGIRAI & ANOR v MUTEVEDZI NO & ANOR 2012 (2) ZLR 224 (H)

TSVANGIRAI & ANOR v MUTEVEDZI NO & ANOR 2012 (2) ZLR 224 (H)

Citation 2012 (2) ZLR 224 (H)

Case No HH-351-12

Court High Court, Harare

Judge	Bhunu J
Heard	14 September 2012
Judgment	14 September 2012
Counsel	*T Mpofu,* assisted by *I Chagonda,* for the applicants No appearance for the respondents
Case Type	Urgent chamber application
Annotations	No case annotations to date

Flynote

Criminal law – *offences under Criminal Law Code – bigamy (s 104) – party to unregistered customary law union – union not dissolved in terms of customary law – marriage to another person under civil law constituting bigamy*

Customary law – *marriage – unregistered customary law union – status of – party to such union proposing to marry another person under civil* D *law – such marriage constituting bigamy in terms of criminal law*

Headnote

A man who is married to a woman in terms of customary law cannot marry another woman in terms of the civil law without committing bigamy as defined in s 104 of the Criminal Law Code [*Chapter 9:23*]. The mere E fact that s 3 of the Customary Marriages Act [*Chapter 5*:*07*] does not recognise an unregistered customary law marriage as a valid marriage for the purposes of bigamy is irrelevant. If the man wishes to marry the other woman, he must divorce the first one extra-judicially, according to customary law practices and procedures, as the formal courts have F no role to play in the dissolution of an unregistered customary law marriage. Upon the lawful dissolution of such a union, the courts can only recognise that the union has come to an end, thereby releasing the couple from the shackles of s 3 of the Act.

Cases cited G

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

Legislation considered

Criminal law (Codification & Reform) Act [*Chapter 9:23*], s 104

Customary Marriages Act [*Chapter 5:07*], s 3 H

Bhunu J

Case information

A *T Mpofu,* assisted by *I Chagonda,* for the applicants

No appearance for the respondents

Editor's note: See also *Karimatsenga* v *Tsvangirai & Ors* (above, at p 195 of this volume) for earlier proceedings in this matter.

Judgment

B **Bhunu J:** The melancholy drama unfolding in this case makes one wonder whether these are the wages of marrying during the sacred month of November, in apparent violation of a well-established Shona custom prohibiting marriage during that month. The first applicant's intended marriage to the second applicant is mired in perpetual controversy and acrimony as the couple continues to be

hounded by the first applicant's marriage to the C second respondent, allegedly contracted on 21 November 2011.

Both applicants intend to be joined in holy matrimony tomorrow, 15 September 2012, in terms of the monogamous civil rights under the Marriage Act [*Chapter 5*:*11*]. The second respondent filed an objection with the first respondent in terms of s 19 of the Act, on the basis that she is married to the D first applicant in terms of an unregistered customary law union. That being the case, the first applicant's intended marriage to the second applicant has the adverse effect of nullifying her customary law marriage thereby depriving her of her rights acquired under customary law.

The first applicant flatly denied ever having been married to the second respondent as alleged or at all. This prompted the first respondent in his E capacity as a magistrate to conduct an enquiry to determine whether in fact she was married to the first applicant in terms of customary law. The presiding magistrate ruled in favour of the second respondent and cancelled the marriage licence authorising the marriage.

Counsel for the applicants prevailed upon me to hear the matter as an *ex parte* F application on an urgent basis, arguing that respondents' legal practitioners were deliberately avoiding service by not answering their phones in order to sabotage the celebration of the marriage already set for tomorrow. Having regard to the urgency of the matter and that the determination being challenged was issued late this afternoon, I reluctantly granted my indulgence.

A reading of the magistrate's reasons for determination shows that he had G regard to evidence laid before him in the form of affidavits and a video recording of the disputed marriage ceremony.

Having considered the evidence before him the magistrate had this to say at p 5 of his ruling:

> "In that video recording it was clear that contrary to the unsubstantiated assertion by H Mr Tsvangirai that he had only paid damages for impregnating Ms Karimatsenga

---

Bhunu J

out of wedlock, the ceremony was payment for *roora* which culminated in A Mr Tsvangirai's emissaries asking for their in-laws' blessing to have a white wedding. The items tabulated on the list of *roora* tally exactly with the items mentioned in the video recording. On a balance of probabilities, the scale tips in the direction that, for all intents and purposes, this was a marriage between Mr Tsvangirai and Ms Karimatsenga.

> After watching the video Advocate *Mpofu* returned with an additional affidavit B from Mr Tsvangirai and, in a bid to obtain the truth, I accepted that Mr *Samukange* and his learned colleagues consented to its admission. There are startling revelations in that statement.
>
> Firstly, Mr Tsvangirai [disowns his emissaries and alleges] that they did what he had not mandated them to do. In other words, he alleges that they went and asked for Ms Karimatsenga's hand in marriage without his consent. This is C unfathomable. The delegation from his side was very big and joyous. There were large quantities of groceries that were bought and generally there was quite some merry making synonymous with a planned ceremony. I have no doubt that claiming otherwise is only a futile attempt by him to deny the obvious."

Quite honestly, I am unable to find any misdirection on the part of the magistrate's well reasoned judgment based on sound logic and a careful D analysis of the evidence before him. In the absence of the record of proceedings I am unable to ascribe any irregularity or fault in the manner in which the proceedings were conducted. The applicants having brought the matter to this court they had to provide this court with the record of proceedings in the magistrates court. Their failure to do so cannot be laid at the door of the respondents. E

The application required the magistrate to determine the validity of the customary law union allegedly entered into between the first applicant and the second respondent. According to Storry *Customary Law In Practice*, there are three essential characteristics for the creation of a valid customary law union, namely: F

1. the consent of the woman, *the woman's guardian* and the man.
2. the agreement as to the amount of *lobola.*
3. a formal handing over of the woman by the *guardian*.

I must hasten to point out, in passing, that since the enactment of the Legal Age of Majority Act 15 of 1982 * women who have attained the legal age of majority have since been emancipated by operation of law and no longer G need a guardian. The consent of the guardian is therefore no longer

a legal requirement for a valid customary law marriage or union. Thus the woman can now hand herself over, normally accompanied by her aunt or relatives.

2012 (2) ZLR p227

Bhunu J

A The applicant, however, only challenged one aspect of the alleged customary law union in which he denied having paid *lobola* or *roora* for the second respondent. The magistrate's enquiry was therefore limited to establishing whether or not the applicant paid *roora* as alleged.

I now turn to consider the correctness or otherwise of the magistrate's B determination on that issue.

Counsel for the applicants sought to discredit the magistrate's reliance on the video recording saying the viewing of the video was fraught with irregularities. The video recording was, however, a mere visual preservation of the events of that day. Apart from the video recording, there is on record Annexture "A" which purports to be a list of the *roora* paid by Mr Tsvangirai's emissaries C for Ms Karimatsenga's hand in marriage, according to customary law. That list duly signed by all the parties concerned has not been challenged or repudiated by anyone. It reads:

> "21 November 2011
>
> Kuroorwakwa Locadia Karimatsengana Morgan Tsvangirai. ("The marriage of D Locadia Karimatsenga by Morgan Tsvangirai")

1.	Ndiro	$100	Plate	$100
2.	Mbonano	$150	Familiarisation	$150
3.	Musikana kunhonga	$1 500	The girl's share	$1 500
4.	Atete	$11 000	Aunt's share	$11 000
5.	MuyaMusha	$1 500	Damages	$1 500
6.	Gusvi	$200	Clapping	$200
7. E	Kupinda mumusha	$300	Home entry	$300
8.	Makandinzwaani	$150	Who told you	$150
9.	Kusunungura homwe	$150	To open the purse	$150
10.	Mbariro	$400	Brandering	$400
11.	Mushonga	$400	Medicine	$400
12.	Mapfukudzadumbu	$2 500	Trampling on the stomach	$2 500
13. F	Rambi	$400	Light	$400
14.	Tsigiraguyo	$400	Balance the grinding stone	$400
15.	Bikiro	$400	Cooking place	$400
16.	Chituru	$150	Stool	$150

17.	Matekenyandebvu	$200	Caressing the beard	$200	
18.	Chemachinda	$2 000	Court Fee	$2 000	
19.	Rusambo	$9 000	paid $600	Dowry $9 000 paid	$600
20. G	Mombedzinotsika 9 3 dzinotsikadzemari $250 each				
	Cattle	9 3 live for cash $250 each			
21.	Yeumaiinotsika				
22.	Muchato - Wedding	$150			
23.	Munyai – Go-between	signed			
24.	Witness	signed			
25. H	Baba	- Father	signed"		

2012 (2) ZLR p228

Bhunu J

Undoubtedly the above payments constitute *roora* rather than payment A of damages for impregnating a girl. While damages were includee in the payments, the payments went far beyond mere payment of damages, but constituted *roora*. That being the case, the presiding magistrate cannot be faulted for concluding that the first applicant is married to the second respondent according to customary law. What this means is that he cannot B contract a civil marriage with any other woman without committing bigamy as defined in s 104 of the Criminal Law (Codification & Reform) Act [*Chapter 9:23*]. That section providet:

"**104 Bigamy**

(1) Any person who, being a party to:

(a) a monogamous marriage and, knowing that the marriage still subsists, C intentionally purports to enter into another marriage, whether monogamous or polygamous, with a person other than his or her spouse by the first-mentioned marriage; or

(b) an actually polygamous marriage and, knowing that the marriage still subsists, intentionally purports to enter into a monogamous marriage with any person; or D

(c) a potentially polygamous marriage and, knowing that the marriage still subsists, intentionally purports to enter into a monogamous marriage with any person other than his or her spouse by the potentially polygamous marriage;

shall be guilty of bigamy and liable, if convicted in terms of:

(i) paragraph (a), to a fine not exceeding level six or imprisonment for a period not exceeding one year or both; E

(ii) paragraph (b) or (c), to a fine not exceeding level five.

(2) Where a person is accused of bigamy in circumstances where he or she is alleged to have purportedly entered into a monogamous marriage while being a party to an unregistered customary law marriage with another person, and the accused denies that he or she is a party to the unregistered customary law

marriage, the burden shall rest upon the prosecution to prove beyond a reasonable F doubt that he or she is a party to the unregistered customary law marriage."

Thus, unlike s 3 of the Customary Marriages Act [*Chapter 5*:07], s 104 of the Criminal Law Code recognises an unregistered customary law union as a marriage for purposes of the prevention and prohibition of bigamy.

It is, therefore, clear and beyond question that our law criminalises and G prohibits a person married in terms of an unregistered customary law marriage or union from contracting a monogamous marriage with any person other than his spouse in terms of customary law. The mere fact that s 3 of the Customary Marriages Act [*Chapter 5*:*07*] does not recognise an unregistered customary law marriage as valid marriage for the purposes of bigamy is irrelevant. This is because the two statutes are not in conflict in H

A so far as none of them legalises bigamy. Thus the presiding magistrate did not misdirect himself in any way when he ruled that authorising the first applicant to marry the second applicant in the circumstances of this case was tantamount to authorising him to commit bigamy.

It is trite that our courts do not sanction the commission of a crime. There B is no need to cite any authorities for this well established rule of law but if any be required, one need look no further than *CFU & Ors* v *Minister of Lands & Ors* 2010 (2) ZLR 576 (S). In any case, there would be no point in authorising the celebration of a marriage that would be null and void *ab initio* for illegality on account of bigamy.

Apparently, after having realised the futility and weakness of his case, the first C applicant sought to divorce the second respondent in open court by offering a dollar note as "*gupuro*", being a token or symbol of divorce in terms of customary law. This was ruled to be unprocedural and uncustomary. I have no doubt that the magistrate was again correct in his ruling. In any case no proof was tendered to the effect that the purported procedure for divorce D was in accordance with customary law and practice.

Above all, the magistrate had no jurisdiction to hear and determine the question of divorce because s 3 of the Customary Marriages Act does not recognise an unregistered customary law union as a marriage for purposes of divorce. In that case, divorce could only take place extra-judicially according to customary law practices and procedures as the formal courts had no role E to play. This is in line with Storry *Customary Law in Practice* at p 54*,* where the learned author remarked that:

> "In view of the provisions of s 3 of the African Marriages Act (now the Customary Marriages Act) [*Chapter 238*] a court has no jurisdiction to hear a divorce action in relation to an unregistered marriage because no marriage is recognised."

F Upon the lawful dissolution of an unregistered customary law union, the courts can only recognise that the union has come to an end, thereby releasing the couple from the shackles of s 3 of the Customary Law Marriages Act.

The court was, however, not sitting to witness or determine any divorce between the two contestants but to determine whether the two were married in terms of customary law. The first applicant's conduct in attempting to divorce G the second respondent at the last minute in court in terms of customary law can only amount to an admission by conduct that he is in fact married to her in terms of customary law. For how else can a man seek to divorce a woman, unless the two are married?

It has been argued that the applicants cannot afford to have the intended H marriage cancelled because the President and other regional leaders are

scheduled to attend the ceremony. It however does not seem to matter to the A judiciary that the President and other regional dignitaries are scheduled to attend the illegal marriage ceremony. Our law is supreme; this is what the rule of law is all about. The first applicant is solely to blame for the mess he finds himself in. According to his affidavit, he became aware of the disputed customary law marriage in November 2011, more than nine months ago. He B had ample time to put his house in

order before embarking on organising an illegal monogamous marriage ceremony with a different woman, well knowing that there was another lady claiming to be married to him in terms of customary law.

In conclusion, I must remark that it was remiss of counsel to refer this hopeless application to court in the middle of the night without any prospects C of success after the magistrate had delivered a water tight, unassailable judgment. Had the application been opposed, I would definitely have been inclined to award costs at the punitive scale upon request as an expression of this court's displeasure at this apparent abuse of legal process.

For the foregoing reasons the application to suspend the cancellation of the D marriage licence issued to the applicants cannot succeed. It is accordingly ordered that the application be and is hereby dismissed.

Atherstone & Cook, applicant's legal practitioners

Venturas & Samukange, second respondent's legal practitioners E

* The provisions of the Legal Age of Majority Act are now to be found in s 15 of the General Law Amendment Act [*Chapter 8:07*] – *Editor*.

© 2015 Juta and Company (Pty) Ltd.

Document 31 of 60

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2012/Volume 2/KATSANDE v GRANT 2012 (2) ZLR 231 (H)

KATSANDE v GRANT 2012 (2) ZLR 231 (H)

Citation	2012 (2) ZLR 231 (H)
Case No	Judgment No. HH-380-12
Court	High Court, Harare
Judge	Zhou J
Heard	1 August 2012; *CAV*
Judgment	19 September 2012
Counsel	*F M Katsande*, for the plaintiff No appearance for the defendant
Case Type	Civil action
Annotations	No case annotations to date

Flynote

Court – jurisdiction – *meaning – when jurisdiction of court determined – principles on which court may exercise jurisdiction – effectiveness – no attachment of defendant or his property – any judgment would be illusory – ratio*

jurisdictionis – cause of action arising outside jurisdiction – need D *for plaintiff to show how court would have jurisdiction*

Legal practitioner – *conduct and ethics – duty to client – duty to advise client of reasonable awards of damages – should not claim inflated damages*

Headnote

The plaintiff and his wife, who both hailed from Zimbabwe, were married E in Zimbabwe but moved to the United Kingdom and took up residence there. While they were there, the defendant became involved in an adulterous relationship with the plaintiff's wife. The plaintiff consulted a legal practitioner in Harare and brought an action in the High Court in Zimbabwe, claiming US$2.5 million as damages. The plaintiff was granted leave to serve the summons and declaration upon the defendant F outside the jurisdiction of the court. The summons and declaration were served upon the defendant in the United Kingdom by the Messenger-at-Arms. The defendant did not enter appearance to defend and was barred. The issue of the court's jurisdiction was raised. A notice of amendment to the summons, alleging that some of the adulterous acts took place in G Zimbabwe, was filed but not served on the defendant.

Held, that jurisdiction means the power vested in a court by law to adjudicate upon, determine and dispose of a matter. The time for determining the jurisdiction of a court to entertain an action is the time of the commencement of the action. An action commences when the summons has been issued and duly served. Three common law principles underpin H the exercise by a court of its jurisdictional powers generally. These are

---

Zhou J

(a) the doctrine of effectiveness; (b) the doctrine of submission; and (c) A the *actor sequitur forum rei* rule.

Held, further, that the doctrine of effectiveness essentially means that jurisdiction depends upon the power of the court to give an effective judgment. *In casu* both the plaintiff and the defendant were *peregrini*. Both parties were resident in the United Kingdom. The plaintiff claimed B that he had not abandoned his domicile in Zimbabwe, but domicile is not a ground of jurisdiction in a delictual claim for adultery damages. The court could not give effect to a judgment given in favour of the plaintiff and against the defendant where there had been no attachment of the defendant's person or his property. Such a judgment would be illusory, as it could not be enforced. C

Held, further, that quite apart from the fact that no arrest or attachment had taken place, the plaintiff had not established any *ratio jurisdictionis*. The cause of action arose outside the jurisdiction of the court. The notice of amendment filed on behalf of the plaintiff did not clothe the court with jurisdiction. At the time that the summons was issued and served there D was no averment that the cause of action had arisen in this jurisdiction.

Held, further, that the amount claimed in damages by the plaintiff was out of this world and bore no relation to the prevailing awards in this and other jurisdictions. A legal practitioner owes it to his injured client to advise him of reasonable awards of damages, instead of creating misdirected expectation in the minds of the client, who looks up to the practitioner E for advice. The cases decided in this country did not support the amount claimed or any reasonable fraction of it.

Cases referred to

Central African Airways Corp v Vickers-Armstrong Ltd 1956 R & N 4; 1956 (2) SA 492 (FS) F

Chaplin v Boys 1971 AC 356

Distillers Co (Biochemicals) Ltd v Thompson [1971] AC 458

Ewing McDonald & Co Ltd v M & M Products 1991 (1) SA 252 (A)

Howard v Howard 1966 RLR 182 (G); 1966 (2) SA 718 (R)

Morten v van Zuilecom (1907) 28 NLR 500 G

Schlimmer v Executrix, Est Rising 1904 TH 108

Sonia (Pty) Ltd v Wheeler 1958 (1) SA 555 (A)

Terblanche NO v Damji & Anor 2003 (5) SA 489 (C)

Thermo Radiant Oven Sales (Pty) Ltd v Nelspruit Bakeries (Pty) Ltd 1969 (2) SA 295 (A)

Utah Intl Inc v Honeth & Ors 1987 (4) SA 145 (W) H

2012 (2) ZLR p233

Zhou J

A *Veneta Mineraria Spa v Carolina Collieries (Pty) Ltd (In Liquidation)* 1987 (4) SA 883 (A)

Zakowski v Wolf 1905 TS 32

Case information

F M Katsande, for the plaintiff

No appearance for the defendant

Judgment

B **Zhou J:** When an estranged man, incandescent with sardonic fury, walks into the office of an attorney and hysterically remonstrates about the loss of his *consortium omnis vitae* to another man, the law imposes the same obligation upon the attorney to objectively advise the client as to his rights and remedies as well as the appropriate forum in which such rights may be C enforced, as in any other case. The facts and circumstances of the instant case, even though it is an unopposed claim for adultery damages, demand that a written judgment be prepared.

The plaintiff married one Marian Katsande (nee Chinyanga) at Harare in December 1993. They were blessed with children. The pleadings and D papers filed do not reveal the number of children. They moved to the United Kingdom, and are presently resident in Scotland. He is pursuing studies for a Bachelor of Science degree in imaging and diagnostic sciences at Caledonia University, Glasgow.

The defendant is also resident in the United Kingdom. His address given in the summons is Flat 439 Mitchell Road, EH 67AR, Edinburgh, United E Kingdom.

On 15 February 2012 a summons was issued at the instance of the plaintiff. The plaintiff claims the sum of US$2 500 000 as damages for adultery. On 5 March 2012 the plaintiff was granted leave to serve the summons and declaration upon the defendant outside the jurisdiction of the court. The F summons and declaration were served upon the defendant in the United Kingdom by the Messenger-at-Arms on 4 April 2012. The defendant has not entered appearance to defend. He is accordingly barred in terms of the rules of court. The matter was accordingly enrolled on the unopposed roll.

The plaintiff's claim is set out as follows in the relevant paragraphs of the G declaration:

> "3. The plaintiff got married to Marian Katsande (born Chinyanga) at Harare Zimbabwe on 17 December 1993 an (*sic*) the marriage still subsists.
>
> 4. From a specific date to the plaintiff unknown but extending from sometime in 2009 to the date when this summons has been issued, on divers occasions with the full knowledge of the existence of the marriage, the defendant has H knowingly and intentionally committed adultery with Marian Katsande.

2012 (2) ZLR p234

Zhou J

> 5. The plaintiff has not condoned the adultery. A
>
> 6. During this period but commencing on a date to the plaintiff unknown the said defendant moved into the matrimonial home cohabited and persists to cohabitate (*sic*) with Marian Katsande at Flat 4 39 Mitchell Road Edinburgh.
>
> 7. As a result of the defendant's conduct the plaintiff has been emotionally traumatised hurt and humiliated beyond endurance. B
>
> 8. More specifically the plaintiff has suffered *contumelia*, the loss of *consortium*, deprivation of the privileges of married life and the alienation of love and affection from the said Marian Katsande."

On 12 July 2012 the plaintiff filed a notice of amendment which amended paragraph 4 of the declaration to read as follows:

> "From a specific date to the plaintiff unknown but extending from sometime in C 2009 to the date when the summons was issued, on divers occasions, and at sundry places including the United Kingdom and Zimbabwe, with the full knowledge of the existence of the marriage, the defendant knowingly and intentionally committed adultery with Marian Katsande."

The notice of amendment was granted, albeit it has not been served upon the D defendant. There can be no doubt that the amendment was filed to address the issue of jurisdiction. The matter was set down on the unopposed roll on 25 July 2012. On that day Mathonsi J asked the plaintiff's counsel to address the issue of whether this court has jurisdiction to entertain the claim, as well as the quantum of damages claimed. In response, the plaintiff's legal practitioners filed supplementary heads of argument, the matter having been E postponed to 1 August 2012.

Jurisdiction means the power vested in a court by law to adjudicate upon, determine and dispose of a matter: *Ewing McDonald & Co Ltd* v *M & M Products* 1991 (1) SA 252 (A) at 256G. The time for determining the jurisdiction of a court to entertain an action is the time of the commencement F of the action. An action commences when the summons has been issued and duly served: *Terblanche NO* v *Damji & Anor* 2003 (5) SA 489 (C) at 498D-E; *Thermo Radiant Oven Sales (Pty) Ltd* v *Nelspruit Bakeries (Pty) Ltd* 1969 (2) SA 295 (A) at 310D; *Howard* v *Howard* 1966 RLR 182 (G); 1966 (2) SA 718 (R); David Pistorius *Pollak on Jurisdiction* 2 ed p 12. G

Three common law principles underpin the exercise by a court of its jurisdictional powers generally. These are the doctrine of effectiveness, the doctrine of submission and the *actor sequitur forum rei* rule. See Herbstein & van Winsen *Civil Practice of the Superior Courts in South Africa* pp 29-31; David Pistorius *op cit* pp 3-8. The doctrine of effectiveness essentially means that jurisdiction depends upon the power of the court to give an H

Zhou J

A effective judgment. In *Schlimmer* v *Executrix, Est Rising* 1904 TH 108 at 111 de Villiers JP held that:

> "A court can only be said to have jurisdiction in a matter if it has the power not only of taking cognizance of the suit, but also of giving effect to its judgment."

Then in *Morten* v *van Zuilecom* (1907) 28 NLR 500 at 509 the court stated that the "great test of the jurisdiction of a court is its power to make its decree B effective". See also *Thermo Radiant Oven Sales Ltd* v *Nelspruit Bakeries supra* at 307*; Sonia (Pty) Ltd* v *Wheeler* 1958 (1) SA 555 (A) at 563; *Veneta Mineraria Spa v Carolina Collieries (Pty) Ltd (In Liquidation)* 1987 (4) SA 883 (A) at 893. In the instant case both the plaintiff and the defendant are *peregrinii*. From the papers filed, the defendant is resident in the United Kingdom. The plaintiff C is also resident in the United Kingdom. The plaintiff submits that he has not abandoned his domicile in Zimbabwe. But domicile is not a ground of jurisdiction in a delictual claim for adultery damages. This court cannot give effect to a judgment given in favour of the plaintiff and against the defendant where there has not been an attachment of the defendant's person or his property. Such a judgment would be illusory, as it cannot be enforced.

D Effectiveness underpins the rule that a court will not entertain an action against a *peregrinus* unless there has been an arrest of his person or an attachment of his property. See *Zakowski* v *Wolf* 1905 TS 32 at 33; *Utah International Inc* v *Honeth & Ors* 1987 (4) SA 145 (W) at 147. The following passage from Erasmus *Superior Court Practice* p A1-30 summarises the principle:

> E "Where the plaintiff is a *peregrinus* (foreign or local) and the defendant is a foreign *peregrinus*, both a recognised *ratio jurisdictionis* and an arrest or attachment are essential. In the absence of a recognised *ratio jurisdictionis* an arrest or attachment will be refused."

In the instant case, quite apart from the fact that no arrest or attachment took place, the plaintiff has not established any *ratio jurisdictionis*. The cause of F action arose outside the jurisdiction of this court. The notice of amendment filed on behalf of the plaintiff does not clothe this court with jurisdiction. At the time that the summons was issued and served there was no averment that the cause of action had arisen in this jurisdiction. The affidavit of evidence filed on behalf of the plaintiff does not give any evidence of the commission of adultery in Zimbabwe. Instead, it makes reference to the defendant's visit G to the parents of Marian Katsande.

The plaintiff has placed reliance on three cases. In *Distillers Co (Biochemicals) Ltd v Thompson* [1971] AC 458 the cause of action arose in New South Wales, as the harmful drug was sold there

and the injury was caused there as well. The fact that the drug had been manufactured in England did not H mean that the cause of action arose in England. The cause of action was the

Zhou J

wrong which was committed upon the plaintiff. In *Chaplin* v *Boys* [1971] A AC 356 the court in the United Kingdom had jurisdiction on the basis of the *actor sequitur forum rei*, as the defendant was resident in that jurisdiction. In *Central African Airways Corp* v *Vickers-Armstrong Ltd* 1956 R & N 4; 1956 (2) SA 492 (FS), the court had jurisdiction on the basis that the cause of action arose in its area of jurisdiction. Accordingly, the three cases do not support the plaintiff's contention on the question of jurisdiction. B

From the authorities cited above, given the facts and circumstances of the instant case, this court does not have the jurisdiction to entertain this action.

Notwithstanding the conclusion which I have reached on the question of jurisdiction, I feel constrained to comment on the quantum of damages in the sum of US$2.5 million which is claimed by the plaintiff. This is no doubt C one of the numerous other cases in which there are claims for damages which are out of this world and bear no relation to the prevailing awards in this and other jurisdictions. The legal profession must be reminded that they owe it to their injured clients to advise them of reasonable awards of damages, instead of creating misdirected expectation in the minds of their lay-clients D who look up to them for advice. In the present case counsel referred to cases decided in the 1990s, long before the advent of the multi-currency regime. Yet there are many cases decided after 2009. Even then, the cases referred to do not support the amount claimed or any reasonable fraction of it.

As the defendant did not oppose the claim, there will be no order as to costs.

In the result, the plaintiff's claim is dismissed. E

F M Katsande & Partners, legal practitioners for the plaintiff

© 2015 Juta and Company (Pty) Ltd.

Document 32 of 60

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2012/Volume 2/S v CHUMA & ANOR 2012 (2) ZLR 237 (H)

S v CHUMA & ANOR 2012 (2) ZLR 237 (H)

Citation	2012 (2) ZLR 237 (H)
Case No	Judgment No. HB-192-12
Court	High Court, Bulawayo
Judge	Makonese J
Heard	20 September 2012
Judgment	20 September 2012
Counsel	Details not supplied
Case Type	Criminal review
Annotations	No case annotations to date

Flynote

C **Criminal procedure** – *stay of proceedings – stay sought on ground of breach of tight to trial within a reasonable time – magistrate not entitled to grant stay – should refer matter to Supreme Court*

Headnote

The accused were granted bail in January 2005 following their arrest on drugs E charges. They appeared regularly at remand hearings until September 2007, when the record seems to have disappeared. No further proceedings took place until April 2010, when the accused appeared before a magistrate after they had been apprehended by the police and brought to court for an application for a cancellation of the warrant of arrest. The warrant of arrest was cancelled. However, the magistrate who had partly heard the matter had since left the bench. For reasons that were not very clear from the record, the matter dragged on slowly until May 2012, when the defence counsel launched an application in the magistrate court for a "permanent stay of proceedings. On at least three occasions, between 2006 and February 2012, the accused persons' legal practitioners had F sought the postponement of the matter on the grounds that they were involved in other commitments elsewhere. In June 2012 the magistrate purported to grant a permanent stay of proceedings.

Held, that the magistrate's order was incompetent. The accused persons' application was premised on an alleged breach of the provisions of s 18(2) of the Constitution of Zimbabwe 1980. In terms of s 24(2) of the G Constitution the court may, on its own accord, refer a constitutional issue to the Supreme Court. When a party to the proceedings applies for referral, the court must refer the issue to the Supreme Court unless it finds that the application for referral is frivolous and vexatious. The magistrate should have referred the application for a permanent stay H of proceedings against the accused to the Supreme Court in terms of

Makonese J

s 24(2). He erred when he granted the order for a permanent stay of A proceedings because he had no jurisdiction to do so.

Case cited

S v Chinanzvavana & Ors HH-73-09

Legislation considered B

Constitution of Zimbabwe 1980, ss 18 & 24

Editor's note: See *S* v *Kusangaya* 1998 (2) ZLR 10 (H), where Devittie and Mungwira JJ, on appeal, held that arising out of the High Court's inherent review jurisdiction, the High Court has jurisdiction to order a permanent stay of criminal proceedings. Using these powers, the High Court can grant an appropriate remedy where the constitutional C right of a person to a fair trial within a reasonable period of time has been violated. The constitutional provision providing for reference to the Supreme Court of constitutional questions merely establishes a procedural mechanism whereby constitutional issues may be raised by the lower courts for decision by the Supreme Court. This provision does not affect the inherent review jurisdiction of the High Court. The learned judges also held that although a magistrate has no inherent jurisdiction to grant a permanent stay of criminal proceedings, there are ways (which they elaborated on) in which a D magistrate can provide an effective remedy where there has been undue delay in bringing an accused for trial or in concluding the trial.

Judgment

Makonese J: This matter has been forwarded on review from the provincial magistrate, Western Commonage magistrates court, with a covering note in the following terms: E

"Please place the record of proceedings before the learned reviewing judge with the following comments:

Pursuant to an application by counsel, a magistrate sitting at Western Commonage made the following order:-

1. The proceedings be and are hereby permanently stayed. F
2. No order as to costs.

We believe that the magistrate is not vested with such powers hence the order, in our respectful view is not competent. Our request is that the order be set aside."

Before the record was forwarded for review, the resident magistrate at Western Commonage had also raised concern at the propriety of the order made by the magistrate and had prepared a detailed memorandum to the provincial G magistrate, Matabeleland North Province, as follows:

"The above cited matter refers.

Please find attached the record of proceedings relating to the above cited matter. On the 18th June 2012 Mr T Chimiso, sitting at Western Commonage magistrates court made the following order, pursuant to a written application by counsel for the accused person that his client's right to a fair trial had been infringed. H

Makonese J

'1. The A proceedings be and are hereby permanently stayed.

2. No order as to costs."

It is clear to myself that no magistrate whatsoever has the jurisdiction to issue such an order and that this order needs to be set aside. Such powers are vested in the Supreme Court of Zimbabwe or the High Court as certain precedent indicates. I believe section 24 of the Constitution clearly indicates that the B remedy Mr T Chimiso granted was not supposed to be granted by him. He was supposed to refer the matter to the appropriate court if he believed that an issue relating to the violation of the accused person's rights under section 18 of the Constitution had been infringed and that the raising of this matter was not frivolous and vexatious.

A reading of the application drafted by the lawyers T. Hara and Partners seems C to suggest that a trial de-novo was ordered. I am not certain whether that was necessary for to my mind the trial was simply supposed to start afresh. I am unable to gather why the trial has not started afresh over the years. In any case a perusal of the record does not indicate the state's attitude to this application was.

The record of proceedings is respectfully referred so that appropriate corrective measures be taken."

D The background of this matter is briefly that on 20 December 2004 the accused persons appeared for an initial remand before a magistrate at Western Commonage Magistrates facing allegations of contravening s 4(b) of the Dangerous Drugs Regulations (RGN 1111 of 1975) as read with s 6(2) of the Dangerous Drugs Act [*Chapter 15:02*]. The allegations are that on that on 17 December 2004 and at Number 61466 Pelandaba, Bulawayo both E accused persons or one or more of them unlawfully dealt in 55 kg of dagga without a licence or a permit. The accused persons were granted bail on 3 of January 2005. Both accused persons attended remands up to 6 September 2007 when the "record fell off the system." On 15 April 2010 the accused persons appeared before a magistrate after they had been apprehended by F the police and brought to court for an application for a cancellation of the warrant of arrest. The magistrate's handwritten notes reflect that the warrant of arrest was cancelled but the magistrate who had partly heard the matter had since left the Ministry for greener pastures. The magistrate did indicate then that an application would be made to the High Court to have the proceedings quashed for a trial to be conducted *de novo*.

G For reasons that are not very clear from the record the matter dragged on slowly until 18 May 2012 when the accused person's defence counsel launched an application in the magistrate court for a "permanent stay of proceedings." I have perused the record and observe that on at least three occasions between 2006 and 20 February 2012 the accused's legal practitioners had sought the H postponement of the matter on the grounds that they were involved in other

Makonese J

commitments elsewhere. In the result both the State and the defence counsel A contributed to the delays occasioned in the conclusion of the matter.

On 18 June 2012, the magistrate sitting at Western Commonage granted an order for a permanent stay of proceedings. There are no reasons given for the decision, which is clearly incompetent and

inappropriate. The accused persons' application was premised on the provisions of s 18(2) of the B Constitution of Zimbabwe which reads as follows:

> "If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law."

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

> "If in any proceedings in the High Court or in any court subordinate to the High C Court any question arises as to the contravention of the Declaration of Rights, the person presiding in that court may, and if so requested by any party to the proceedings shall, refer the question to the Supreme Court unless, in his opinion, the raising of the question is merely frivolous or vexatious."

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

In a case like this, when an application for referral to the Supreme Court is made, the court before which it is made has a very limited role to play. It has to refer the case to the Supreme Court if it cannot find that the application is E frivolous and vexatious. See *S* v *Chinanzvavana & Ors* HH-73-09.

The magistrate should have referred the application for a permanent stay of prosecution or proceedings against the accused persons to the Supreme Court in terms of s 24(2) of the Constitution. He clearly fell into error when he granted the order for a permanent stay of proceedings because he had no such jurisdiction to do so. F

It is not necessary for the purposes of this review judgment to consider the merits of the application for a permanent stay of prosecution. What I have considered is the propriety of the order issued by the magistrate.

In the result I make the following order:

1. The order of the magistrate of 18 June 2012 is hereby set aside. G
2. The matter is referred back to the magistrate's court for trial *de novo* before a different magistrate.

© 2015 Juta and Company (Pty) Ltd.

Document 33 of 60

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2012/Volume 2/MISI v ZIMBABWE NATIONAL ARMY 2012 (2) ZLR 241 (H)

MISI v ZIMBABWE NATIONAL ARMY 2012 (2) ZLR 241 (H)

Citation	2012 (2) ZLR 241 (H)
Case No	Judgment No. HH-379-12
Court	High Court, Harare
Judge	Mathonsi J
Heard	19 September 2012: *CAV*
Judgment	25 September 2012
Counsel	*T Matiyashe,* for the applicant *M Machingura,* for the respondent
Case Type	Urgent chamber application

Annotations No case annotations to date

Flynote

Constitutional law – *Parliament – Parliamentary Legal Committee – adverse report on subsidiary legislation – effect*

Military law – *cantonment area – declaration of by Minister of Defence –* D *Minister's power to acquire any land and declare land to be a cantonment area*

Headnote

The applicant bought a piece of land near Kadoma. Some years later, he found the army on his land, erecting a fence to incorporate part of his land as a cantonment area. He sought an interdict to prevent the army from E including any of his land within the cantonment area. The respondent showed that the Minister of Defence had declared the area which included the portion of the applicant's land to be a cantonment area. A statutory instrument, the Defence Cantonments Notice, 2012 (SI 61 of 2012), had been published in terms of s 89 of the Defence Act [*Chapter 11:02*]. F The applicant sought a provisional order restraining the respondent from acquiring the piece of land. The respondent opposed the grant of the order. It was, however, submitted on behalf of the applicant that, *inter alia,* no regard need be paid to the notice as it had been the subject of an adverse report by the Parliamentary Legal Committee because, by criminalizing the entry of persons onto the cantonment, it had infringed G their constitutional rights.

Held, that in terms of s 96(1) of the Act, where "any land" other than communal land is required for defence purposes such land can be acquired by the Minister for that purpose. Where such land is required for a cantonment, the Minister is empowered by s 89 to declare such land a cantonment. The H Minister gave notice through a statutory instrument that the area being

Mathonsi J

fenced by the army was a cantonment area. That statutory instrument had A not been invalidated and the applicant was not challenging its validity.

Held, further, in dismissing the application, that the report of the Parliamentary Legal Committee did not have the effect of invalidating the notice which had been duly gazetted and remained effective and binding. B

Legislation considered

Defence Act [*Chapter11:02*], ss 89 & 96(1)

Defence (Cantonment) Notice, 2012 (SI 61 of 2012)

Case information

T Matiyashe, for the applicant

M Machingura, for the respondent C

Editor's note: (1) It is not clear why the applicant cited the Army, rather than the responsible Minister, as respondent, though nothing appears to have been made of this.

(2) If land is acquired in terms of s 96(1) of the Defence Act, the procedures set out in the Land Acquisition Act [*Chapter 20:10*] must be followed, and compensation must be paid. It is not clear from the judgment whether the applicant's land had in fact been D so acquired. It is also not clear whether an area can be declared to be a cantonment area without having first been acquired.

Judgment

Mathonsi J: In this application, the applicant seeks a provisional order in the following terms;

"**Terms of Final Order Sought** E

That you show cause to this Honourable Court why an order should not be granted in the following terms:

1. Respondent in fencing its cantonment area or operation shall not include the applicant's land which was purchased from Kadoma Rural District Council which is also known as number 2 The Range until there's an order from a F competent court to do so.
2. Respondent to pay costs of suit at a higher scale.

Interim Relief

Pending the return date or finalisation of this matter, it is ordered that:

1. Respondent in its fencing exercise be and is hereby ordered to immediately stop incorporating, or including the applicant's land also known as number G
2. The Range Kadoma."

In his founding affidavit the applicant stated that he applied to the Ministry of Local Government, Public Works and National Housing to acquire stand number 2 The Range Kadoma sometime in 2003. His application was successful and the Ministry referred him to the Kadoma Rural District H

A Council under whose jurisdiction the land in question falls. In due course he purchased the land and paid the requisite purchase price.

The applicant submitted supporting documents showing the transaction between himself and the local authority in the form of a deed of cession signed on 14 January 2005. He also submitted a proposed site plan for a B filling station, supermarket and truck inn he intends to construct on the stand. It appears common cause that up to now no construction work has commenced at that site.

To the applicant's chagrin it was brought to his attention on 6 September 2012 that the respondent had started erecting poles for purposes of fencing C off the area which fence is set to incorporate his land. He has not given details as to whether the fence takes away the whole or part of his stand. When he made inquiries he was advised that the area was being fenced as it was declared a cantonment for the respondent.

This prompted the applicant to bring this application on an urgent basis seeking the relief alluded to above as it is his view that he has a clear right D over the land in question, he having purchased it as aforesaid. Mr *Matiyashe,* appearing for the applicant, submitted that all the essentials of an interdict have been met as the applicant has a clear right which is now being threatened by the respondent. In light of the activities taking place at the site, he has no other remedy but the one that he is pursuing.

E Major *Machingura,* who appeared for the respondent, strongly opposed the application. He submitted that the area in dispute has to be fenced as it was declared a cantonment in terms of s 89 of the Defence Act [*Cha*pter *11*:*02*] ("the Act"). He drew my attention to the Defence (Cantonment) Notice, 2012 (SI 61 of 2012).

F In terms of s 89 of the Act:

> "The Minister may, by notice in a statutory instrument, declare *any area or place* to be a cantonment for the purposes of this Part:
>
> Provided that the powers conferred by this section shall not include the power to acquire, whether compulsorily or by agreement, any Communal Land or any interest in or right over Communal Land, otherwise than in accordance with the G Communal Land Act [*Chapter 20*:*04*]" (the emphasis is mine).

It may be useful to read s 89 in conjunction with s 96(1) of the Act, which provides:

> "When it appears to the President that any land or an interest in or right over any land is required for defence purposes, it shall be lawful for the Minister, on the H authority of the President, to acquire such land, interest or right:

> Provided that the powers conferred by this subsection shall not include the power A to acquire, whether compulsorily or by agreement, any Communal Land or any interest in or right over Communal Land, otherwise than in accordance with the Communal Lands Act [*Chapter 20*:*04*]."

Clearly, therefore, where "any land" other than communal land is required for defence purposes such land can be acquired by the relevant Minister for that purpose. Where such land is required for a cantonment, the Minister is B empowered by s 89 to declare such land a cantonment. It matters not in my view that before such declaration was made the land had been purportedly donated by the Kadoma City Council which, according to the applicant, did not have authority over the land in question as it fell under the jurisdiction of the Kadoma Rural District Council instead. I have not found it necessary C to inquire further into the status of the two local authorities regarding the land in dispute or indeed, if they are two different entities as alleged by the applicant. This is because it would not make a difference.

The Minister of Defence gave notice through the Defence (Cantonment) Notice (SI 61 of 2012) that the area being fenced by the army is cantonment area for purposes of an army boarding school. That statutory instrument has D not been invalidated and remains extant. The applicant has not approached the court challenging the validity of the statutory instrument. Quite to the contrary he has come to court claiming a clear right over the property which entitles him to an interdict against the respondent.

The requirements of a permanent interdict that one should have a clear right, E which right is being infringed or a well-grounded apprehension of such an infringement, a well-grounded apprehension of irreparable harm to the applicant, the absence of any other satisfactory remedy and that the balance of convenience favours the grant of the interdict, have not been met because a clear right cannot exist where there is a statutory instrument declaring the land a cantonment. F

Mr *Matiyashe* submitted that the applicant has got a clear right over the disputed land because he has shown, through documents filed of record, that he purchased it from the local authority under which it falls. That argument is not sustainable at all because, as I have already stated, the Minister is empowered to declare any land a cantonment. What is common cause is that G the land in dispute is not Communal Land as to place it outside the power given to the Minister by s 89 of the Act.

It cannot be said, by any stretch of the imagination, that the applicant has a clear right over the land when it has been declared a cantonment in terms of the law. A challenge of that declaration is not what is before me. Mr *Matiyashe* has produced an adverse report compiled by the Parliamentary H

Mathonsi J

A Legal Committee on SI 61 of 2012 in which that committee states that the declaration of the area as a cantonment, which has the effect of criminalising the entering of the area by members of the public, infringes upon the rights of members of the public enshrined in the Constitution.

Even if one were to accept that the views of the Parliamentary Committee are persuasive, those views do not relate to the rights of ownership sought B to be protected by the applicant but merely the curtailment of the freedom of movement in the area. More importantly, as Mr *Matiyashe* has conceded, that report does not have the effect of invalidating the statutory instrument which remains effective and binding.

As a court of law I cannot enforce a report of a Parliamentary Committee over C regulations which have been gazetted and constitute the law of the country. Accordingly that report does not elevate the applicant's case to anything that can be protected by a court order. I am, therefore, not persuaded that the applicant has made out a good case for the relief that he seeks.

Accordingly the application is hereby dismissed with costs.

D *Mangwana & Partners*, applicant's legal practitioners

Zimbabwe National Army, respondent's legal practitioners

© 2015 Juta and Company (Pty) Ltd.

Document 34 of 60

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2012/Volume 2/S v TAPERA & ORS 2012 (2) ZLR 246 (H)

S v TAPERA & ORS 2012 (2) ZLR 246 (H)

Citation	2012 (2) ZLR 246 (H)
Case No	Judgment No. HH-372-12
Court	High Court, Harare
Judge	Hungwe & Mavangira JJ
Heard	22 May 2012; *CAV*
Judgment	26 September 2012
Counsel	*R F Mushoriwa,* for the appellants Ms *F Kachidza,* for the respondent
Case Type	Criminal appeal
Annotations	No case annotations to date

Flynote

Criminal law – *offences under Criminal Law Code – culpable homicide – death caused by negligence – foreseeability – objective test – what must be foreseen – need to foresee risk of death, not merely risk of injury – need for a nexus between actions of accused and death of deceased* D

Headnote

The appellants, who were all police officers, were convicted of culpable homicide. They had, at night and on an unlit road, intercepted a bus. Acting in concert, they forced the driver to reverse the bus for a considerable distance in order to go back to the nearby police station. They were acting on the belief that inside the bus was a suspect whom the complainant in E a case of assault would identify at the station. The third appellant was driving a vehicle parallel to the reversing bus with his headlights on full beam facing the direction towards which the bus was reversing. A flashing blue light on top of his vehicle was operating. A motor vehicle travelling in the same lane as the reversing bus came upon the scene and rammed into the back of the bus, killing the driver and two other F passengers. There were no particulars of negligence set out in the charge sheet but the basis of the charge, as set out in the State outline, was that the appellants created a dangerous situation which they failed to warn approaching motorists about, resulting in the motor vehicle driven by the deceased crashing into the back of the bus. G

Held, that the test for negligence in culpable homicide is objective. What ought to have been foreseen, whether what was foreseeable ought to have been guarded against, and the measures which ought to have been taken are adjudged by the standards of what the reasonable man would have done in the circumstances. Foreseeability is an essential element to be considered in deciding whether a causal connection exists between the H

Hungwe. J

A unlawful act or omission and the death of the victim. Foreseeability of risk of bodily injury, as opposed to risk of death, is not sufficient. The test of foreseeability in culpable homicide is,

however, an objective one and it is sufficient for legal responsibility to arise that the accused ought to have foreseen some risk of death.

Held, further, that to convict an accused person of culpable homicide, the court must find as fact the existence of a causal link between that person's act or omission and the death of the deceased before liability can attach. Death must have been reasonably foreseeable as a consequence of the accused's conduct: for example; the manner of assault, or of driving in which the accused was engaged vis-à-vis the deceased. The argument that the accused is liable because he was engaged in an unlawful act which somehow resulted in the death of the deceased implicitly imports the rejected doctrine of *versari in re illicita*.

Held, further, that the appellants may have overstepped the call of duty regarding the execution of effecting an arrest. Their pursuit of the suspect was, however, largely in the line of duty. They could hardly have foreseen that, in requiring the driver to promptly get to the police station by reversing the bus, someone else outside the bus could die when there was appropriate signalling by the blue beacon atop the third appellant's vehicle. On the evidence, there was no *nexus* between the actions of the appellants and the death of the three deceased. Rather, the evidence pointed to the failure by the deceased driver to keep a proper look out as being the proximate cause of the fatal crash.

Cases cited

R v Emerson & Ors 1957 R & N 743 (SR); 1958 (1) SA 442 (SR)

R v John 1969 (2) SA 561 (RA); 1969 (2) RLR 23 (A)

S v Jack 1990 (2) ZLR 166 (S)

S v Jongwe 1987 (2) ZLR 12 (H)

S v Ncube 1990 (2) ZLR 303 (S)

S v Ndebele 1988 (2) ZLR 249 (H)

S v Ruzario 1990 (1) ZLR 359 (S)

Legislation considered

Supreme Court (Magistrates Courts) (Criminal Appeals) Rules 1979 (SI 504 of 1979), r 22 (1)

Case information

R F Mushoriwa, for the appellants

Ms *F Kachidza,* for the respondent

Hungwe. J

Judgment

Hungwe J: The appellants were convicted of three counts of culpable homicide as defined in s 49 of the Criminal Law (Codification & Reform) Act [*Chapter 9:23*]. They were sentenced to 15 months' imprisonment, of which five months were suspended on condition of good behaviour and a further 10 months were suspended on condition that the appellants performed 350 hours of community service. Aggrieved by their conviction and sentence, they now appeal to this court against both.

The appellants were convicted of culpable homicide on the following general facts. On 5 August 2007 the appellants intercepted a bus along Robert Mugabe road. Acting in concert, the appellants forced the driver to reverse the bus for a considerable distance in order to go back to Rhodesville police station. The appellants were acting on the belief that inside the bus was a suspect whom the complainant in a case of assault would identify at the station. The third appellant was driving a vehicle parallel to the reversing bus with his headlights on full beam facing the direction towards which the bus was reversing. As a result of this, a motor vehicle travelling in the same lane as the reversing bus and coming from the city centre came upon the scene and rammed into the back of the bus, killing the driver and two other passengers.

In a three page judgment, the magistrate made the following findings of fact. He found that the driver of the bus was forced to reverse the bus for the distance of 400 metres when visibility was dark. He also found that the appellants failed to warn other motorists of the danger which had been created by the E reversing bus. Further, he found that the third appellant drove parallel to the bus, thereby creating a dark spot to oncoming traffic. He concluded that the deceased collided into the reversing bus due to poor visibility and reasoned that the appellants, acting in concert and with common purpose, had created the danger on the road and therefore found them guilty of culpable homicide.

Out of the twelve "grounds of appeal", only two grounds meet the requirements F of r 22(1) of the Supreme Court (Magistrates Courts) (Criminal Appeals) Rules 1979, which require an appellant to set out such grounds "clearly and specifically". Where the grounds of appeal are so generalised that it cannot be said that they complied with the rules, an appellant risks his "notice of appeal" being a nullity. See *R* v *Emerson & Ors* 1957 R & N 743 (SR); G 1958 (1) SA 442 (SR); *S* v *Jack* 1990 (2) ZLR 166 (S); *S* v *Ncube* 1990 (2) ZLR 303 (S).

The first of the only two grounds which I consider relevant to the determination of this appeal is ground four. The appellants, in that ground, state that the magistrate erred in fact and in law in finding that the third appellant drove parallel to the bus towards the direction of the city whilst flashing his vehicle H

Hungwe. J.

A headlights thereby impairing the vision of drivers of oncoming traffic. The second main ground of appeal states that the magistrate erred in fact and in law in finding that the deceased crashed into the bus as a result of poor visibility when evidence led at the trial was that one of their passengers inside the deceased driver's vehicle managed to see the bus from a considerable distance.

B In his heads of argument and at the hearing of the appeal, Mr *Mushoriwa* raised two points *in limine*. The first was that the record failed to reflect correctly the proceedings in the court *a quo*, in that the closing submissions by counsel were not part of the appeal record. Relying on *S* v *Ndebele* 1988 (2) ZLR 249 (H), he argued that where the record does not speak for C itself and cannot be relied upon for the proper processing of an appeal, the conviction must be set aside. He also pointed out the obviously contradictory entries by the magistrate, indicating a verdict of "Not guilty" having been endorsed on the charge sheet, yet the same magistrate proceeded to sentence the appellants. He referred me to *S* v *Jongwe* 1987 (2) ZLR 12 (H) for the proposition that, once the magistrate made a ruling, he was *functus officio.* D No doubt Mr *Mushoriwa* is correct in the argument he makes, but only to a point. First, an appellant who has signed a certificate of inspection of an appeal record cannot turn around and complain that the record does not sufficiently reflect what transpired during trial when he has affixed his signature to such a certificate, unless he is pointing to the tampering with the record after the E certificate was signed. I did not hear Mr *Mushoriwa* say this. In any event, he personally affixed his hand to the certificate signifying his satisfaction with the same. Second, and in any event, such irregularities as he relies upon in his points *in limine* are good grounds of review rather than grounds of appeal. I therefore dismiss the points *in limine*.

The case for the State was built around the allegation that the appellants created F a dangerous situation which they failed to warn approaching motorists of, resulting in the motor vehicle driven by the deceased crashing into the back of the bus. There were no particulars of negligence set out in the charge sheet so as to inform the appellants the case they had to meet. The State needed to set out these particulars clearly in the charge. However these particulars G appear in the State outline where the following appears:

> "11 The accused were negligent in that they disregarded the safety of the passengers in the bus by making it stop and making it reverse in the middle of a very busy road.
>
> The accused persons failed to provide adequate warning to other motorists of the hazard they had created, considering the fact that this was at night H and the portion of the road is unlit.

Hungwe. J.

> The three accused failed to consider the fact that the headlights of their A vehicle would interfere with the vision of oncoming drivers and cause them to drive into the rear of the reversing bus, which

was in the middle of the road.

It is a contravention of the law to permit a vehicle to stop or remain stationary in the middle of the road, obstructing the smooth passage of other road users, yet not regarding the statute, the accused made the bus stop in the B middle of the road and even reverse for almost half a kilometre.

12 The three accused persons had no right to override the law and cause the deaths of three people and injuries to five people. They had no right to negligently cause the accident, which resulted in the death of Elton Kondo, Martha Kondo and Albert Samson ..."

The evidence led at trial contained apparent contradictions to the State outline. C As an example, only one witness told the court that the bus reversed for a distance of approximately 400 metres. The driver of the bus told the court that he had barely gone 100 metres when he was asked to reverse back to the police station. He told the court that traffic was not heavy and he reversed to the corner of Clyde Road and Robert Mugabe Road under the direction D of one of the appellants. He was stationary when the other driver rammed into the back of his bus. He was in his lane of travel towards Mabvuku from town. A witness from the twincab truck whose driver died on the spot, Angelina Kondo, told the court that she had seen the bus and alerted their driver of the presence of the bus but to no avail. He drove into the rear of the bus despite her shouts of imminent danger. It is doubtful that she could E tell whether it was reversing or stationary since she had no way of telling this. The relevance of her evidence is that such evidence creates doubt as to whether the collision was not caused by the deceased driver's failure to keep a proper look-out. It also contrasts the claim in the state outline that the drivers of oncoming traffic were dazzled by the flashing headlights F of the third appellant's vehicle. In any event, even if the third appellant's headlights were on full beam, the duty to keep a proper lookout rested on the deceased driver since he was travelling behind the bus. As such whether the bus was stationary, as its driver says, or reversing, as claimed by State witnesses, such an occurrence is within ordinary human experience in our roads. Buses and old heavy duty trucks are known to break-down in the most G unsafe places along the road. It is up to all road-users, especially drivers, to keep a constant look-out for such eventualities as would require them to take necessary avoiding action. Even more common is the incidence of careless drivers who do not dip their lights when meeting on-coming traffic at night. The duty of the conscientious driver in such an eventuality is to slow down until one can negotiate safe passage or even pull off the road. H

Hungwe. J.

A See *S* v *Ruzario* 1990 (1) ZLR 359 (S). Commenting on culpable homicide as defined in s 49 of the Code, Professor Geoff Feltoe *Commentary on the Criminal Law (Codification and Reform) Act, 2004* remarked thus:

> "Previously in our law culpable homicide was only committed when X negligently failed to foresee and guard against death. The Code has added a further type of culpable homicide which may be referred to as advertent or conscious negligence. B Advertent negligence applies where X appreciates that there is a risk of death but rather than taking a cautious risk which would mean that he or she would have intention to kill, X negligently fails to guard against the risk."

There is no question of the appellants appreciating that there would be a risk of death in requiring the bus driver to reverse back to the station, therefore the old species of culpable homicide needs to be examined further as that C species applies.

The test for negligence in culpable homicide is objective. What ought to have been foreseen, whether what was foreseeable ought to have been guarded against, and the measures which ought to have been taken, are adjudged by the standards of what the reasonable man would have done in the circumstances: D P M A Hunt *South African Criminal Law and Procedure vol 2* (1992).

On a charge of culpable homicide, foreseeability is an essential element to be considered in deciding whether a causal connection exists between the unlawful act or omission and the death of the victim. Foreseeability of risk of bodily injury, as opposed to risk of death, is not sufficient. The test of E foreseeability in the crime of culpable homicide is, however, an objective one and it is sufficient for legal responsibility to arise that the accused ought to have foreseen some risk of death.

After analysing the changes brought forth by two important decisions regarding culpable homicide in both South Africa and in this jurisdiction Fieldsend J (as he then was) said in *R* v *John* 1969 (2) SA 561 (RA) at 568; F 1969 (2) RLR 23 (A):

"If the views expressed above regarding the state of law of culpable homicide in Rhodesia and South Africa prior to the decisions in *van der Mescht's* case and *Bernardus*' case are correct [1], the change brought about in the law of South Africa by these decisions is really one of approach. On the basis of the views expressed above, the effect of the decisions is not to introduce the element of G foreseeability for the first time or to alter its essential nature as an element in the crime but simply to emphasise the importance of foreseeability as an objective element by stating that henceforth it must be treated as a separate and distinct element in the form of *mens rea*. But whether foreseeability is introduced as a separate element or not, it is of the greatest importance that the meaning of

---

Hungwe. J.
'cause' should be clearly understood because a causal *nexus* still remains an A essential and basic element of the offence."

I understand the above analysis to require the court convicting an accused person of culpable homicide to find as fact the existence of a causal link between that person's act or omission and the death of the deceased, before liability can attach. It requires an answer to the question: what caused the B death of the deceased? What this in practical effect means is that death must have been reasonably foreseeable as a consequence of the accused's conduct; for example, the manner of assault, or of driving in which the accused was engaged vis-à-vis the deceased. The reasoning that because the accused was engaged in an unlawful act which somehow resulted in the death of the deceased implicitly imports the rejected doctrine of *versari in re illicita.* By C that doctrine it followed, as a way of logic, that because X was involved in an illegal act which resulted in the deceased's death he is liable for the death of the deceased, whether or not such death was reasonably foreseeable. The test for foreseeability in our criminal law, as in delict, is objective.

In our law of delict a person is held responsible for damage if he could have foreseen that damage could result from the act. It is not necessary that he in D fact must foresee exactly what sort of damage the act can cause or what the extent of the damage will be. Due to the nature of human society, it is assumed that if he can foresee damage he must also foresee that the damage can be of an unexpected and unusual nature. In my view, the same attitude ought to be adopted in regard to the delict of homicide which is also a punishable delict. E

In casu, it cannot be disputed that the appellant may have overstepped the call of duty regarding the execution of effecting an arrest. Their pursuit of the suspect was however largely in the line of duty. They could hardly have foreseen that in requiring the driver to promptly get to the station by reversing the bus someone else outside the bus could die when there was appropriate signalling by the blue beacon atop the third appellant's vehicle. F There seems to have been, on the State evidence, sufficient warning mounted for the sake of warning other road-users in the form of the third appellant whose motor vehicle is said to have had a blue beacon and an officer on foot directing the bus driver.

I find that on the evidence led at the trial, there was no *nexus* between the G actions of the appellants and the death of the three deceased. Rather, the evidence points to the failure to keep a proper look out by the deceased driver as being the proximate cause of the fatal crash. As pointed out above, the fact of this matter is that the duty to drive carefully rested on the deceased driver who was travelling along a blocked lane. Whether the blockage was a result of a reversing bus guided by a beacon or a police officer on foot or H

Hungwe. J.

A a bus stationary in its lane, does not relieve the deceased driver of his duty to keep a proper lookout.

Unfortunately the judgment by the magistrate did not discuss which of the witnesses he believed or disbelieved. Such an approach must be deprecated where a sentence of imprisonment is imposed. It is an unhelpful approach to the appeal court as one must revert to a fresh assessment of the evidence B on the record. Where it so happens that in the rush to complete a heavy backlog, the magistrate could not give detailed reasons for judgment, as here, the opportunity to address this failure should be used when the notice of appeal is served on the magistrate. He must then address all the grounds advanced in the notice and grounds of appeal as required by the Supreme C Court (Magistrates Courts) (Criminal Appeals) Rules 1979.

In light of the fact that death was not reasonably foreseeable as a consequence of the act of requiring the bus driver to reverse his bus, I am unable to find that the State proved beyond reasonable doubt the charge of culpable homicide against the three appellants.

D In the result, the appeal against both conviction and sentence is allowed. The conviction is quashed and the sentence is set aside. In its place the following verdict is substituted:

"The accused are found not guilty and acquitted."

E MAVANGIRA J concurred

Mawere & Sibanda, appellants' legal practitioners

Attorney-General's Office, respondent's legal practitioners

1 *S* v *van der Mescht* 1962 (1) SA 521 (A) **;***S* v *Bernardus* 1965 (3) SA 287 (A)

© 2015 Juta and Company (Pty) Ltd.

Document 35 of 60

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2012/Volume 2/SIBANDA & ANOR v OCHIENG & ORS 2012 (2) ZLR 254 (H)

SIBANDA & ANOR v OCHIENG & ORS 2012 (2) ZLR 254 (H)

Citation	2012 (2) ZLR 254 (H)
Case No	Judgment No. HH-382-12
Court	High Court, Harare
Judge	Mtshiya J
Heard	25 September 2012; 26 September 2012; 28 September 2012; *CAV*
Judgment	3 October 2012
Counsel	Mrs *B Mtetwa*, for the applicants Mrs *N Moyo*, for the first, fourth, ninth and eleventh respondents *D P Drury*, for the second, fifth and twelfth respondents Mrs *S N Njerere*, for the sixth, seventh and tenth respondents *F Girach*, for the thirteenth respondent *E W W Morris*, for the eighth and fourteenth respondents Ms *A Chirisa*, for the fifteenth respondent
Case Type	Urgent chamber application
Annotations	No case annotations to date

Flynote

Legal practitioner – *practice – requirement for three years' practical training before being entitled to practise on own account – person proposing to practise as an advocate – not exempt from requirement for appropriate training – need for regulatory framework for such training*

Practice and procedure – *parties – joinder of – misjoinder – person joined* D *as a party not having made decision being challenged and not being able to implement order sought – joinder not proper*

Headnote

The applicants, along with a third newly registered legal practitioner, joined the advocates' chambers in Harare as pupils. They were told that they E would be under the supervision of the senior member of chambers, and that their respective pupil masters had to sign off any work when it was returned to the instructing legal practitioners. Both the applicants were issued with practising certificates by the fifteenth respondent (the Law Society) describing each of them as "Advocate." The certificates F were endorsed with a condition that the applicants could not operate trust accounts.

A few months after they joined chambers, the applicants were advised by the secretary of the advocates' chambers association of new, detailed, rules regulating their pupillage. They refused to sign the letter of acknowledgement and, in a lengthy memorandum, challenged the legal G basis of the new rules. They said that the rules were an attempt to equate their pupillage with the training at the "side bar", but argued that the only limitation placed upon them upon admission as advocates was that they should not operate a trust account, which advocates do not do anyway.

The secretary responded to the applicants' memorandum in a way that confirmed the termination of the applicants' relationship with the H

Mtshiya J

A association, which took effect on the date when the applicants refused or failed to sign for the new regulatory framework. The Bar Association informed the applicants that, contrary to what the applicants asserted in their memorandum, they were not members of the Association, not yet being entitled to practise on their own account as 36 months had not elapsed since their registration. The Association said that a practitioner B who has not completed the prescribed 36 month period has no greater right to practice as an advocate than he has to open a firm of attorneys.

When asked to intervene and to provide a mediator, the Law Society replied that it regarded the dispute as essentially a labour matter. It said that the Advocates' Chambers was like a private club, which is governed C in terms of its own constitution. One joins the Chambers through invitation. In joining the Chambers one is deemed to have accepted the rules of the Chamber as prescribed in the constitution, memoranda, custom and practices. The Law Society expected the Chambers to have a comprehensive training régime in place. It would be remiss of a set of chambers to take on pupils without putting in place a pupillage training D programme. Because the applicants' membership of chambers had ended, their right to hold a practising certificate had fallen away.

The applicants (who were not joined by the third pupil) brought proceedings against the 12 qualified advocates in chambers, as well as the chambers, the Bar Association and the Law Society, for an order that they be restored E to their tenancy at chambers, and that the new rules be declared null and void. The 12 advocates objected to being joined in their personal capacities, as they said they could not implement the order sought.

Held, that the applicants knew where authority lay and which entities to deal with. When he joined chambers, the first applicant knew who the chambers association was and that is why he directed his application F to it. That association was the entity that admitted both applicants into pupillage. The applicants' memorandum was addressed to the entities that the applicants knew could render the relief they now sought. They knew who was terminating or restructuring their pupillage. The only entities that could attend to the relief the applicants were seeking were the chambers association, the Bar Association and the Law Society. The G individual advocates should not have been joined.

Held, further, that following the fusion of the profession in 1981, all those practising law in Zimbabwe became known as legal practitioners. That title included advocates. Legal practice in Zimbabwe is regulated by the Legal Practitioners Act [*Chapter 27:07*] and the subsidiary legislation H thereto, including the Legal Practitioners (General) Regulations 1999

Mtshiya J

(SI 137 of 1999). The training referred to in the regulations applies to all A newly registered legal practitioners in Zimbabwe, including intending advocates, unless lawfully exempted. The applicants were fully aware of that, but hardly made any direct reference to the regulations. They conveniently avoid direct reference to the law but at the same time indicate that their rights in this matter were protected by the Act – the Act that tells them how to practise law lawfully in Zimbabwe. B

Held, further, that to grant the order sought by the applicants would enable them to practise on their own. This would contravene the law which governs all legal practitioners in Zimbabwe. Section 4(1) of the Regulations makes it illegal for a legal practitioner to practise on his own account before the expiration of a period of not less than 36 months from the C date of his registration during which he must have been employed as a legal assistant by another legal practitioner. The Law Society has no authority to accord any exemptions to anyone outside the law. The only way for a legal practitioner to be able to practise on his own account is to first of all under go the required practical training as required by D law. That training covers all facets of legal practice and is not restricted to trust accounts only.

Held, further, that the training of those who appear in the various courts of our country is crucial and hence the deliberate provision for practical training provided for in the law. Highly qualified legal practitioners will always be an asset so the judiciary and indeed to the entire nation. Newly E admitted persons lack the knowledge, experience and professionalism to be effective advocates. They are frequently a downfall to their clients and a hindrance to the administration of justice, yet with time and experience they could become paragons of the profession. That experience cannot conscientiously be obtained by immediate entry to practice at the highest level of the profession. It would therefore be retrogressive F and unpardonable for the court to join the queue of those who might want to downgrade the practical training of legal practitioners in this country. It would also be a sad day if the court were, because of the call for sympathy, to allow the violation of the country's laws, especially by those who have the mandate to interpret those laws. There was therefore G a need to immediately put an end to an illegality.

Held ,further, that the public relies on entities such as the professional associations and the Law Society to ensure that the country produces the best trained legal practitioners. The practical training of newly registered legal practitioners is of national importance, so it is imperative that the parties, with the involvement of the Law Society, should strive to find H

Mtshiya J

A a way of accommodating each other under a regulatory framework that does not violate or offend the law. The answer is not to abandon the programme but to move forward legally.

Cases referred to

Matida v Chairman, PSC & Anor 1998 (1) ZLR 507 (H)

B *Mavheya v Mutangiri & Ors* 1997 (2) ZLR 462 (H)

Maxwebo v Chrmn, PSC HH-125-97

Legislation considered

Legal Practitioners Act [*Chapter 27:07*]

C Legal Practitioners (General) Regulations 1999 (SI 137 of 1999), s 4(1)

Case information

Mrs *B Mtetwa*, for the applicants

Mrs *N Moyo*, for the first, fourth, ninth and eleventh respondents

D P Drury, for the second, fifth and twelfth respondents

Mrs *S N Njerere*, for the sixth, seventh and tenth respondents

D *F Girach*, for the thirteenth respondent

E W W Morris, for the eighth and fourteenth respondents

Ms *A Chirisa*, for the fifteenth respondent

Judgment

Mtshiya J: This is an urgent chamber application wherein the applicants E pray for a provisional order in the following terms:

"**TERMS OF FINAL ORDER SOUGHT:**

That you show cause to this Honourable Court why a final order should not be made in the following terms:

1. The terms and conditions which applied to the applicants at the time of their admission be and are hereby declared to be binding on the Respondent. F
2. The regulatory framework imposed on the applicants on 22 August 2012 be and is hereby declared a nullity.
3. The resolution of the meeting of 7 August 2012 be and are hereby declared null and void.
4. That the respondents who oppose the application pay the costs. G

INTERIM RELIEF GRANTED:

Pending determination of this matter, the applicant is granted the following relief:-

1. The applicants' tenancy at 13th Floor Old Mutual Centre be and is hereby restored.
2. The respondents be and are hereby ordered not to interfere with the applicants' practice in any manner contrary to the terms and conditions which applied H to the applicants at the time of their admission.

Mtshiya J

3. That those respondents who oppose the application pay the costs thereof." A

The background to the relief sought is as follows:

The first applicant registered as a legal practitioner on 29 February 2012. The second applicant is also a registered legal practitioner. His date of registration is not indicated in the papers.

On 14 February 2012, before his registration, the first applicant applied to B the thirteenth respondent to be admitted as "a pupil and member." He states that in March 2012 the thirteenth respondent responded to his application in terms similar to those given to the second applicant on 15 May 2012 when he (the second applicant) was admitted to advocates' chambers. The said letter, authored by the secretary of the thirteenth respondent, reads as follows: C

"**RE: ADMISSION TO THE ADVOCATES' CHAMBERS**

I refer to your application for admission to the Advocates' Chambers as a pupil.

I am pleased to advise that your application has been successful subject to the following:

1. You will need to be issued with a valid practising certificate by The Law Society of Zimbabwe for the year 2012. If you present this letter to The Law D Society and pay the required amount you will be issued with the certificate.
2. You will be subject to the Bar Rules and Constitution and to the Constitution of the Advocates' Chambers. As an advocate you will not be allowed to accept any work other than from a duly licenced legal practitioner/attorney/solicitor.
3. You will be allocated a room in Chambers upon payment of the required E sum of money. You will be advised of the amount by Mrs Benn or by the Honorary Treasurer in due course.
4. You will be a pupil under the supervision of the senior members of these Chambers. All work which you return to instructing legal practitioners must be signed by your pupil Master.

I take this opportunity to welcome you to the Advocates' Chambers and hope that F your association with distinguished members of the profession in this Chambers (*sic*) will assist you in your professional development."

The second applicant joined the thirteenth respondent on 1 June 2012. The above terms and conditions applied to both applicants.

It is common cause that the applicants were duly issued with practising certificates G by the fifteenth respondent describing each of them as "Advocate." The certificates were endorsed with a condition

that the applicants could not operate trust accounts.

In addition to the terms contained in thirteenth respondent's letter of 15 May 2012, the first applicant says his pupil master confirmed the terms and conditions as follows: H

Mtshiya J

"(a) I A would report to my pupil master any matters on which I would require guidance and supervision;

(b) I would be entitled to receive briefs and instructions from law firms in my own name and as a pupil advocate;

(c) That my master would countersign any work I had done as a form of quality control;

(d) That B I would also be under the general supervision of other senior members of the Bar and that in the unlikely event of being briefly to appear in a matter in which my master had been briefly in opposition, any other senior member of the bar would countersign such work;

(e) That I would get assignments from my master or any other member of Chambers and if they were satisfied with my input, I would be entitled to C co- authorship of the document, e.g. Heads of Argument;

(f) That I would have a right of audience in all courts of law in Zimbabwe and all other quasi-judicial hearings which allow legal representation;

(g) That my master would determine the duration of my pupilage taking into account my performance, competence and general profession development. Until such time that my master indicated I was ready to be weaned, I would D remain under pupilage."

The second applicant confirms the above in the following terms:

"3. I confirm that I joined the Advocates Chambers as a member under pupilage on 1 June 2012 and I refer to Annexure E of the first applicant's affidavit hereto which is the admission letter sent to me by the third respondent in his capacity as the Secretary of the Advocates Chambers. As is clear from the E contents of Annexure E, I was admitted on certain conditions which included being issued with a practising certificate by the Law Society of Zimbabwe, being subject to the Bar Rules and Constitution and to the Constitution of the Advocates' Chambers, being allocated a room in Chambers upon the payment of the required sum of money, and that I would be a pupil under the supervision of senior members of Chambers. I wish to highlight the F terms under paragraph 2 of Annexure E which state as follows: "As an Advocate you will not be allowed to accept any work other than from a duly licensed legal practitioner/attorney/ solicitor". I highlight this sentence as it appears that some of the respondents are under the misapprehension that the title "Advocate" never applied to me and that I was not entitled to directly receive work in my name. G

4. I confirm that I duly met all the conditions set out in Annexure E and that I indeed subjected myself to the Bar Rules and Constitution and to the Constitution of the Advocates' Chambers. I confirm that prior to applying to join the Advocates Chambers, I had done extensive consultations on the workings of Chambers and in particular I consulted the then Chair of Chambers, Advocate Happious Zhou and the Secretary, Advocate Thabani Mpofu, the third respondent herein. I confirm that both Advocate Zhou H (now Justice Zhou) and Advocate Mpofu confirmed the admission terms

Mtshiya J

and conditions as set out in Annexure E and I then resigned my employment A with Messrs Dube, Manikai & Hwacha to join Chambers in the belief that the terms set out in Annexure E and as elucidated in my enquiries and consultation with the then Chair and Secretary would be binding on all concerned and would not be altered or changed outside the Bar Rules and Constitution and the Constitution of the Advocates Chambers and without any due process where rights that would have accrued to me could be unilaterally changed by the other member. B

5. Based on these representations by the then Chair and the current Secretary, the third respondent herein, I duly commenced my practice as a pupil Advocate under Advocate Girach as my Master. I conducted my practice in terms of the conditions set out in my admission letter and received briefs in my own name although all my work went out countersigned by my Master or other senior member of Chambers." C

The applicants state that the legal fraternity was advised of their positions through the following memorandum, again authored by the secretary of thirteenth respondent:

"PLEASE BE ADVISED THAT the following is a list of members of the Advocates' Chambers Association practising as Advocates at Advocates' Chambers, 13th Floor, Old Mutual Centre, Harare as at the first June 2012. D

Morris E W W

Fitches R M

Mehta D S

Uriri L

Mpofu T

Chadambuka Z T

Ochieng D E

Chingwena R

Mahere F

Girach F

Mangaliba T

Morris-Davies A

Kachidza-Mazhude P

PUPILS F

Sibanda T

Bwanali R

Hashiti S M

Chambers now has three (3) pupils all of whom will remain under the supervision of the senior members of the Chambers. All the work they do will be countersigned G by their pupil masters"

The above memorandum was copied to:

Registrar, Supreme Court

Registrar, High Court

Registrar, Labour Court

Registrar, Administrative Court H

Mtshiya J

A It is important to note that the second pupil, R Bwanali, mentioned in the above memorandum, is not a party to these proceedings.

On 7 August 2012 the applicants were advised of new rules that would regulate their pupillage. The following were the new rules:

"**REGULATORY FRAMEWORK GOVERNING PUPILLAGE AT** B **ADVOCATES' CHAMBERS**

I. Interpretation

1. A 'pupil' shall be any person admitted to pupillage by the Advocates' Chambers Association and who qualifies to be registered as a legal practitioner under the Legal Practitioners Act [*Chapter 27:07*].
2. A 'master' shall be a member of the Advocates' Chambers Association in C charge of a pupil.

II. General

3. The rules set out herein are not exhaustive and are intended for the guidance of pupils admitted to pupillage at Advocates' Chambers. They do not cover every point that may arise in practice. Any member who requires advice as to a matter of conduct or etiquette whether covered by these rules or not should seek the advice of the Chairman of the Advocates Chambers D Association.

III. Acceptance of briefs

4. A pupil shall not accept a brief in his or her own name.
5. Any instructions to a pupil shall be in the form of a brief to the pupil's master. E
6. A pupil shall not render any professional services save in cases referred to in (4) and (5) above.

IV. Appearances

7. A pupil shall not receive instructions to appear in a court, other than the magistrates court, in the absence of his master.
8. A pupil shall account for his or her whereabouts during working hours to F his or her master.

V. Charging of fees

9. A pupil shall not charge fees in his own name.

10. The pupil's master shall decide upon the fees to be charged by a pupil in respect of any work done. G
11. In so deciding, the master may consult his or her pupil.

VI. Touting

12. A pupil shall not tout or advertise in any way.
13. A pupil shall not represent to any person, directly or indirectly, that he or she is an advocate.

VII. Practising Certificates H

14. A pupil may hold a practising certificate.

Mtshiya J

15. A practising certificate held by a pupil shall not bear the title "Advocate" A
16. A practising certificate held by a pupil shall bear an endorsement indicating that the pupil can only accept instructions under the supervision of the pupil's master.
17. Pupillage shall be for a period of not less than 36 months.
18. Upon the expiry of a pupil's pupilage contract, a pupil may apply to the Advocates' Chambers Association for admission as a member B
19. A pupil shall be allocated a room or part of a room for the duration of his pupillage contract.
20. A pupil shall be liable to pay the rental costs of a room or part of a room allocated to him or her.
21. A pupil who fails to observe these rules will risk termination of his pupillage contract. C
22. An *ad hoc* disciplinary committee shall be constituted by the Chairman to handle any complaints of misconduct by a pupil."

The above rules were later sent to each applicant (pupil) on 22 August 2012 under cover of a short letter which read as follows:-

> "Pursuant to the Extraordinary General Meeting of 7 August 2012, find hereto D attached a copy of the regulatory framework under which you are required to operate forthwith. You are required to sign a copy of this letter and deliver it to Advocate Mahere to signify your receipt and acceptance of the terms set out therein. Should you fail to sign and deliver the letter by close of business on 29 August 2012, your pupillage contract will be deemed to be terminated with effect from that date. E
>
> We look forward to providing you with a rewarding and fruitful pupillage"

The applicants responded to the above letter on 30 August 2012 through a memorandum addressed to the secretary of the thirteenth respondent and copied to:-

- All members of the Advocates' Chambers Association F
- Secretary of the Bar Council of Zimbabwe, and
- Secretary of the Law Society of Zimbabwe

In their memorandum the applicants rejected the new regulations. In the main they stated:

> "5. We categorically reject to be bound by the principle and terms of the so G called regulatory framework or any regulatory framework outside the Legal Practitioners Act [*Chapter 27:07*] ('the Act'). From the outset, the so called regulations are lacking in informing us under what authority they are being made. They deliberately avoid associating themselves with the Act despite mention of the same in the first clause. The spirit of the Act is such that no rules or regulations or amendment of such rules, shall affect the right to practice of a registered legal practitioner who was entitled to H

Mtshiya J

> A practice as such before the date of commencement of the rules, regulations or amendment, as the case may be. To suggest otherwise and to give an ultimatum coupled with threats of dismissal from the Chambers, would not only be tainting these proposed regulations with gross illegalities but would also be suggestive of the sheer ineptitude and *mala fides* of the framework's draftsman or draftswoman. B
>
> 6. It is an elementary principle in law that one cannot legislate retrospectively in a manner which adversely affects vested rights and interests. Your regulatory framework flagrantly flies in the face of that well-founded pillar of justice.
> 7. In terms of the Act, only the Law Society of Zimbabwe ("the Law Society") has the power to regulate the practice of the profession. This is trite law. You did not cite any provision of the Act which empowers you to legislate. At best, and only at the 'club' level, only the Bar Association would

be C an appropriate body to come up with a position such as one which you overzealously sought to pursue.

8. We were admitted to the Advocates' Chambers as members under pupillage. That is the only reason why our admission was subject to registration as legal practitioners and to our being issued with valid practising certificates, appropriately issued to us by the Law Society, recognizing us as advocates. D That right and title cannot be taken away by your regulations. For the avoidance of any doubt, our status as members cannot be challenged. *We are members of the Advocates' Chambers and the Bar Association. Since our admission, we are members of the Advocates' Chambers.* Even the purported regulations (without clothing them with any validity), abundant with inelegance as they may be, concede to this status in clause II thereof. E

14. The provision that we cannot accept briefs in our own names clearly contradicts the terms of our letter of admission to the bar and is contrary to the rules of the bar which we subscribe to and are binding upon us. This provision seeks to make us employees of our masters, contrary to the Bar Rules. *An advocate cannot employ another registered legal practitioner.* The provision therefore attempts to rob us of our statutory right. The same F applies to the suggestion that pupils should account to their master for hours of work. The position that exists is that our masters should oversee our work and counter-sign our briefs and work as a measure of safeguarding the standard of work coming from the bar and maintain the bar's reputation. This is entirely acceptable, for it is a reasonable, necessary and proper safeguard, until such a time when the master reposes confidence in the work of a pupil. G

15. The statement that only in the magistrate court can we appear without our master is unlawful. It is ridiculous. Our right of audience in the High Court and Supreme Court is anchored, steadfast and secure in the Act and the Regulations in terms thereof. You cannot take away that right. The absurdity of your provision is that while our contemporaries at the side-bar are appearing in the superior courts by themselves, thus gaining extensive H knowledge, confidence and experience, we will be relegated to be your

---

messengers to the magistrates court, and upon completion of our pupillage A we then suddenly expect to get briefs from our contemporaries to appear in the superior courts. This is patently preposterous.

16. In your regulations, you included a clause relating to charging fees. Your clause is inconsistent with our letters of admission and is *ultra vires* the Bar Rules. We are entitled to charge a fee, guide only, and only by the Law Society Tariff. B

17. We do not understand the clause on touting as that is a matter of common knowledge and ethics inculcated in us in law school and fully canvassed by the bar rules.

18. An attempt is made to equate our pupillage with that at the side bar. This is an erroneous effort. The only limitation placed upon us upon admission as advocates is that we should not operate a trust account. This mischief C simply does not exist in an advocate's practice and an advocate who does not operate a trust account cannot be encumbered with the same limitations. *The practice of an advocate entitles one to practice on his own account*. The only limitation in this regard is one placed by the Law Society, thus, he should not operate a trust account as there is a risk that, as a sole practitioner he may abuse trust funds. Where there is no trust account to the question of limitation falls away. D

20. It is common cause that if by any chance a member decides to leave the bar and undertake practice of an attorney he/she will be required to undergo the 36 months pupillage again, notwithstanding their years of experience at the Bar. On the other hand, as already intimated herein and elsewhere, attorneys have been accepted to the bar under pupillage". (My own italics to emphasize the fact that the applicants were indeed practising on their E own account)

Clearly there is no doubt that, by declaring that "An advocate cannot employ another registered legal practitioner…. The practice of an advocate entitles one to practice on his own account", the applicants agree with the opinion of the first respondent F

On 3 September 2012 the secretary of thirteenth respondent responded to the applicants' memorandum in a way that confirmed the termination of the applicants' relationship with the thirteenth respondent, which took effect on 29 August 2012, when applicants refused or failed to sign for the new regulatory framework. The letter read, in part, as follows:

"I have received a Memorandum dated 30 August 2012 but placed in my G cubbyhole on the 31st August 2012. I might, obviously in consultation with the Chairman, need to call an appropriate meeting to discuss

the contents of that memorandum. For my assistance in pursuing those efforts, I propose that you clarify the following issues:

i. Since my letter of the 22nd August 2012 indicates that your failure to sign the Regulatory Framework by 29th August 2012 would result in the H

Mtshiya J

A determination of your relationship with Chambers, (and it being common cause that the deadline has come and gone without such signing or any extension having been sought), in what capacity have you addressed that correspondence to me? …

vi. Having lost your individual Pupil Masters (and it being common cause that you cannot practice without their supervision), how do you suppose you B could possibly remain at Chambers?

In view of my letter of the 22nd August 2012 as well as my *prima facie* view on the correctness of your position, I would appreciate a very urgent response. To that end, should I not get your clarification by end of day on the 4th September 2012, I will take it that the matter has been closed. In that event, I will entertain no further correspondence from yourselves on the subject. Be thou guided accordingly."

C In addition to the above, on 3 September 2012 the fourteenth respondent, through its secretary also wrote to the applicants. The letter read, in part, as follows:

"**RE: YOUR STANDING IN RELATION TO THE BAR ASSOCIATION**

The entire Council has considered your most unfortunate memorandum dated D 30 August 2012 and received by each of us the next day.

The first and most important point to be made is that you are not members of the Bar Association. Not one of you even applied, and you are certainly not in possession of letters accepting you as members of the Bar Association. I also mote that although you are all registered as legal practitioners, your own memorandum establishes that are not yet entitled to practice for your own account. E It is thus doubtful whether you are suitable candidates for membership of the Bar Association anyway. The practice of an advocate is of a sole practitioner. In the absence of some general or specific arrangement addressing that concern, the Council might not have regarded it as competent to admit as a member a person who is not yet lawfully entitled to practice for his own account.

These same considerations create doubts as to the propriety of your just-ended tenancy at Advocates' Chambers. It would appear that a practitioner who has F not completed the prescribed 36 month period has no greater right to practice as an advocate than he has to open a firm of attorneys. To the extent that an arrangement might be made to mitigate that position, you correctly observe that it is the prerogative the Bar Association (in consultation, where appropriate, with the Law Society) to define such measures.

It is therefore true that Advocates' Chambers would have acted outside its G powers if it sought to unilaterally create an institution professing to be a system of pupillage. However (as you may have seen from correspondence to which you had unauthorized access), Advocates' Chambers must have intended to present the proposed framework to the Bar Council for adoption on the proper authority in due course.

I can confirm that, if asked, the Bar Council would likely have urged the H Association and the Law Society to ratify a cogent framework that might have

---

Mtshiya J

permitted you to practice in some capacity. The Bar Council, after all, serves A to promote the orderly functioning of the advocates' profession. Sadly, it seems that your own rejection of that framework stymied the internal process by which Advocates' Chambers might have reached the stage of making that request to the Bar Council. It would appear that you have thereby frustrated the very process that might have led to you regularizing your position with the Bar Association. We therefore make no comment on the substance of the proposed framework, B as it was never before us.

If and when the Bar Association has adopted a system of pupillage, or perhaps when you have earned the right to practice for your own account in the normal course of events, you might wish to apply for membership of the Bar Association. Unless and until you are accepted as such, the Bar Council takes umbrage at your representations that you are members. Given the recent termination of your C tenancy at Advocates' Chambers, no basis remains for you to hold yourself out as advocates. You are reminded to refrain from doing so."

On 13 September 2012 the applicants addressed the following letter to the Secretary of the fifteenth respondent (the Law Society of Zimbabwe):

"**RE: PUPILLAGE REGULATORY FRAMEWORK AND TERMINATION OF PUPILLAGE AND TERNANCY AT THE ADVOCATES'** D **CHAMBERS**

1. We refer you to the above matter and our previous discussions on the matter.
2. Our efforts to indulge the chairperson of the Advocates' Chambers with the hope of fostering an agreeable way forward have not been fruitful. The standing position is that our tenancy has been terminated and we should vacate the premises with immediate effect. E
3. We take the view that the resolution of this deadlock can be done amicably. Accordingly, we kindly request for your intervention in appointing a third-party as mediator to deal with the following issues:
   a. The pupillage regulatory framework
   b. The dismissal of the present pupils. F
   c. The termination of tenancy at the Advocates' Chambers
   d. The way forward
4. Our suggested mediators include Hon Eric Matinenga, Advocate de Bourbon, Hon Zhou among any other senior members of the bar, preferably members of the Bar Association of Zimbabwe.
5. We further seek your urgent intervention to ameliorate likely prejudice to G members of the public who have instructed attorneys to entrust us with their work. As things stand our access to the Advocates' has been restricted yet we have briefly in our possession and matters that we are already seized with and we find ourselves as destitute without rooms/offices and without a library to us.
6. We look forward to your imminent response." H

Mtshiya J

A On the same date the fifteenth respondent responded, through its Executive Secretary, in the following terms:

"I advise that after going through your letter and other correspondence copied to me, my view is that the Law Society cannot intervene in this matter which is essentially a labour matter.

B I have arrived at this position after careful consideration of the following issues.

The Advocates Chambers is like a private club which is governed in terms of its own constitution. One joins the Chambers through invitation. In joining the Chambers one is deemed to have accepted to follow the rules of the Chamber as prescribed in the constitution, memoranda, custom and practices. The Law Society of Zimbabwe (LSZ) expects the Chambers to have a comprehensive C training regime in place. It will be remiss of a Chamber to take on pupils without putting in place a pupilage training programme.

It is obvious that the Chamber sought to introduce a framework for such pupillage through its memorandum of the 22nd August 2012. The framework was objectionable to you. Whilst you sought to have an opportunity to discuss the objectionable portions of the framework, your principals did not grant that D and instead insisted on you signing acceptance of the framework. You refused to do so leading to the termination of your tenancy at the Chambers.

I acknowledge that as a result you find yourself holding briefs but with no means to act on them. You have no offices and no access to a library nor to any other basic necessities of effectively discharging your mandate in terms of the briefs you hold. Your right to hold a practising certificate and to practice has fallen away.

E The termination of your tenancy breaches no Law Society regulations. It is not wrong for the Chambers to put in place a training framework for the pupils it takes on. The introduction of this may have been done in a 'cleaner' way but the principle is not wrong.

Arbitration

F The LSZ is of the view that it cannot impose itself on the parties to a dispute. Having regard to our views expressed above the LSZ sees no scope for involving itself in any form of arbitration in this matter.

Current Briefs

I would suggest that you retrieve your briefs and advise the court and the clients o this unfortunate development.

G **Your Status**

In view of the loss of your tenancy at the Chambers, you can no longer remain entitled to practice using your current practising Certificates. You have the following options at your disposal:

(a) You find a new Principal in which case you need to apply for a new Practising H Certificate or

Mtshiya J

(b) You negotiate a settlement with your erstwhile Principals and therefore A seek for a settlement in which case you retain your Practising Certificate or proof of settlement.

If I do not hear from you within the next forth-eight hours you are ordered to surrender your current Practising Certificates to my office.

Please note that this position has been taken in consultation with Council." B

On 20 September 2012 the applicants' legal practitioners addressed the following letter to the thirteenth respondent:

"I have been consulted by Messrs Hashiti and Sibanda regarding the dispute on the regulatory framework governing your pupils. Having perused the correspondence exchanged, the various instruments that govern your association and having served at Chambers in the early years of my career, I am of the view that this matter C ought to be resolved amicably and without any litigation. Your Association is a member of the World Bar Council which seeks to uphold all aspects of fair play and in my view it would cause the local Bar incalculable harm to be embroiled in litigation where it will be alleged that the Bar has failed to follow due process in dealing with its pupils. Would your Committee be willing to meet with me as a matter of urgency in an endeavour to find an amicable solution to the dispute." D

The dispute remained unresolved and on 24 September 2012 the applicants filed this application on an urgent basis.

The parties appeared before me on 25 September 2012. I urged the parties to consider an amicable settlement. To that end I postponed the matter to 26 September 2012. E

On 26 September 2012 the parties advised me that there was no possibility of an amicable settlement. On the same date almost all respondents filed opposing papers – which papers I and the applicants' legal practitioners had had no time to read. I again postponed the matter to 28 September 2012.

When the hearing of the matter commenced on 28 September 2012, two preliminary points were raised. F

The first issue was that the first to twelfth respondents had been misjoined to the proceedings.

It was argued that their citation in their individual capacities was irregular since they had no authority to implement the order sought.

The second issue, raised on behalf of fourteenth respondent, was that the G order sought was incompetent because it would perpetuate an illegality.

In view of the issue of illegality that was raised, I then indicated that arguments or submissions on that issue would naturally lead to a consideration of the merits of the matter before me. I believed a determination of that issue would dispose of the matter. That approach was generally accepted by the parties. H

Mtshiya J

A I shall now deal with the preliminary issues that were raised.

Upon reading the opposing papers to this application I had hoped that the applicants would concede on the issue of misjoinder. I was, unfortunately, terribly wrong. I had formed that impression because I believed the thirteenth and the fourteenth respondents, as entities capable of suing and being sued, B were the possible implementers of the relief sought. In any case the applicants, including their legal practitioner, had directed all their correspondence to the thirteenth respondent.

The respondents (first to twelfth) submitted that it was wrong for applicants, who are legal practitioners, to sue them in their personal capacities. The applicants, it was argued, knew the correct parties to be cited but they had C deliberately proceeded to join the individual respondents (first to twelfth) either as a way of forcing them to compromise or simply to embarrass them. Such conduct, it was argued, merited costs on a higher scale.

Mrs *Mtetwa* for the applicants disagreed. She submitted that the opposing papers revealed contradictory positions being taken by the individual D respondents. She also said those who had authored correspondence which affected the applicants were not in a position to confirm whether or not they had authority to write to the applicants as internal administrative systems in both thirteenth and fourteenth respondents were dysfunctional. That being the case, she went on, it was

only proper to cite all the respondents in their E individual capacities. There was need to establish the source of authority in both the thirteenth and the fourteenth respondents, she argued.

Mrs *Mtetwa* also said it would not be fair to demand costs from the applicants when it was clear that they acted on the advice of their seniors who were now disowning them. Furthermore, the regulatory authority, the fifteenth F respondent, had given its blessings to the arrangement.

I am unable to fully go along with the applicants' arguments. The applicants knew where authority lay and which entities to deal with. As far back as 14 February 2012, the first applicant knew who the thirteenth respondent was and that is why he directed his application to it. That was the entity that admitted both applicants into pupillage. The applicants' memorandum of G both 27 July 2012 and 30 August 2012 was addressed to the entities that the applicants knew could render the relief they now seek *in casu*. A reading of those documents confirms that the applicants knew who exactly to approach for any requisite relief. The documents do not reveal disfunctionality in both thirteenth and fourteenth respondents. The applicants knew who was H terminating or restructuring their pupilage. The applicants are pretty alive

---

Mtshiya J

to the fact that, working together, the thirteenth, fourteenth A and fifteenth respondents are the entities that can attend to the relief they seek.

Regarding the citation of wrong respondents, in *Maxwebo* v *Chairman, Public Service Commission* HH-125-97, a case referred to in *Matida v Chairman, PSC & Anor* 1998 (1) ZLR 507 (H), Smith J had this to say: B

> "Before concluding, I wish to make an observation on the party cited as respondent. The Chairman of the Public Service Commission was so cited. Although exception was not taken thereto, I consider that it was improper to cite him as respondent. Section 74 of the Constitution establishes the Public Service Commission which consists of the Chairman and not less than two and not more than seven other members. Any findings, ruling or decisions of the Public Service C Commission are those of that body and not of the Chairman. Accordingly, the Chairman of the Public Service Commission cannot do anything in the name of the Commission if the majority of members do not agree with him. The distinction is illustrated by the order sought by the applicant. The draft order states that the respondent's decision to find the applicant guilty of misconduct should be set aside. However, the finding of guilty was not a decision of the respondent. It was a decision of the Public Service Commission. I therefore D consider that it was improper to cite the Chairman as respondent. The Public Service Commission should have been cited as respondent."

Given the legal status of thirteenth, fourteenth and fifteenth respondents, I do not see why the above principles should not apply *in casu*. It is only the thirteenth, fourteenth and fifteenth respondents who can deal with the order sought. E

In view of the foregoing, I agree with the first to twelfth respondents that they were indeed misjoined. There was no point in citing them because they cannot exercise any individual authority to implement the relief sought. I therefore uphold the point *in limine*.

I am, however, not convinced that an order for costs can be justified when it F is clear that the position in which the applicants found themselves was not of their own making. I am of the view that an order for costs should not be made against the applicants. I believe that their dealings with the thirteenth respondent were above board and the applicants believed they were on their way to become fully fledged advocates. Nothing had ever been brought to G their attention until the July discussions relating to the issue of pupillage. The circumstances of this case therefore dictate that each party should bear its own costs.

I now come to the second issue raised *in limine*. The issue, according to the fourteenth respondent, is that in terms of s 4(1) of the Legal Pratitioners (General) Regulations (SI 137 of 1999) (the regulations) it is illegal for a H

Mtshiya J

A legal practitioner to practice on his/her own account before the expiration of a period of not less than 36 months from the date of registration.

Section 4(1) of the said regulations provides as follows:

"(1) Subject to this section, a legal practitioner shall not commence to practise as a principal, whether on his own account or in partnership or association with any other person, unless he has been employed as a legal assistant for not less than B thirty-six months after registration with a legal practitioner who has himself –

(a) been in practice in Zimbabwe for at least forty-eight months; and

(b) been approved by the Minister after consultation with the Council for Legal Education and the Council of the Society."

The applicants are not covered under the exemptions that are spelt out under C the regulations.

Mr *Morris* submitted that advocates practice for their own account. This, he said, could not be the position with the applicants until they had completed 36 months' employment as legal assistants. He said the order sought by the applicants would enable them to practice on their own. Granting such an order, he said, would contravene the law which governs all legal practitioners D in Zimbabwe.

Mrs *Mtetwa* submitted that the regulator, the fifteenth respondent, had authorised the applicants to practice through the issuance of practising certificates endorsed "Advocate." The only meaningful limitation endorsed on the practising certificates was a prohibition to operate trust accounts. E She argued that the idea of changing the regulatory framework for pupils in midstream was unjustifiable. In terms of the new (proposed) regulations the applicants would lose their right of audience in the superior courts. That would be illegal.

The fifteenth respondent did not take a firm position on the issue apart from F confirming that once applicants lost membership of the thirteenth respondent, the practising certificates would be withdrawn. I want to believe that, as far as the fifteenth respondent was concerned, it regarded the applicants as employees of thirteenth respondent. That is why it viewed the whole dispute as a labour matter.

Furthermore, the fifteenth respondent agreed that it would be illegal for G applicants to practice on their own account. It emphasized on the need for compliance with the legal Practitioners Act [*Chapter 27:07*].

I am in agreement with the fourteenth respondent on the issue of illegality. Following fusion in 1981, all those practising law in Zimbabwe became known as legal practitioners. That title includes advocates. Legal practice H in Zimbabwe is regulated by the Legal Practitioners Act and the subsidiary,

---

Mtshiya J

legislation there to. The training referred to under the regulations applies to A all newly registered legal practitioners in Zimbabwe, including intending advocates, unless lawfully exempted. The applicants, in my view, are fully aware of that. I am, however, disappointed that, notwithstanding the fact that the applicants are legal practitioners and the fact that the opinion that was sought by the thirteenth respondent is largely an interpretation of the B regulations, the applicants hardly make any direct reference to the regulations. They conveniently avoid direct reference to the law but at the same time indicate that their rights in this matter are protected by the Act. (*i.e.* the Act that tells them how to practice law lawfully in Zimbabwe).

What the applicants refuse to do is to admit that they have, unfortunately, C with the help of the thirteenth, and fourteenth respondents violated the law. The applicants are fully aware of the 36 months period for practical training. In their memorandum of 27 July 2012 the applicants made the following proposals:

"5. Our proposed position is that we should:

(i) Not pay subscription in the first year. This arises from the fact that we D are at this stage still crawling. We have not fully established ourselves in terms of drafting itself, living up to the courts' expectations in terms of appearance, arguments and to some point even etiquette. Contacts have not been made and are still in the process of being made.

(ii) Pay a third of the subscriptions in the second year. The reason being that, a pupil by that time will have to some extent matured. One is, E in the second year, expected to start receiving a sizeable number of briefs in their own name, their finances have improved; they have established themselves and are now coping up with the work of an advocate.

(iii) Pay two thirds of the subscriptions in the third year. A pupil, at this stage, is still a pupil, but will be in a better position to cope with F increased financial and professional obligations. They

will however still need some degree of supervision.

(iv) Pay full subscriptions after the third year and immediately upon completion of pupillage. It is trite that practise from the bar is self-inhibiting in that once one has failed to impress and engender the confidence of the profession, they cannot sustain their presence at G the bar. This is evidenced by the frequency of resignations of new members to the bar.

6. Upon finishing the third year or at any time after the second year, subject to the satisfaction of the pupil master, a pupil can now obtain the status of a full member enjoyed by senior members of the Bar with the attendant rights and obligations." H

2012 (2) ZLR p273

Mtshiya J

A The above proposals are spread over a period of three years. Clearly the applicants are aware of the 36 months but what they do not want to do is "to be employed as legal assistants for not less than 36 months without practising on their own account. They have no problem with the 36 months as long as they can *remain practising on their own account.* That in terms of the law would be illegal. I do not believe that the fifteenth respondent has B authority to accord any exemptions to anyone outside the law. The only way for a legal practitioner to be able to practice on his or her own account is to first of all undergo the required practical training as required by law. That training covers all facets of legal practice as can be seen from annexure 1 of the fifteenth respondent's opposing papers. The training is not restricted C to 'Trust Accounts' only.

It appears that sometime in July 2012, the thirteenth respondent suddenly came face to face with the regulations and then immediately tried to find ways of running the pupilage system within the law. A new "Regulatory Framework Governing Pupillage at the Advocates Chambers" was introduced. The applicants rejected it. I do not think I need to discuss the import of the D proposed new regulatory framework. All I am required to do at this stage is to determine whether or not it is permissible in law to allow the applicants to practise on their own account without complying with the regulations. My answer, as already seen, is no.

This is certainly a matter in which this court has a great interest. The training E of those who appear in the various courts of our country is crucial and hence the deliberate provision for practical training provided for in the law. Highly qualified legal practitioners will always be an asset so the judiciary and indeed to the entire nation. To that end, in *Mavheya* v *Mutangiri and Ors* 1997 (Z) 462 (H) Gillespie J, complaining about the quality of a legal practitioner's F work, made the following observation(s):

> "The extremely low standard of work encountered in this case, which regrettably is by no means unusual, cause one to ponder on the whole policy pertaining to the right of audience in this court. Graduates of the local university have the privilege of being entitled to obtain admission to the profession purely on the basis of their degrees. Foreign graduates, even those with impeccable academic G qualifications from universities in jurisdictions applying the Roman-Dutch law of this country, must undergo further professional examinations before admission. Not only may local graduates obtain automatic admission, but immediately upon being registered as legal practitioners, they may (and unfortunately do) purport to appear in any court, even the Supreme Court, on the most complicated and important of matters. Such newly admitted persons as this case shows, lack the knowledge, experience and professionalism to be effective advocates. They H are frequently a downfall to their clients and a hindrance to the administration

---

2012 (2) ZLR p274

Mtshiya J

of justice. Yet with time and experience they could become paragons of the A profession. That experience cannot conscientiously be obtained by immediate entry to practice at the highest level of the profession. It seems to me that earnest consideration must be given to the institution of a graded series of practising certificates for the differing levels of court. Issue of certificates to practice in the higher court should be permitted only upon completion of a satisfactory period of practice at lower levels and should be subject to periodical review or B renewal. Only thus can one encourage the attainment of the highest standards within the profession. Only thus can public confidence in the profession and the administration of justice be earned."

It would therefore be retrogressive and unpardonable if this court were to join the queue of those who might want to down grade the practical training of legal practitioners in this country. It would also be a sad day if this court C were, because of the call for sympathy, to allow the violation of the country's laws, especially by those who have the mandate to interpret those laws. There is therefore need to immediately put an end to an illegality.

The public relies on entities such as the thirteenth, fourteenth and fifteenth respondents to ensure that the country produces the best trained legal D practitioners. The practical training of newly registered legal practitioners is a programme of national importance. That being the case, it is imperative that the parties, with the involvement of the fifteenth respondent, should strive to find a way of accommodating each other under a regulatory framework that does not violate or offend the law. The answer is not to abandon the programme but to move forward legally. E

Given the foregoing, I am unable to grant the relief sought. Such a move would indeed be an endorsement of an illegality.

My thoughts on costs remain the same as already indicated herein when I dealt with the first preliminary issue. Although the applicants are legal practitioners, they were, in my view, hopelessly misled by their mentors. F I therefore think that this is a proper case where each party should bear its own costs.

I therefore order as follows:

1. Both preliminary issues are upheld with no order as to costs; and
2. The relief sought is refused with no order as to costs. G

Mtetwa & Nyambirai, applicants' legal practitioners

Bar Association of Zimbabwe, for the fourteenth respondent

Law Society of Zimbabwe, for the eighth and fifteenth respondents

Advocates' Chambers Association, for the thirteenth respondent H

Mtshiya J

A *Coghlan Welsh & Guest*, for the first and fourth respondents

Chimuriwo & Partners, for thethird respondent

Honey & Blanckenburg, for the second, fifth, sixth, seventh, tenth, eleventh, twelfth and thirteenth respondents

---

© 2015 Juta and Company (Pty) Ltd.

Document 36 of 60

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2012/Volume 2/RUVINGA v ZETDC (2) 2012 (2) ZLR 276 (H)

RUVINGA v ZETDC (2) 2012 (2) ZLR 276 (H)

Citation	2012 (2) ZLR 276 (H)
Case No	Judgment No. HH-389-12
Court	High Court, Harare
Judge	Zhou J
Heard	1 August 2012; *CAV*
Judgment	10 October 2012
Counsel	Details not supplied

Case Type Unopposed claim

Annotations No case annotations to date

Flynote

Delict – *negligence – foreseeability – causation – need to show not only that defendant's conduct factually caused the loss but also that the loss was reasonably foreseeable at time of act*

Headnote

The plaintiff, a farmer, paid the respondent to have electricity connected to D his farm. The installation included a transformer. Some years later the defendant, without the knowledge and consent of the plaintiff, connected other farms to the plaintiff's point of supply. That increased the load beyond the capacity of the transformer and caused a fall in the voltage and damage to the electric motors on the plaintiff's farm. As a consequence E of the damage to the electric motors, the plaintiff could not irrigate his crops. He claimed damages under three heads: for the value of the lost crops, for the reasonable cost of replacing the damaged electric motors and for mental anguish, anxiety and depression.

Held, that for the defendant to be held liable to pay the damages claimed under the third head it had to be shown that its conduct not only factually caused F the loss, in the sense of the loss having ensued as a consequence of the conduct complained of, but also that the loss suffered was sufficiently connected to the defendant's conduct to justify making it liable for such loss. The latter stage is what is referred to as legal causation; and the test for determining legal causation is that of reasonable foreseeability. A G wrongdoer is held liable only for the reasonably foreseeable consequences of his conduct. The moment of causing damage is the relevant one in determining reasonable foreseeability. One test is this: was the consequence, as well as the causal progression between the act and the consequence, at the time of the act foreseeable with such a degree of probability that the consequence can, in the light of the circumstances, H

Zhou J

A reasonably be imputed to the alleged wrongdoer? Based on this test, the anguish, anxiety and depression suffered by the plaintiff was so remotely connected to the conduct of the defendant that the defendant could not be held liable for it. Such loss could not be reasonably foreseeable as a consequence of the connection by the defendant of other farmers to the point of supply of electricity to which the plaintiff's farm was connected.

Cases cited B

Gibson v Berkowitz 1996 (4) SA 1029 (W)

International Shipping Co (Pvt) Ltd v Bentley 1990 (1) SA 680 (A)

Media 24 Ltd & Anor v Grobler 2005 (6) SA 328 (SCA); [2005] 3 All SA 297 (SCA) C

Ocean Accident & Guarantee Corp Ltd v Koch 1963 (4) SA 147 (A)

Smit v Abrahams 1992 (3) SA 158 (C)

Standard Chartered Bank of Canada v Nedperm Bank Ltd 1994 (4) SA 747 (A)

Overseas Tankships (UK) Ltd v Miller Steamship Co (Pty) Ltd (The D *"Wagon Mound" (No. 2))* [1966] 2 All ER 709 (PC)

Tuck v CIR 1988 (3) SA 819 (A)

United Bottlers (Pvt) Ltd v Shambawamedza 2002 (1) ZLR 341 (S)

Judgment

Zhou J: This is an unopposed claim for damages. After I had heard submissions I reserved judgment in order to consider the submissions made E by the plaintiff.

The plaintiff is a farmer by occupation. He carries on his farming operations at Subdivision 38 of Exwick Farm in Chegutu. In June 2002 the plaintiff and the defendant entered into an agreement in terms of which the plaintiff was to pay to the defendant US$217 655.80 for electricity to be connected F to his farm. In terms of the same agreement the defendant was obliged to connect, and did connect, electricity to the plaintiff's farm. The defendant also supplied a 100KV transformer. Sometime in 2008 the defendant, without the knowledge and consent of the plaintiff, connected other farms to the plaintiff's point of supply. That increased the load beyond the capacity of the transformer and caused a fall in the voltage and damage to the electric G motors. As a consequence of the damage to the electric motors, the plaintiff could not irrigate his crops.

The plaintiff's case is that, as a result of the failure of his irrigation, he lost his crops, as a result of which he has suffered damages as set out in the declaration. The loss falls under three heads. A sum of $208 849 is claimed H in respect of the lost crops as the value thereof. $9 800 is the reasonable

---

Zhou J

cost of replacing the damaged electric motors. The plaintiff also claims a A sum of $200 000 as damages for mental anguish, anxiety and depression.

I have no difficulty with the sum of $208 849 for the value of the lost crop. The affidavits and documents attached show that to be the reasonable value of the crops lost by the plaintiff as a result of the conduct of the defendant. I equally have no difficulty with the claim for the loss suffered in respect B of the destruction of the electric motor in the sum of $9 800. I do, however, wish to consider the claim for a sum of $200 000 in respect of damages "for mental anguish, anxiety and depression".

The issue arises of whether that loss was caused by the conduct of the defendant. For the defendant to be held liable to pay the damages claimed C it must be shown that its conduct not only factually caused the loss, in the sense of the loss having ensued as a consequence of the conduct complained of, but also that the loss suffered is sufficiently connected to the conduct of the defendant to justify making it liable for such loss. The latter stage is what is referred to as legal causation. In the case of *International Shipping Co (Pvt) Ltd v Bentley* 1990 (1) SA 680 (A) at 700 the court stated as follows: D

> "Demonstration that the wrongful act was a *causa sine qua non* of the loss does not necessarily result in legal liability. The second enquiry, viz whether the wrongful act is linked sufficiently closely or directly to the loss for legal liability to ensue or whether, as it is said, the loss is too remote. This is basically a juridical problem in the solution of which considerations of policy play a part. This is sometimes called 'legal causation'." E

See also *Ocean Accident & Guarantee Corp v Koch* 1963 (4) SA 147 (A); *Tuck v Commissioner for Inland Revenue* 1988 (3) SA 819 (A) at 832; *Standard Chartered Bank of Canada v Nedperm Bank Ltd* 1994 (4) SA 747 (A) at 763;*Gibson v Berkowitz* 1996 (4) SA 1029 (W) at 1039-1040.

In our jurisdiction the test for determining legal causation is that of reasonable foreseeability. See *United Bottlers (Pvt) Ltd v Shambawamedza* 2002 (1) ZLR 341 (S). F A wrongdoer is held liable only for the reasonably foreseeable consequences of his or her conduct. The moment of causing damage is the relevant time in determining reasonable foreseeability. Visser & Potgieter, *Law of Damages* 2 ed 274 states the following:

> "The reasonable foreseeability test … limits liability to those factual consequences G which a reasonable person in the position of the defendant would reasonably have foreseen. It is not necessary that all the consequences of the defendant's conduct should have been foreseen: only the general nature or the kind of harm which actually occurred must have been reasonably foreseeable. The exact extent or precise manner of occurrence need not have been reasonably foreseeable. However, the risk of harm must have been a real risk, which a reasonable person would not have brushed aside as being far-fetched … Van H

Zhou J

A Rensburg … suggests the following test: 'Was the consequence, as well as the causal progression between the act and the consequence, at the time of the act foreseeable with such a degree of

probability that the consequence can, in the light of the circumstances, reasonably be imputed to the alleged wrongdoer?'"

See also *Smit v Abrahams* 1992 (3) SA 158 (C) at 165*; Overseas Tankships (UK) Ltd* v *Miller Steamship Co (Pty) Ltd (The "Wagon Mound" (No. 2))* B [1966] 2 All ER 709 (PC).

I understand the above test to mean that the loss suffered must be sufficiently connected to the conduct of the wrongdoer that a reasonable person, in the position of the wrongdoer, would not consider such loss to be far-fetched. If the loss would be brushed aside as far-fetched by a reasonable person in the position of the defendant, then the loss should be considered to be too C remote to be imputed to the defendant, even if the defendant's conduct was the condition *sine qua non* for the loss concerned.

In my view, the loss caused by the anguish, anxiety and depression is so remotely connected to the conduct of the defendant that the defendant cannot be held liable for it. Such loss could not be reasonably foreseeable D as a consequence of the connection by the defendant of other farmers to the point of supply of electricity to which the plaintiff's farm was connected.The case of *Media 24 Ltd & Anor* v *Grobler* 2005 (6) SA 328 (SCA); [2005] 3 All SA 297 (SCA) does not support the plaintiff's claim in the instant case. In that case the psychological harm was directly caused by the sexual harassment which was the conduct complained of by the affected employees. E Accordingly, the plaintiff's claim for damages in the sum of $200 000 in respect of "mental anguish, anxiety and depression" cannot succeed.

In the result, judgment is hereby given in favour of the plaintiff against the defendant for:

1. Payment of the sum of $218 649, together with interest thereon at the F prescribed rate from the date of service of the summons to the date of payment.
2. Costs of suit.

© 2015 Juta and Company (Pty) Ltd.

Document 37 of 60

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2012/Volume 2/SHEENA FLOWERS (PVT) LTD & ORS v COMMISSIONER-GENERAL, ZIMBABWE REVENUE AUTHORITY 2012 (2) ZLR 280 (H)

SHEENA FLOWERS (PVT) LTD & ORS v COMMISSIONER-GENERAL, ZIMBABWE REVENUE AUTHORITY 2012 (2) ZLR 280 (H)

Citation	2012 (2) ZLR 280 (H)
Case No	Judgment No. HH-427-12
Court	Income Tax Appeal Court, Harare
Judge	Hlatshwayo J
Heard	12 October 2012
Judgment	12 October 2012
Counsel	*L T Biti,* for the appellants *A B Chinake,* for the respondent
Case Type	Income tax appeal
Annotations	No case annotations to date

Flynote

Revenue and public finance – *income tax – deductions – allowable deductions – costs associated with export of goods – export market development expenditure entitling taxpayer to a double deduction – distinction from normal costs incurred for purposes of trade – costs incurred must relate to export market and be over and above usual expenses associated with* D *export of goods – wholly and exclusively for export development*

Headnote

The appellants were companies whose main business was horticulture, focussed on the growing of flowers and exporting cut flower stems to external markets. Many expenses are incurred in the process of exportation E of the flowers, including special packaging, air-freight, port fees and agents' commissions. It was a trade practice to employ marketing agents, who use their expertise to decide the best market destination for the flowers, organise the most appropriate method of transportation of such flowers and advise on selling arrangements. Such agents were employed F on an informal basis, without any long term agreement between the grower and agent, who is simply notified once any shipment has been dispatched. The rates of commission varied from agent to agent. The responsibility of the agent was focussed on the disposal of the shipment to prospective buyers, who in turn used the services of the agents to identify sellers and advise on their requirements on a regular basis. The G flowers remained the property of the grower.

The appellants sought tax relief in terms of s 15(2)(gg) of the Income Tax Act [*Chapter 23:06*] in respect of the expenses incurred in the process of exportation of the flowers, including packaging costs, air freight, port fees, agents' commissions and marketing charges. That provision allowed for a double tax deduction. It gave the taxpayer a deduction in respect of H

2012 (2) ZLR p281

Hlatshwayo J

A the amount of any "export market development expenditure" incurred by him, together with an amount equal to 100% of such expenditure. Such expenditure is defined as being expenditure, not being expenditure of a capital nature, that is proved to the satisfaction of the Commissioner to have been incurred wholly or exclusively for the purpose of seeking opportunities for the export of goods from Zimbabwe or of creating or B increasing the demand for such exports, and includes such expenditure as market research, advertising, participating in trade fairs, and bringing prospective buyers to Zimbabwe. It was argued on behalf of the appellants that the payment of agents and air-freight charges associated with export of flowers created and increased the demand for such exports and that C the intention of the legislature in enacting the section was to provide an incentive to exporters who in fact are providing foreign currency to the state. The respondent maintained that the intention of the legislature was to encourage the development of new export markets in addition to those export markets which already existed, or to create or increase the demand for such exports, again in addition that which already existed. D The costs incurred by the appellants in exporting the flowers to the foreign markets did not fall within the definition of "export market development expenditure", but were simply costs incurred for the purposes of trade and therefore allowable in terms of s 15(2)(a), under which the deductions allowed are "expenditure and losses to the extent to which they are incurred for the purposes of trade or in the production of income except to the extent E to which they are expenditure or losses of a capital nature".

Held, that not every item of expenditure incurred in the export of goods qualifies for the double deduction. The basic distinction is between expenditure falling under s 15(2)(gg) and that which can be subsumed under s 15(2) F (a). It is conceivable that a given item of expenditure might be partially for export development (s 15(2)(gg)) and partly for the purposes of trade or the production of income (s 15(2)(a)). Such expenditure would not qualify for the export development double deduction as it would not have been incurred "wholly or exclusively" for the purpose of seeking opportunities for the export of goods from Zimbabwe, or of creating or G increasing the demand for such exports. Generally speaking, expenses incurred for the purpose

of obtaining an order or a contract in a foreign country would qualify for the double deduction. Such expenses would usually be connected or concerned with opportunity or creating or increase in demand for export of goods. On the other hand, expenses H incurred for the purpose of fulfilling an order or contract so obtained

Hlatshwayo J

or entered into would not qualify unless any item connected with the A fulfilment of the contract could be proved to have been incurred for the purpose mentioned in the definition.

Held, further, that the packaging and airfreight expenses were not wholly and exclusively incurred for the purposes spelt out in s 15(2)(gg), but for the purpose of fulfilling already existing orders and thus would B not qualify for the double deduction. The agents' commission and marketing charges, however, were expenditures incurred wholly for the procurement of orders for the goods exported and thus qualified for the double deduction.

Cases cited

C v CoT 1973 (2) RLR 100 (G); 1973 (4) SA 449 (R) C

CIR v Wandrag Asbestos Ltd (1992) 57 SATC 123

Legislation considered

Income Tax Act [*Chapter 23:06*], ss 15(2)(a) and 15(2)(gg) D

Case information

L T Biti, for the appellants

A B Chinake, for the respondent

Judgment

Hlatshwayo J: The above appeals are all centred on the decision of the respondent refusing to allow as permissible deductions in terms of s 15(2) E(gg) of the Income Tax Act [*Chapter 23:06*] certain expenditures incurred by the appellants. To the extent that there are minimal disputes of fact and to the extent that the issues of law raised are the same, it was agreed to consolidate the matters and to issue a single judgment covering all the appellants.

Background

The background to these matters is generally set out in the appellants' cases. F The appellants are companies with limited liability according to the laws of Zimbabwe. Their main business is horticulture, focused on the growing of flowers and exporting cut flower stems to external markets. Many expenses are incurred in the process of exportation of the flowers, and these include special packaging, air-freight, port fees and agents' commissions. It is a trade G practice to employ marketing agents, for instance Lianchi Flower Exporters employed by appellants Millar Brothers Limited, who use their expertise to decide the best market destination for the flowers, organise the most appropriate method of transportation of such flowers and advise on selling arrangements. Such agents are employed on an informal basis without any long term agreement between the grower and agent, who is simply notified H

Hlatshwayo J

A once any shipment has been dispatched. The rates of commission vary from agent to agent. The responsibility of the agent is focused on disposal of the shipment to prospective buyers, who in turn use the services of the agents to identify sellers and advise on their requirements on a regular basis. The flowers remain the property of the grower.

B The respondent has objected to:

(a) any deduction based on special packaging;

(b) air-freight and port expenses associated with export of flowers. This is so in particular in the case *of Luxaflor Roses (Pvt) Ltd*, and

(c) a deduction of commission and marketing charges paid to agents. This C is so in the majority of appellants.

In *Sheena Flowers (Pvt) Ltd, Charlotte Flowers (Pvt) Ltd, Sarah Flowers (Pvt) Ltd, Jomawena Enterprises* and *JH Butler Farms (Pvt) Ltd* the objections were couched as follows:

(a) agent's commission and marketing charges paid to agents were for the purpose of seeking markets for the flowers outside Zimbabwe and qualify D for the double deduction;

(b) airfreight charges are a necessary expense incurred for the purpose of increasing the demand for the flower exports and therefore qualify for the allowance. The costs are incurred to ensure that the flowers reach the overseas markets timeously and in an acceptable condition and thereby E increasing the demand for the flowers.

The issue, therefore, is whether packaging expenses, air-freight costs, commissioning and marketing charges are acceptable charges for the purposes of s 15(2)(gg) of the Act.

The respondent accepted the above stating of the cases.

F **The law**

Section 15(2)(gg) allows the taxpayer the benefit of a deduction in respect of the amount of any export market development expenditure incurred by the taxpayer in the year of assessment, together with an amount equal to 100 percent of such expenditure: in other words, a double deduction. The term G "export market development expenditure" is defined in this section as follows:

> "For the purposes of this paragraph –
>
> 'export market development expenditure' means expenditure, not being expenditure of a capital nature, that is proved to the satisfaction of the Commissioner to have been incurred wholly or exclusively for the purpose of seeking opportunities for the export of goods from Zimbabwe or of creating H or increasing the demand for such exports and, without derogation from the

---

generality of the foregoing, includes expenditure for any one or more of the A following purposes –

(i) research into, or the obtaining of information relating to, markets outside Zimbabwe;

(ii) research into the packaging or presentation of goods for sale outside Zimbabwe;

(iii) advertising goods outside Zimbabwe or otherwise securing publicity B outside Zimbabwe for goods;

(iv) soliciting business outside Zimbabwe or participating in trade fairs;

(v) investigating or preparing information, designs, estimates or other material for the purpose of submitting tenders for the sale or supply of goods outside Zimbabwe; C

(vi) bringing prospective buyers to Zimbabwe from outside Zimbabwe;

(vii) providing samples of goods to persons outside Zimbabwe;

'goods' means anything that has, in Zimbabwe, been manufactured, produced, grown, assembled, bottled, canned, packed, graded, processed or otherwise dealt with in such manner as the Commissioner may approve."

Mr *Biti* for the appellants submitted that the payment of agents and air-freight D charges associated with export of flowers "creates and increases the demand for such exports". In para 3.1.6 of his heads, he sought to establish the intention of the legislature in coming up with s 15(2)(gg) of the Income Tax Act and concluded that "the legislative intention is to provide an incentive to exporters who in fact are providing foreign currency to the state". However, E the respondent disagreed with this contention, maintaining that the intention of the legislature was to encourage the development of new export markets in addition to those export markets which already exists, or to create or increase the demand for such exports, again in addition that which already exists. Accordingly, Mr *Chinake,* for the respondent, posited that the costs incurred by the appellants in exporting the flowers to the foreign markets do F not fall within the definition of "export market development expenditure". The airfreight costs, port charges, commission and marketing charges incurred by the appellants are costs, which are simply incurred for the purposes of trade and therefore allowable in terms of s 15(2)(a).

The contention by the respondent is unassailable. In the absence of proof G to the satisfaction of the Commissioner that the costs incurred in the export of flowers by the appellants were increased above the usual expense for the purpose of seeking opportunities in an export market or for the purpose of increasing demand, the expenditure cannot qualify for the double deduction.

Section 15(2)(a) provides that the deductions allowed shall be "expenditure and losses to the extent to which they are incurred for the purposes of trade or H

2012 (2) ZLR p285

Hlatshwayo J

A in the production of income except to the extent to which they are expenditure or losses of a capital nature".

In the light of the above definition, it is clear that not every expenditure incurred in the export of goods qualifies for the double deduction. The s15(2)(gg) definition does not create or constitute an "export allowance" in the B sense that any expense incurred for the purpose or connected with selling of goods in a foreign country qualifies for this allowance. This appears to be the reasoning in submissions made on behalf of the appellants, and in this regard they are made in erroneous appreciation of the clear provisions of the Income Tax Act.

In my view, the basic distinction, therefore, is of expenditure falling either C under s 15(2)(gg) and that which can be subsumed under s.15(2)(a). It is conceivable that a given expenditure might be partially for export development (s.15(2)(gg)) and partly for the purposes of trade or the production of income (s.15(2)(a)). Such expenditure would not qualify for the export development double deduction as it would not have been incurred "wholly or exclusively" for the purpose of seeking opportunities for the export of D goods from Zimbabwe, or of creating or increasing the demand for such exports. Herein lies the second error in appellants' submissions. There is a failure to prove or try and show how much of the expenditure, if any, was incurred "wholly or exclusively" for export development.

The distinctions outlined above were clearly made in the case of *'C' v Commissioner* E *of Taxes* 1973 (2) RLR 100 (G); 1973 (4) SA 448 (R) by Goldin J who restricted allowable expenditure as that which is "incurred for the purpose of seeking opportunities for the export of goods or of creating or increasing the demand for such exports", and refused to accept as export development expenditure any direct or indirect costs incurred in satisfying the existing demand of foreign buyers for the purpose of fulfilling existing orders for F exports, unless it is shown that such expenditure expanded the market, concluding at p 451 as follows:

> "Application of this approach is by no means free from difficulties and borderline cases will inevitably arise. But, generally speaking, expenses incurred for the purpose of obtaining an order or a contract in a foreign country would qualify for this allowance. Such expenses would usually be connected or concerned G with opportunity or creating or increase in demand for export of goods. On the other hand, expenses incurred for the purpose of fulfilling an order or contract so obtained or entered into would not qualify for an allowance unless any item connected with the fulfilment of the contract can be proved to have been incurred for the purpose mentioned in the definition. For example, the expense of packing goods in fulfilling an export order would not qualify because it is an H expense incurred for the purpose of fulfilling a contractual obligation and not for

---

2012 (2) ZLR p286

Hlatshwayo J

the purpose of obtaining the contract. But if the cost of packaging is increased A above the usual expense involved because more expensive material is used or methods adopted for a purpose mentioned in para.(a) of the definition, then the additional costs could fall within it."

Mr *Biti* submitted that *CIR* v *Wandrag Asbestos (Pty) Ltd* (1992) 57 SATC 123 accepts implicitly the issue of commission as a legitimate export market development expenditure. In that case the taxpayer agreed to supply all B asbestos it mined to a local competitor for export. The competitor then fibrized the asbestos and blended it with its own. The mixed asbestos was exported through the competitor's marketing structure for which the taxpayer paid the competitor a selling commission based the asbestos delivered to it. The selling commission was allowed as a legitimate "expenditure incurred C directly for the procurement of orders for goods exported". The submission is highly persuasive that by parity of reasoning, the payment of commission to agents *in casu* is an expenditure incurred directly for the procurement of orders for goods exported.

Conclusion

It has not been shown that packaging and airfreight expenses were wholly and D exclusively incurred for the purposes set out in s 15(2)(gg). It appears to me that they were incurred for the purpose of fulfilling already existing orders, and, thus, would not qualify for the double deduction. The agents'

commission and marketing charges, however, are, on the strength of authorities discussed above, expenditures incurred wholly for the procurement of orders for the E goods exported, and, thus, qualify for the double deduction. As the appeal has succeeded only in part, it is proper that each party bears its own costs.

In the premises, the appeal succeeds in part. The disallowance of packaging, airfreight and port expenses is upheld. The agents' commission and marketing charges, however, do qualify for the double deduction in terms of s 15(2)(gg). Each party shall bear its own costs. F

Honey & Blanckenberg, appellants' legal practitioners

Kantor & Immerman, respondent's legal practitioners,

© 2015 Juta and Company (Pty) Ltd.

Document 38 of 60

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2012/Volume 2/MDC & ANOR v MUDZUMWE & ORS 2012 (2) ZLR 287 (S)

MDC & ANOR v MUDZUMWE & ORS 2012 (2) ZLR 287 (S)

Citation	2012 (2) ZLR 287 (S)
Case No	Judgment No. S-37-12
Court	Supreme Court, Harare
Judge	Chidyausiku CJ
Heard	17 October 2012
Judgment	17 October 2012
Counsel	*F Girach,* for the applicants *L Uriri,* for the respondents
Case Type	Chamber application
Annotations	No case annotations to date

Flynote

C **Appeal** – *costs – security for – "good and sufficient" security – what constitutes – written undertaking to pay security as requested by respondent – such offer constituting good security – duty cast on respondent to specify sum required, failing which sum will be as determined by registrar*

Costs – *security for – "good and sufficient" security – what constitutes –* D *written undertaking to pay security as requested by respondent – such offer constituting good security – duty cast on respondent to specify sum required, failing which sum will be as determined by registrar*

Headnote

In their notice of appeal, the appellants stated: "In terms of the Rules the E appellants undertake to pay the costs of preparing the record of proceedings and the respondents' costs including paying into court such costs as requested by the respondents and determined by the Registrar" and "In

terms of the Rules appellant hereby tenders costs for the preparation of the record and any other costs." The issue arose whether these statements constituted "good and sufficient" surety for the costs of the appeal as F required by r 46(2) of the Supreme Court Rules 1964 (RGN 380 of 1964).

Held, that the word "good", in the context of r 46(2), denotes an appropriate method of availing the money that is required, and the quality of the method of provision, such as payment into court, deposit into a trust account, etc. The word "sufficient" simply means an adequate amount or sum of money in the circumstances of the case. Rule 46(2) is about G arranging for an amount or sum of money, provided in a satisfactory manner, which is capable of covering the respondents' expenses in the event that the issue is resolved in the respondents' favour, bearing in mind the circumstances of the case, its complexity, and the length of time it will take to be completed. The nature of the undertaking/tender given H by the appellants in their notice of appeal was such that the respondents

---

Chidyausiku CJ

had been invited to request such costs as they saw fit. The respondents A ought to have responded to their request and indicated a suitable sum of money to cover their security of costs.

Held, further, that a written undertaking offering payment of an adequate sum of money to cover the respondent's costs is sufficient compliance with r 46(2) and constitutes "good" security. What constitutes adequate B or "sufficient" money is something at the time the offer is made is privy to the respondent. Where an offer to pay money into court as security for costs is made, it becomes incumbent on the respondent to disclose the amount the respondent requires to cover its costs. In the event of a failure to agree on the *quantum* the registrar determines the *quantum*. It is not open to the respondent to refrain from disclosing the *quantum* until C after *dies induciae* in order to facilitate a claim for dismissal for default.

Legislation considered

High Court Rules 1971 (RGN1074 of 1971), rr 34(1), 36(1) & (3) & 46(2) & (5) D

Case information

F Girach, for the applicants

L Uriri, for the respondents

Judgment

Chidyausiku CJ: These two chamber applications involve a dispute for leadership of the MDC (M) Party ("the Party") between two factions. The E one faction is led by Professor Arthur Mutambara. I shall refer to this faction as "the appellants". The other faction is led by Professor Welshman Ncube. I shall refer to this faction as "the applicants". The applicants in these two chamber applications seek the dismissal of the appeals noted by the appellants in cases SC 176/12 ("the first case") and SC 331/12 ("the second case").

I will treat these two matters as one for purposes of judgment. The same F issue, compliance with r 46(2) of the Supreme Court Rules ("the Rules"), is raised in both matters. Both counsel are in agreement that I roll the two matters into one.

Both chamber applications are made in terms of r 36(1) of the Rules, and seek the dismissal of the appeals filed in both cases, on the ground that the G appellants failed to enter into good and sufficient security for the applicants' costs of appeal as is required in terms of r 46(2) of the Rules.

As I have already stated, the issue that falls for determination in these chamber applications is the meaning to be ascribed to r 46(2) of the Rules. The facts that form the background to this case are not particularly relevant to the issue that falls for determination. I will, however, summarise them H

Chidyausiku CJ

A very briefly for the purpose of providing context. The Party held a National Congress ("the Congress") in January 2011. The Congress was convened in December 2010 by Professor Welshman Ncube, the second applicant, who was at the time the Secretary General of the Party.

The appellants applied to the High Court for an order declaring the outcome B of the Congress invalid on the ground that the holding of the Congress was not in compliance with the provisions of the Constitution of the Party. The application was dismissed. The appellants noted an appeal against that determination. The applicants also applied to the High Court in separate proceedings for an order interdicting Professor Mutambara from holding himself out as the President of the Party. The application was successful C and Professor Mutambara was interdicted from holding himself out as the President of the Party. The appellants (the Mutambara faction) appealed against this judgment. Thus, the Mutambara faction lost in both cases and appealed against both judgments.

The appellants, in respect of both matters, were required in terms of r 46 to D enter into good and sufficient security for the applicants' costs of appeal, in the absence of a waiver of the right to security. While r 46(5) provides that the security for costs be provided within thirty days of the notice of appeal, r 46(2) provides that security for costs shall be provided before lodging the record with the Registrar of this court. There is no reference to a thirty E day period in r 46(2), thus creating a potential conflict with r 46(5) which provides that the lodging of the record is done within thirty days. There is need to amend r 46 in order to harmonise subrules (2) and (5) of the Rules. I shall revert to this point later.

The applicants, the Ncube faction, made these chamber applications in terms of r 36(1), which provides as follows:

> F "(1) If an appellant who is required to furnish security for the respondent's costs of appeal fails to furnish such security within the period prescribed in sub-rule (5) of rule 46, the respondent may forthwith give notice to the appellant that, on the date specified in the notice, being not less than five days after service of the notice, he will apply to a judge for dismissal of the appeal by reason of such failure, and for such other order specified in the notice as he may require."

G In para 7 of the notice of appeal in the first case the appellants undertook to pay into court the costs of the record and the applicants' costs of appeal:

> "7. *In terms of the Rules* the appellants undertake to pay the costs of preparing the record of proceedings and the respondents' costs including paying into court such costs as requested by the respondents and determined by the H Registrar" (the emphasis is mine).

Chidyausiku CJ

Similarly, the appellants in para 13 of the notice of appeal in the second case A tendered costs of the record and any other costs:

> "13. *In terms of the rules of court*, appellant hereby tenders costs for the preparation of the record and any other costs" (the emphasis is mine).

Both notices of appeal are clear, in that whatever it is that the appellants are offering was in terms of the Rules. It is common cause that the notices of B appeal containing the above offers of payment of security costs were filed within the thirty days stipulated in r 46(5).

It follows, therefore, that, if it is accepted that paras 7 and 13 of the notices of appeal constitute entering into good and sufficient security, then there was compliance within the time prescribed by the Rules. The applicants, however, contend that both the undertaking and the tender of costs contained C in the notices of appeal do not constitute "entering into good and sufficient" security for costs prescribed by r 46(2).

Thus the crisp issue that falls for determination is what constitutes entering into good and sufficient security for costs within the meaning of r 46(2) or, put differently, whether what the appellants offered in the notices of appeal D constitutes entering into good and sufficient security for costs in terms of r 46(2).

According to the *Shorter Oxford English Dictionary* the meaning of the word "good" is: "fitting, and suitable". The word "sufficient" is an adjective which means: "of a quantity, extent or scope adequate to certain purpose or object". E

The word "good", in the context of r 46, denotes an appropriate method of availing the money that is required, the quality of the method of provision, such as payment into court, deposit into a trust account, *etcetera*. The word "sufficient" simply means an adequate amount or sum of money in the circumstances of the case. In my view, r 46(2) is about arranging for an amount or sum of money, provided in a satisfactory manner of payment, F which is capable of covering the applicants'

expenses in the event that the issue is resolved in the applicants' favour, bearing in mind the circumstances of the case, its complexity, and the length of time it will take to be completed.

The applicants submit that the appellants failed, refused or neglected to make adequate arrangements for a suitable amount of money that will cover their G expenses. The appellants counter this by arguing that they undertook to pay into court such costs as may be requested by the applicants and determined by the Registrar in the event of disagreement.

Whether this undertaking/tender contained in the notices of appeal sufficiently discharged the *onus* on the appellants to enter into good and sufficient security for costs resulted in robust contestation by counsel. Mr *Girach*, for H

2012 (2) ZLR p291

Chidyausiku CJ

A the applicants, argued that the court ought to strike out the appeals because r 46(2) placed the appellants in the driving seat of the process of ensuring that adequate security for costs was provided to the Registrar. He further argued that the appellants had failed to drive that process. It was, however, accepted by both counsel that, as a matter of ethics and convention, counsel usually communicate telephonically or in writing and discuss a suitable B amount and an appropriate method of payment, which may include payment into court, a deposit in the legal practitioner's trust account or a deposit into a specified bank account pending finalisation of the matter. If the parties fail to agree on an amount of money for the costs the Registrar is then called upon to determine a suitable sum.

C Mr *Uriri*, for the appellants, whilst accepting the above practice, argued that the nature of the undertaking/tender given by the appellants in their notices of appeal was such that the applicants had been invited to request such costs as they saw fit. The appellants contended that the applicants ought to have responded to their request and indicated a figure for their security for costs, the implication being that the appellants would have paid willingly. D Put differently, the appellants contended that the undertaking/tender in the notices of appeal shifted the *onus* to the applicants to take the next move and indicate a suitable sum of money to cover their security of costs. I am persuaded by this submission. I find this submission persuasive because whatever the appellants were offering or undertaking was predicated on the E Rules. In other words, the offer or undertaking given in the notices of appeal were made in terms of the Rules and thus had to be read with the Rules.

No satisfactory explanation was given to the court as to why the convention of communicating, as a courtesy, between members of the profession fell into disuse in this case. On being invited to address the court on this aspect, Mr *Girach* maintained that the *onus* was on the appellants to drive the F process and make the first move. Mr *Uriri* submitted that the appellants' written undertaking was an invitation to treat which the applicants failed to take up for reasons best known to them.

Mr *Uriri* also sought to produce a letter allegedly filed of record with the Registrar of the Supreme Court at Bulawayo and with Webb, Low and Barry, G the applicants' legal practitioners of record, in which the appellants allegedly attempted to engage the applicants on the issue of security for costs. The applicants denied ever receiving the letter and objected to its production. The appellants tendered the letter as proof that they did something and to counter the contention by the applicants that they sat on their laurels and did not do anything to rectify their alleged non-compliance with the provisions of H r 46(2). I provisionally admitted the letter subject to my ruling on the matter.

2012 (2) ZLR p292

Chidyausiku CJ

I have concluded that it is not necessary for me to make a ruling on the A admissibility of the letter, because I will determine this matter on the basis that paras 7 and 13 of the notices of appeal constitute entering into good and sufficient security for the costs required by r 46(2).

Mr *Girach* submitted that r 46(2) does not contemplate that an undertaking suffices for purposes of providing "good and sufficient" security for costs. B He argued that if this were so, the legislature would have used the same express language used in r 34(1). Rule 34(1) provides:

> "(1) The appellant, unless he has been granted leave to appeal *in forma pauperis* shall, at the time of the noting of an appeal in terms of rule 29 or within such period therefrom, not exceeding five days, as the

> Registrar of the High Court may allow, deposit with the said Registrar the estimated cost of the preparation C of the record in the case concerned:
>
> Provided that the Registrar of the High Court may, in lieu of such deposit, accept a written undertaking by the appellant or his legal representative for the payment of such cost immediately after it has been determined."

Thus, r 34(1) expressly provides that the appellant *deposits* with the Registrar the estimated cost of the record and also authorises the Registrar to accept *a* D *written undertaking* by the appellant or his legal representative in lieu of the deposit. Rule 46, it was argued, does not provide for a written undertaking and therefore does not envisage a written undertaking as a method of providing good and sufficient security.

Rule 46(2) provides that: E

> "(2) Where the execution of a judgment is suspended pending an appeal and the respondent has not waived his right to security, the appellant shall, before lodging with a registrar copies of the record, enter into good and sufficient security for the respondent's costs of appeal:
>
> Provided that where the parties are unable to agree on the amounts or nature of the security to be provided, the matter shall be determined by the registrar." F

Thus r 46(2) –

(i) enjoins an appellant to enter into good and sufficient security before lodging copies of the record with the Registrar.

(ii) empowers the Registrar to determine the amount of security for costs where the parties are unable to agree. G

I am not persuaded by Mr *Girach's* submission. The critical phrases in the two rules are "written undertaking" in r 34(1) and "enter into" in r 46(2). In my view, these two phrases are not mutually exclusive or destructive. The one "enter into" is broader in meaning and subsumes the later written undertaking. The use of the different phrases, which mean essentially the same, does not evince a different intention on the part of the legislator. A written undertaking H

2012 (2) ZLR p293

Chidyausiku CJ

A offering "good and sufficient security", such as cash deposit, payment into court, *et cetera,* of an adequate sum of money to cover the respondent's costs is sufficient compliance with r 46(2). Obviously what constitutes adequate or sufficient amount of money in dollars and cents is something at the point in time the offer is made is privy to the respondent. Where an offer to pay money into court as security for costs is made it becomes incumbent on the B respondent to disclose the amount the respondent requires to cover its costs. In the event of a failure to agree on the *quantum* the registrar determines the *quantum*. It is not open to the respondent to refrain from disclosing the *quantum* until after *dies induciae* in order to facilitate a claim for dismissal for default. I am therefore satisfied that the offer and the undertaking to meet C the applicants' costs, as set out in paras 7 and 13 of the notices of appeal, constitute sufficient compliance with r 46(2).

Apart from the above, r 36(1) does not enjoin the judge to dismiss an appeal in every case of failure to comply with r 46(2). The judge has a discretion in the matter. In this regard r 36(3) provides:

> D "(3) The judge, on an application for dismissal by the respondent brought in terms of sub-rule (1), may dismiss the appeal and, additionally or alternatively, may make such other order as he thinks fit, including any order as to costs, whether or not one or other or both the parties to the appeal appear at the hearing."

Thus, the exercise of the power to dismiss the appeal is dependent upon the decision by a judge whether or not to exercise his discretion to dismiss E the appeal, or to make any other order as he thinks fit. The question is what the interests of justice demand of the judge in the exercise of the discretion conferred upon him by r 36(3) in the circumstances of each case.

Generally speaking, justice demands that an appeal should be determined on the merits as opposed to being dismissed on a technicality. However, F the need to determine an appeal on the merits is no licence to disregard the Rules. The judge has to balance the demands of the one against the other.

I find the conduct of both parties leaves a lot to be desired. The parties failed to act in accordance with the convention of communicating and deciding a suitable method of providing for security for costs. This litigation could G have been avoided by the exercise of common sense.

In concluding that this is not a proper case for dismissal of the appeals, I have also taken into account the following factors –

1. The appellants furnished a written undertaking for security for the costs of the appeal within one month of the date of filing the notice of appeal, H in compliance with the provisions of r 46(5).

Chidyausiku CJ

2. A written undertaking to furnish security for the costs of the appeal is a A credible method of providing security for costs.
3. Rule 46(2) does not expressly provide one method of providing security for costs, as opposed to r 34 which demands that a deposit of cash be made directly to the Registrar of the High Court.
4. Rule 46(2) could have *bona fide* misled the appellants into believing B that the time for the provision of security for costs has not elapsed and that this could be done any time before the records were lodged with the Registrar of the Supreme Court, which lodging of the record is yet to take place.
5. The applicants should have made a demand for a specific amount which C they considered appropriate as provision for their security for costs, in response to the offer of security for costs made in the notices of appeal.
6. The parties are equally to blame for not communicating with each other on the issue of the provision for the security for costs.

In the result, it is ordered that –

1. The applications for dismissal of the appeals in case numbers SC 176/12 D and SC 331/12 are hereby dismissed.
2. The parties are directed to agree on the amount and manner of securing the applicants' costs of appeal within ten days of this judgment, failing which the Registrar of this court shall determine an appropriate amount to be paid into court for security for costs in terms of r 46(2) within E thirty days of the date of this judgment.
3. Costs will be costs in the cause.

Webb, Low & Barry, applicants' legal practitioners

Mbidzo, Muchadehama & Makoni, respondents' legal practitioners F

© 2015 Juta and Company (Pty) Ltd.

Document 39 of 60

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2012/Volume 2/M M PRETORIUS (PVT) LTD & ORS v MUTYAMBIZI 2012 (2) ZLR 295 (S)

M M PRETORIUS (PVT) LTD & ORS v MUTYAMBIZI 2012 (2) ZLR 295 (S)

Citation	2012 (2) ZLR 295 (S)
Case No	Judgment No. S-29-12
Court	Supreme Court, Harare
Judge	Ziyambi JA (in chambers, in terms of r 5 of the Supreme Court Rules)
Heard	30 April 2012; *CAV*

Judgment 17 October 2012

Counsel *A Kara*, for the applicants
S Hashiti, for the respondent

Case Type Application for condonation

Annotations No case annotations to date

Flynote

Costs – *de bonis propriis – legal practitioner – defects in application for condonation attributable to flagrant disregard of rules and a casual attitude – costs de bonis propriis appropriate*

D **Legal practitioner** – *conduct and ethics – duty to client – duty to exercise utmost diligence in handling affairs of client – omissions and oversights due to practitioner's disregard of rules and casual attitude – costs de bonis propriis appropriate*

Headnote

E A legal practitioner is not engaged by his client to make omissions and to commit oversights. He is paid for his professional advice and for the use of his skills in the representation of his client. He is not paid to make mistakes. These could be costly to his client. He is professionally, ethically and morally bound to exercise the utmost diligence in handling the affairs of his client.

F Where the blame for the numerous defects in an application for condonation of late noting of an appeal was entirely attributable to the applicants' legal practitioner's flagrant disregard of the rules of court and his casual attitude, it would be appropriate to make an order that the practitioner should pay the costs personally.

Case referred to G

Apostolic Faith Mission in Zimbabwe & Ors v Murefu S-28-03

Gono v Trustees, Zimbabwe West Annual Conference, United Methodist Church S-65-06

Case information

H *A Kara*, for the applicants

Ziyambi JA

S Hashiti, for the respondent A

Judgment

Ziyambi JA: This is an application for condonation of the late noting of an appeal and an extension of time within which to appeal.

The High Court judgment sought to be appealed against was delivered on 23 November 2011.The application was filed on 12 March 2012, almost four B months later. In terms of the Supreme Court Rules 1964 ("the Rules") an appeal shall be noted within 15 days of the date of the judgment. See r 30(a).

The application is beset with problems, the first of which is that it does not contain a copy of the judgment appealed against (see r 31). This non-compliance renders the application fatally defective, as no consideration C of the application can be undertaken without sight of the judgment.

Moving on to the merits of the application, the delay is over three months. In an application for condonation, the judge, in determining whether sufficient cause has been shown to exist justifying the grant of the indulgence sought, will take into account the cumulative effect of certain factors, among which D are the extent of the delay and the explanation therefor, the prospects of success on

appeal, the respondent's interest in the finality of the judgment and the avoidance of unnecessary delays in the administration of justice.

In their affidavit in support of the application, the applicants alleged as follows. Following the delivery of the judgment on 23 November 2011, their legal E practitioner filed a notice of appeal on 25 November 2011.

(1) He did not serve the notice on the Registrar of the High Court, as required by r 29(2).This omission was due to an oversight on his part.

(2) The notice of appeal did not mention the court in which the judgment was handed down, nor did it state whether the whole or part of the judgment was being appealed against (as required by r 29). F

(3) They were led to believe that "strict compliance *technically* renders the notice a nullity subject to condonation by this court and that *strictly speaking* one has to apply for an extension of time in which to comply". I quote this to show the extent of the lack of diligence and the casual approach of the legal practitioner in regard to the preparation of this G application. The italics are mine.

(4) The non-compliance was not due to the fault of the applicants but was an *oversight* by their legal practitioner.

(5) It *would appear* they are *deemed* out of time for noting their appeal but there was a *genuine attempt* to appeal timeously. H

Ziyambi JA

(6) They A have attached a notice of appeal from which it can be seen that the delay is minimal.

The applicants' legal practitioner, Mr Harvey, who drafted both the notice of appeal and the application averred that:

(1) due to pressure of work the omission in the notice was *overlooked* B by him.

(2) the oversight in not filing the notice in the High Court was *probably* due to the fact that there was an intervening weekend (my italics)

(3) he *forgot* to check that his messenger had not "filed in the High Court";

(4) he "*assumes* for the purposes of this matter that the judgment was issued C on 6 February 2012 as per the date stamp on it".

(5) the "non-compliance with the Rules was *inadvertently* made by me and I apologise for my carelessness and for not being more diligent, and for not checking that my messenger had not served the papers in the High Court".

D In effect, the applicants alleged that they had filed a defective notice of appeal and had omitted to serve it on the High Court, as is required by the Rules, due to an oversight by their legal practitioner.

A more flagrant disregard of the Rules is difficult to imagine, and a more casual attitude by a legal practitioner to a serious matter is difficult to conceive.

E A legal practitioner is not engaged by his client to make omissions and to commit "oversights". He is paid for his professional advice and for the use of his skills in the representation of his client. He is not paid to make mistakes. These could be costly to his client. He is professionally, ethically and morally bound to exercise the utmost diligence in handling the affairs of his client.

I find the explanation given for the delay to be unreasonable. To quote F Gwaunza JA in *Gono* v *Trustees, Zimbabwe West Annual Conference of the United Methodist Church* S-65-06:

> "I do not find the explanation tendered for the default in question to be reasonable. Legal practitioners are expected to be acquainted with the rules of the court, and to abide by them. They should not do their clients a disservice by 'overlooking' important requirements under the rules of the court."

G The applicants and their legal practitioner have placed the blame for the disregard of the Rules in this case squarely on the shoulders of the legal practitioner but, as was said in *Apostolic Faith Mission in Zimbabwe & Ors* v *Murefu* S-28-03:

> "There is a limit beyond which a client cannot escape the consequences of the H conduct of his legal practitioner and it seems to me that this limit has been

Ziyambi JA
exceeded in this case. See *Saloojee &Anor* v *Minister of Community Development* A
1965 (2) SA 135 (A) at 141C-E where Steyn CJ remarked as follows:

> 'There is a limit beyond which a litigant cannot escape the result 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 B has lately been burdened with an undue and increasing number of applicants for condonation in which the failure to comply with the rules of this court 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 a condonation of a failure to comply with a rule of this court, the litigant should be absolved from the normal consequences of such a relationship, no matter what the circumstances of the failure are.'" C

As to the prospects of success on appeal, the applicants make no mention thereof in their affidavits and no determination can be made on this issue, particularly as the judgment appealed against does not form part of the record. It follows that the applicants have not established that there are any prospects of success on appeal. D

In conclusion, taking into account the cumulative effect of the factors set out above, I am of the view that the applicants have not shown good and sufficient cause for the grant of the indulgence sought.

The blame for the defects in the application must rest solely on the shoulders of Mr Harvey, the applicants' legal practitioner. He will be ordered to bear the costs personally. E

Accordingly, it is ordered as follows:

(1) The application is dismissed.

(2) The costs shall be paid by the applicants' legal practitioner, Mr Roy Harvey, personally. F

Granger & Harvey, applicants' legal practitioners

Mutamangira&Associates, respondent's legal practitioners

© 2015 Juta and Company (Pty) Ltd.

Document 40 of 60

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2012/Volume 2/ZIMBABWE COMMERCIAL FARMERS' UNION v GAMBARA 2012 (2) ZLR 299 (H)

ZIMBABWE COMMERCIAL FARMERS' UNION v GAMBARA 2012 (2) ZLR 299 (H)

Citation	2012 (2) ZLR 299 (H)
Case No	Judgment No. HH-395-12
Court	High Court, Harare
Judge	Mathonsi J
Heard	11 October 2012; *CAV*
Judgment	17 October 2012
Counsel	P *Kawonde*, for the applicant Respondent in person

Case Type Opposed application

Annotations No case annotations to date

Flynote

Contract – set-off – *when may be claimed – necessary for both debts to be liquidated or capable of easy proof*

Headnote

D Set off, or *compensatio*, comes into effect when two parties are reciprocally indebted to each other, a natural obligation being sufficient. The reciprocal debts must be liquidated, in the sense of being either admitted or capable of easy and speedy proof. Where one or neither of the debts is liquidated or ascertainable, then set off cannot come into play.

Cases referred to E

Commissioner of Taxes v First Merchant Bank Ltd 1997 (1) ZLR 350 (S)

McCrone v Sibanda 1991 (2) ZLR 28 (H)

SMM Hldgs Pension Fund v Fidelity Life Assurance Co HH-280-12

F *Zimbabwe Broadcasting Holdings v Gono* 2010 (1) ZLR 8 (H)

Case information

P Kawonde, for the applicant

Respondent in person

Judgment

Mathonsi J: The respondent was, until his resignation on 29 February G 2012, employed by the applicant as its acting director. As an employee of the applicant he was entitled to use of the employer's vehicle, an Isuzu extended cab registration number ABK 7760.

At the time of his resignation, the respondent was required to surrender the vehicle to the applicant but elected to retain it because he was owed certain H sums of money by the applicant. His decision was contained in a letter he

---

Mathonsi J

wrote to the applicant on 29 February 2012 which reads in pertinent part A as follows:

> "**SURRENDERING OF UNION ASSETS**
>
> Further to my letter of the 24th February 2012 to you on the payment of my outstanding terminal benefits, I note with concern that you have failed to provide me with a date when I should expect to get these benefits. … B
>
> I have doubts that the Union will be able to pay me within a reasonable time (defined by the Supreme Court as 14 days) and in order to put pressure on it to pay me, I shall delay the handover of the vehicle that was in my possession i.e ABK 7760 until such time that the Union has paid me my terminal benefits. I will be able to deliver the vehicle as soon as I am paid. If I do not hear from you within 48 hours on the proposed payment dates, I shall take it that you are OK with this arrangement." C

Although the applicant, through its legal practitioners, demanded the motor vehicle, by letter dated 8 March 2012, the respondent was unmoved. As a result, the applicant filed this application in which it seeks the following order:

> "IT IS ORDERED THAT:
>
> 1. The respondent or any person in possession of the applicant's property D namely Isuzu extended cab registration number ABK 7760 issued by the applicant to the respondent, be and is hereby directed to surrender the said property to the Deputy Sheriff upon service of this order.

2. In the event that the respondent or any person in possession of the aforesaid vehicle fails to comply with this order, the Deputy Sheriff be and is hereby authorised to seize and attach such property and hand it over to the applicant. E

3. The respondent shall pay the costs of this application."

In its founding affidavit sworn to by the acting director, Shadreck Tsimba, the applicant stated that the respondent's entitlement to the motor vehicle ended with his employment contract. He possesses no lawful or justifiable reason to hold on to the vehicle and whatever perceived entitlement to terminal F benefits should be subject of a separate claim divorced from the vehicle.

In his opposition, the respondent raises a two prolonged defence to the application, namely, that at the time of hand over/take over, the applicant agreed with his proposal to hold on to the vehicle until his terminal benefits were paid and, for that reason, he possesses the vehicle "by mutual consent". G Secondly, he pleads set off in light of the fact that he is owed some money which he is entitled to set off against the value of the motor vehicle, a value that has not been determined.

In support of his claim that the applicant consented to his possession of the vehicle, the respondent has attached an unhelpful "asset transfer form" signed by the parties on 1 March 2012, showing that he surrendered an HP H

A laptop to the applicant and has an endorsement that "vehicle not handed but with 77 902 km as mileage."

By no stretch of the imagination can that document be said to contain an agreement that the respondent should retain the vehicle. What is more, a few days after the purported agreement, the applicant's legal practitioners B addressed a letter to the respondent on 8 March 2012 demanding delivery of the vehicle. I am not persuaded that there was ever an agreement for the respondent to retain the vehicle and make a finding that he has that vehicle without the owner's consent.

What has happened in this matter is that the applicant has brought a vindicatory action against the respondent as owner of the vehicle which was given to the C respondent as a benefit in terms of his employment contract, a contract which has been terminated. As stated by Gowora J (as she then was) in *Zimbabwe Broadcasting Holdings* v *Gono* 2010 (1) ZLR 8 (H) at 9G-H and 10A:

> "Our law is to the effect that once an employee has been suspended or dismissed from employment, any benefits extended to such employee from that D relationship cease. In *Chisipite Schools Trust (Pvt) Ltd* v *Clark* 1999 (2) ZLR 324 (S) Gubbay CJ stated:
>
> > 'Pending the removal of suspension, the respondent was not entitled to the continued enjoyment of the benefits comprising the free occupation of the Headmistress's house and the continued use of the motor vehicle. A labour relations officer cannot order the respondent to surrender these particular E benefits. Consequently, the applicant, being unable to resort to self help, approached the High Court for relief. I consider it was justified in doing so.'"

At 11A-B the learned judge observed:

> "The vehicle was a benefit afforded to the respondent in terms of a contract of employment with the applicant. That contract has since been terminated. The F respondent has therefore to establish a defence to the claim by the applicant for the return of its vehicle to its possession."

I am in agreement with that pronouncement. *In casu* the respondent insists that he is entitled to set off what is owed to him by the applicant against the value of the vehicle. That value has not been agreed. What he is owed has G not been agreed. In fact, the applicant has argued that the respondent is only owed a sum of $321.89. The question which arises is whether the respondent can rely on set off in this matter.

Set off or *compensatio* is a method by which debts are extinguished simultaneously *ipso jure*: *McCrone* v *Sibanda* 1991 (2) ZLR 28 (H) at 31A. H As stated in R H Christie *Business Law in Zimbabwe* 2 ed at p 112-113:

> "Set off, or *compensatio*, comes into effect when two parties are reciprocally A indebted to each other, a natural obligation being sufficient … The reciprocal debts must be liquidated, in the sense of being either admitted or capable of easy and speedy proof.

> There must be true reciprocity of debts, in the sense not only that they must be owing between the same parties but that in respect of each debt each party must have been acting in the same capacity." B

In *Commissioner of Taxes* v *First Merchant Bank Ltd* 1997 (1) ZLR 350 (S) at 353C Gubbay CJ said of set off:

> "At common law, set off or *compensatio* is a method by which mutual debts, being liquidated and due, maybe extinguished. It takes place *ipso jure*. If the debts are equal, both are extinguished; if unequal, the smaller is discharged and the larger is proportionally reduced." C

I had occasion in *SMM Holdings Pension Fund* v *Fidelity Life Assurance Co* HH-280-12 to comment on an attempt to set off a debt sounding in money against the value of shares. I stated at p 19 that:

> "More importantly, I am not persuaded that the requirements of set off have been established in this matter. It is a requirement that the debts or obligations must D be of the same nature, and liquidated. The defendant sought to set off money against shares. The value of shares fluctuated. In addition, the amount owed to the defendant, even assuming it was able to prove entitlement, is not what the shares were worth at the time."

I stand by that pronouncement which, in my view, has equal application to the facts of the present matter. The respondent cannot set off the vehicle whose E value has not been determined against the controverted claim for terminal benefits. That remedy is simply not available to him.

It remains for me to deal with additional evidence submitted by the respondent and attached to his heads of argument. Specifically, the respondent attached an arbitral award in his favour that he be paid some money. Granted, the respondent is a self–actor but there are basic rules of this court that cannot F be derogated from in these proceedings. In terms of r 235 of the High Court Rules 1971:

> "After an answering affidavit has been filed, no further affidavit may be filed without the leave of the court or a judge."

The respondent did not seek leave to introduce the award but merely smuggled G it into the court record attached to his heads of argument. He was not entitled to do that. I have therefore disregarded that evidence. In any event, even if there exists an arbitral award in the respondent's favour for payment of money, it does not entitle him to retain the applicant's vehicle. What he has done is to resort to self-help, which is as unacceptable as it is illegal. He cannot be the executioner in his own case. H

Mathonsi J

A The applicant is entitled to the return of its motor vehicle. The respondent is at liberty to pursue whatever remedies he has regarding his terminal benefits, if any.

Accordingly it is ordered that:

1. The respondent or any person in possession of the applicant's property, B namely, an Isuzu extended cab registration number ABK 7760 be and is hereby directed to surrender the said vehicle to the Deputy Sheriff upon service of this order.
2. In the event of failure to comply with para 1 above, the Deputy Sheriff be and is hereby authorised and directed to seize the said vehicle and deliver it to the applicant. C
3. The respondent shall pay the costs of this application.

Kawonde & Co, applicant's legal practitioners

© 2015 Juta and Company (Pty) Ltd.

Document 41 of 60

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2012/Volume 2/SANANGURA v ECONET WIRELESS (PVT) LTD & ORS 2012 (2) ZLR 304 (H)

SANANGURA v ECONET WIRELESS (PVT) LTD & ORS 2012 (2) ZLR 304 (H)

Citation	2012 (2) ZLR 304 (H)
Case No	Judgment No. HH-398-12
Court	High Court, Harare
Judge	Kudya J
Heard	5 September 2012; 6 September 2012; 7 September 2012; 2 October 2012; 4 October 2012; *CAV*
Judgment	17 October 2012
Counsel	*N Chikono,* for the plaintiff *H Nkomo,* for the defendants
Case Type	Civil trial
Annotations	No case annotations to date

Flynote

Damages – delictual – *failure to quantify loss of earnings and payment of legal fees – absolution from the instance granted*

Delict – *actio injuriarum* – *defamation – qualified privilege – presumption of animus injuriandi – when arises – displacement of presumption – onus* D *upon plaintiff to prove animus injuriandi – defendant writing defamatory letter without full knowledge of the facts – animus injuriandi established – assessment of damages*

Delict – actio injuriarum – *malicious prosecution – malice – wide meaning of – several potential defendants – plaintiff having choice against whom* E *to proceed – malice established – liability of defendants for damages arising from malicious prosecution – assessment of damages*

Practice and procedure – *parties – choice of – action for malicious prosecution – several potential defendants – plaintiff having choice against whom to proceed* F

Headnote

In a suit for malicious prosecution involving a number of potential defendants, a plaintiff has the absolute choice to elect who to proceed against.

"Malice", in delict, has a wide meaning. It covers spite and ill will, often referred to express malice or *dolus directus*; indirect and improper motive, often referred to as implied malice or *dolus indirectus*; and statements G that a defendant did not know to be true, reckless as to whether the statements were true or false and otherwise known as *dolus eventualis*.

The plaintiff brought an action against the first and second defendants, alleging that he had been the victim of malicious prosecution for which they were responsible. He sought general damages for pain and suffering as well as the *contumelia* and further sums in respect of loss of earnings H

Kudya J

A and legal fees arising therefrom. In addition, he brought a related action against the third defendant in respect of a letter which he alleged had been written on behalf of the third defendant and was defamatory of him. In respect of the malicious prosecution, the plaintiff had been arrested by the police because of a complaint by persons, including the second defendant, acting on behalf of the first defendant, that the plaintiff had B stolen certain electronic recharge card pins belonging to the first defendant. The plaintiff was detained, in unpleasant conditions, in police custody for six days and a further two days in prison, awaiting trial. Eventually the charges against the plaintiff were withdrawn by the prosecutor during the course of the criminal trial. Notwithstanding an attempt by the first C defendant to obtain a certificate declining prosecution so

as to facilitate a private prosecution, the Director of Public Prosecutions declined to interfere with the prosecutor's decision. On the facts it was accepted by the court that the case against the plaintiff was a very weak one indeed, a fact which must have been obvious to the legal adviser representing both defendants. However, as far as plaintiff's damages were concerned, D he led no evidence quantifying his loss of earnings, nor did he produce any receipts relating to his payment of legal fees nor call in evidence the legal practitioners involved.

Concerning his action for defamation against the third defendant, the offending letter was written on the letterhead of the third defendant, E which was a subsidiary company and a distributor of electronic airtime for the first defendant. It informed the plaintiff that the third defendant had terminated the airtime agreement it had entered into with him with immediate effect. The letter continued, that the "… decision follows the fraudulent activities on (plaintiff's) account that prejudiced Econet F Wireless Zimbabwe (Pvt) Ltd of prepaid airtime", and was copied to four internal employees of the first defendant. In denying the defamation, the third defendant relied upon the evidence of its managing director, who admitted writing the letter on behalf of the third defendant. The third defendant raised the defence of qualified privilege, arguing that all four persons to whom the letter was copied had a right to receive it G and an interest in the contents thereof. The managing director conceded, however, that he wrote the letter without full knowledge of the facts upon which it was based.

Held, that, on the facts, the liability of the first and second defendants for malicious prosecution had been established. The arrest, incarceration H and subsequent prosecution of the plaintiff had been actuated by malice,

---

only leaving his measure of damages for the malicious prosecution to A be decided.

Held, further, that the failure of the plaintiff to quantify his loss of earnings and his failure to lead or produce evidence relating to his payment of legal fees meant that the first and second defendants had to be absolved from the instance in regard thereto. The plaintiff was, however, entitled B to general damages and, having regard to the treatment he received, a punitive award of $20 000 for malicious prosecution was justified.

Held, further, and in regard to the alleged defamation, that, while it had been established that the contents of the letter were indeed defamatory, the presumption that the third defendant had acted *animo injuriandi* had been negated by its raising of the defence of qualified privilege. However, the C resulting onus upon the plaintiff to prove *animus injuriandi,* had been discharged in the light of the admission by the third defendant's managing director that he wrote the offending letter without a full knowledge of the facts. In other words, he was reckless as to whether its contents were true or false. This amounted to malice.

Held, further, that having particular regard to the fact that the publication D of the letter was restricted to four people, a fair and appropriate sum to assuage plaintiff's feelings was the sum of $2000.

Cases cited

Bande v Muchinguri 1999 (1) ZLR 476 (H)

Butau v Madzianike & Ors HH-378-12 E

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

Macheka v Metcalfe & Anor HH-62-07

Manyange v Mpofu & Ors 2011 (2) ZLR 87 (H)

Mbundire v Buttress 2011 (1) ZLR 501 (S)

Monckten v BSA Co 1920 AD 324 F

Moyo v Nkomo & Anor HB-38-11

Mugadziwa v Shoko HH-34-06

Mugwadi v Nhari & Anor 2001 (1) ZLR 36 (H)

Nheta v Fernades HB-29-94

Nkala v Sebata & Anor 2009 (2) ZLR 203 (H) G

Tekere v Zimbabwe Newspapers (1980) Ltd & Anor 1986 (1) ZLR 275 (H)

Zvobgo v Kingstons Ltd 1986 (2) ZLR 310 (H)

Case information

N Chikono, for the plaintiff

H Nkomo, for the defendants H

Kudya J

Judgment

A **Kudya J:** On 12 August 2011, the plaintiff issued summons against the first and second defendants for malicious prosecution and against third defendant for defamation. He claimed US$530 000 for malicious prosecution, being US$300 000 for loss of earnings, US$150 000 for pain and suffering, US$70 000 for *contumelia*, US$10 000 for legal fees and US$180 000 for defamation and interest on these amounts and costs of suit. The defendants B contested the action. In addition, the first defendant filed a counterclaim that it later withdrew on 2 October 2012 with a tender of the plaintiff's wasted costs. This judgment is concerned with the main claim only.

The plaintiff, the chief executive officer of and majority shareholder in Flamsrock Trading (Pvt) Ltd (Flamsrock), gave evidence on his own behalf C and produced six documentary exhibits. He called the additional testimony of Tamutswa Mugadza, a former customers' service employee of Flamsrock. The second defendant, a loss control and investigations officer of first defendant, testified on his own behalf and for the first defendant. In addition, Chido Kwande, a legal officer of the first defendant testified, as did Ophias Sherewa, the managing director of the third defendant. The third defendant D was a subsidiary of and distributor of electronic airtime for the first defendant. The defendants produced a further two documentary exhibits.

The following evidence was common cause. On 10 February 2009 the third defendant, represented by Ophias Sherewa, and Flamsrock, represented by the plaintiff, entered into an agreement, exh 8, for the supply of electronic E airtime generated by the first defendant by the former to the latter. Flamsrock bound itself to sell prepaid airtime vouchers purchased at a discount of 7½ per cent through three TPS terminals and the third defendant undertook to service the terminals and guaranteed their smooth operation.

On Tuesday 31 March 2009, the plaintiff was arrested by detective assistant inspector Mazenyera and detective sergeant Dodo of Gweru Central police F station, at his workstation at the corner of Robert Mugabe Street and First Street in Harare, for the theft of electronic recharge card pins belonging to the first defendant. The detectives were in the company of the second defendant and Innocent Mango, an account manager of the first defendant. He was taken to the offices of the third defendant in Pegasus House on Samora Machel G Avenue in Harare. He was interrogated for two hours. Thereafter, he was detained at Rhodesville police station for two nights before he was driven to Gweru Central police station on 2 April 2009. He engaged the services of a legal practitioner in Gweru to represent him. He was taken to court on Monday 6 April where he was remanded in Hwahwa remand prison until he was granted bail on 8 April 2009. He surrendered his passport as part of his H bail conditions. On or about 6 April 2009, the plaintiff secured the position

---

Kudya J

of a consultant with a South African company, Dawn Advisory Services A (Pty) Ltd for the Musina Burial Society Project. The full details of the project proposal are set out in the 42 page document, exh 6. His application for the return of his passport to travel for the board meeting of 24 April 2009 in connection with the project failed and resulted in the cancellation in exh 3 of his consultancy by Dawn Advisory Services. He remained on bail until B 17 August 2009 when the charges against him were withdrawn before plea for lack of evidence. Meanwhile on 12 May 2009, the third defendant wrote exh 2 to the plaintiff cancelling the pre-paid airtime agreement.

On 24 August 2009, the plaintiff wrote a letter of demand to the defendants. It was responded to on 27 August, exh 4, by the present erstwhile legal C practitioners of the defendants. Soon thereafter the plaintiff sued the defendants in HC 4343/2009. The matter was withdrawn at the pre-trial conference stage as a result of the resuscitation of the criminal proceedings. Dawn Advisory Services engaged the services of the plaintiff as a consultant in another project based in Kimberley in the Northern Cape province of South Africa in terms of the conditions set out in the employment agreement, exh D 1, executed in Johannesburg on 2 November 2009. On 12 November 2009 he obtained a five year work permit, exh 5, to take up employment in the Republic of South Africa with Dawn Services as a consultant.

At the instigation of the first defendant, on 28 April 2010 the Director of Public Prosecutions, in exh 7, acceded to the demand of the first defendant E to resuscitate the withdrawn charges of theft of recharge pins, opining that the plaintiff had a case to answer. The plaintiff was summonsed and tried for two counts of theft on the unchanged evidence that had led to the withdrawal of the charges. Amongst the witnesses called by the State were the second defendant and an employee of the first defendant, Abishama Amerigo. The F plaintiff attended his trial from Kimberley, South Africa until he was acquitted at the close of the prosecution case. He then launched the present action.

There were several disputes of fact between the parties. One of the disputes was whether or not the plaintiff was related to the second defendant. The two parties agreed that the plaintiff's mother shared the same surname as G the second defendant. The two had never met until 2008 when the second defendant investigated a theft committed against the first defendant allegedly by the plaintiff, Whatmore Jonga and Tinashe Simba in CRB 4671/08 that is still to be tried. The second defendant disputed the relationship. The plaintiff failed to adduce evidence to establish the relationship. I find that they are not related. H

Kudya J

A The second dispute concerned the utterances and conduct of the second defendant towards the plaintiff during the period he was under arrest. The plaintiff averred that the second defendant exhibited hostility towards him. He directed the police on what to do. At one time the police allowed the second defendant to interrogate him in private at Gweru Central police station. The second defendant took the attitude that an employee of the first B defendant had supplied the plaintiff with the recharge pins in question; and when he failed to extract a confession confirming this belief, he threatened that the plaintiff would rot in Hwahwa prison and requested the police to deal with him without mercy. The plaintiff's witness, Tamutswa Mugadza, stated that the second defendant visited Flamsrock offices twice on the day C the plaintiff was arrested and once two or three days later. He demanded the keys and the combination to the office safe from Tendai Handiro. He returned and took the witness to Pegasus House for questioning. He wanted to know where Flamsrock employees were printing airtime that he said the plaintiff had stolen from the first defendant. Tamutswa Mugadza confirmed the high handed manner exhibited by the second defendant even in the D presence of the police.

The second defendant denied these allegations. He stated that he carried out investigations on the stolen recharge pins in Makoni, Chitungwiza. One of the purchasers, Needmore Haji, led him to David Chimbirimbiri, who in turn led him to the plaintiff. He invited the plaintiff for an interview E at the head office of the first defendant in Masasa. He interviewed him in the presence of his account manager, Innocent Mango, the business risk manager, Innocent Chadyiwa, and a fellow investigator, Nkosana Kanye; all employees of the first defendant. The plaintiff claimed that he had received 150 cards worth US$750 from one Tony and provided the meeting with Tony's Telecel cellular number. He did not have the full details of Tony, F such as his surname, business and residential address. He indicated that Tony was a walk-in supplier who asked his supervisor Tendai Handiro to sell the recharge pins for him on commission. Tendai Handiro wrote his name and the details of the transaction in a register for that purpose. Tony would come daily to collect his proceeds less commission from the sale. He provided the physical description of Tony and his suspicion from his accent that he was G a foreigner. The second defendant apparently believed him for he requested him, and he agreed as a business partner of the first defendant, to trap Tony.

Two weeks elapsed without feed back from the plaintiff. Then the late Sergeant Dodo from Gweru telephoned the second defendant concerning a deactivated recharge voucher. The voucher had been sold by Judith Nyamukunda in Gweru H who held more of the deactivated recharge vouchers. Judith led the detective

Kudya J

sergeant and detective assistant inspector Mazenyera to Caleb Majiri who A was arrested at Pennywise in Eastlea, Harare. They were driven by Innocent Mango from Gweru to Harare. Majiri had received 450 recharge pins worth US$2 250 from the plaintiff and was detained at the third defendant's Pegasus House offices. The plaintiff was arrested and taken to the same offices. He did not disclose supplying Caleb with 450 recharge vouchers until Caleb was B produced before him by the police. The second defendant asked the plaintiff in the presence of the police why he had not disclosed providing Caleb with these recharge vouchers. He maintained that the recharge vouchers had been supplied by Tony. Thereafter the second defendant drove the two police detectives, the plaintiff, Caleb and Innocent Mango to Gweru in his Mazda 626. In his summary of evidence and the letter written by his counsel, exh C 4, the second defendant further indicated his belief that the plaintiff had a fiduciary duty to disclose airtime distributors who were selling airtime at rock bottom discounts to the first defendant.

I discerned from the second defendant's summary of evidence and his testimony, both in chief and under cross-examination, that he believed from D the time of Caleb's arrest to the time he left the witness box that he had an unassailable case of theft of recharge pins against the plaintiff. The second defendant reinforced his belief that the plaintiff was a dishonest person from the 2008 investigations. The 2008 theft of 45 international test roaming sim cards lost by first defendant were traced to a retired army captain, Salani, who had supplied them to Chimbirimbiri. Chimbirimbiri had in turn supplied E them to the plaintiff who refilled them in a sim box where they were all recovered from the plaintiff and his two colleagues. The second defendant thus believed that he had a strong case of theft against the plaintiff. This was based on the 600 recharge pins worth US$3 000 that were traced back to him. The plaintiff had incomplete information on Tony, notwithstanding that Flamsrock did business with him from October 2008. He did not voluntarily F disclose supplying 450 recharge pins to Caleb.

The second defendant was, however, aware that the plaintiff could not have stolen the recharge vouchers without inside assistance from an employee of the first defendant. The plaintiff did not have the passwords that would provide him access to the information operating systems of the first defendant. G He also did not have access to the computer hardware of the first defendant.

The second defendant's investigations of 24 March 2009, within the first defendant, revealed that 150 recharge pins sold in Chitungwiza were part of many that were generated for Innscor Zimbabwe Ltd by Jacqueline Chingosho, of the first defendant's inventory department on 27 February 2009. Innscor had requested recharge pins of US$2 denominations. The inventory H

Kudya J

A department generated US$5 pins. Innscor declined to collect them. Chingosho e-mailed Tawanda Munhenga and Solomon Manda of the information system department to immediately deactivate them. Munhenga, of his own accord, did not do so but chose to route them back into the system and placed them at the bottom of the reallocation tray. The 450 recharge vouchers were part of the many that were generated for OK Zimbabwe Ltd by Emmanuel Gonde B and Jacqueline Chingosho in the inventory department on 24 February 2009. These were personally delivered by the first defendant's OK Zimbabwe account manager, Abishama Amerigo, to OK Zimbabwe on a flash stick on 25 February. Mr Mandizha, of OK Zimbabwe Ltd, loaded the file into his company's system. The recharge cards were for the wrong denominations. C The inventory supervisor of the first defendant, Felix Mpala, emailed the information system department to deactivate the recharge pins and copied the e-mail to Mr Mandizha at OK Zimbabwe Ltd. Again, Tawanda, in his wisdom defied the e-mail and filed the active recharge pins at the bottom of the reallocation platform.

The awareness held by the second defendant that the plaintiff could not have D acted without inside information, coupled with his belief that he had a strong case against him, in all probability led him to utter the words attributed to him by the plaintiff; that for failing to disclose his accomplice in the first defendant he would rot in Hwahwa prison. The highhanded manner in which the second defendant acted was confirmed by Tamutswa Mugadza. E I therefore believed the plaintiff's story on the words and conduct of the second defendant towards him.

I also find that the second defendant, for reasons best known to himself, falsely claimed that the Gweru police did not receive a report of complaint from the first defendant before they came to Harare to arrest Caleb and thereafter the plaintiff. He used a written report he made after the plaintiff F had been arraigned as proof of this averment. He however admitted that the late sergeant Dodo was drawn into the investigations by the hue and cry raised by the deactivation of the recharge pins that had been sold to the general public in Gweru by Judith Nyamukunda. He further admitted that Dodo telephoned him. He did not disclose his conversation with Dodo. The G probabilities are that he explained that deactivation was a result of theft of the recharge pins from the first defendant. He thus made a verbal report of theft. That he did so, was confirmed by his averment that Gweru police opened a report received book (RRB) number and a crime register (CR) number. It is further confirmed by his averment that he went to Gweru with Innocent Mango, a fellow employee of the first defendant whose car conveyed the H Gweru police to Harare to arrest Caleb Majiri. It was contrary to his story

that the police was informed by the customer care department of the first A defendant that the recharge pins that were deactivated had been stolen. It contradicted the averments in para 3.1 of the plea and 6 of the summary of evidence that the arrest followed a report from the first defendant. The second defendant falsely claimed the existence of a fiduciary duty on the plaintiff to notify the first defendant of discounts that were below the standard ones B it provided. Such a clause does not appear in exh 8. He failed to produce such a condition under cross examination.

At the pre-trial conference held on 17 January 2012, seventeen issues were referred to trial. Of these, fourteen were for the main claim and three for the counterclaim. At the commencement of trial, I reduced the seventeen issues to five. I perceived the issues for determination for both the main and C counterclaim to be:

1. whether the arrest and prosecution of the plaintiff was actuated by malice by the first and second defendant;
2. whether the letter of 12 May 2009 was defamatory of the plaintiff;
3. what is the measure of damages due to the plaintiff in each instance; D
4. whether the plaintiff stole the first defendant's recharge pins;
5. in what amount the plaintiff is liable to the first defendant.

The withdrawal of the counterclaim leaves three issues for determination. I proceed to deal with each issue in turn. E

1. Whether the arrest and prosecution of the plaintiff was actuated by malice

It was common cause that the plaintiff was arrested by the police and prosecuted by the Attorney-General in terms of the powers conferred on both State institutions by the Constitution and the Criminal Procedure and Evidence Act. The plaintiff did not join these State institutions in the present suit. He F was not obliged to do so. In the defamation case of *Zvobgo* v *Kingstons Ltd* 1986 (2) ZLR 310 (H) at 324G Reynolds J stated:

> "Furthermore, and to the best of my knowledge, there is no reason why the plaintiff should not proceed against only one of two or more possible defendants, and no reason why he should not recover a total award from that defendant." G

Even though the sentiments were stated in a defamation case, in my view they apply with equal force to malicious prosecution. *Bande* v *Muchinguri* 1999 (1) ZLR 476 (H) at 483G-484A is by implication to the same effect. Malaba J, as he then was, stated that:

> "I now decide whether Mr Bande has established on a balance of probabilities the elements of the delict of malicious prosecution. A prosecution was of course H

A instituted against Mr Bande which terminated in his favour. The criminal proceedings were instituted by the public prosecutor in the exercise of the delegated powers of the Attorney-General contained in s 76(4) (a) of the Constitution of Zimbabwe. The question is whether Mr Muchinguri instigated the institution of the prosecution against the plaintiff."

In my view, a plaintiff has the absolute choice to elect who to proceed against B in a suit of malicious prosecution. The question for determination is whether the plaintiff has established the elements of the delict of malicious prosecution.

The plaintiff averred that the first and second defendants instigated his prosecution. The plaintiff established that he was arrested by detective assistant inspector Mazenyera. He established that the complainant who made the report against him through its customer care department and the second C defendant was the first defendant. He established that he was arrested at the instance of the second defendant who at all times acted for the first defendant. This was confirmed by the second defendant and para(s) 3.1 of the plea and 6 of the defendants summary of evidence. The first and second defendants denied acting in malice and averred that they simply told the detectives the D facts and left them to act on their own judgment. In addition they averred that the detectives were engaging in an arresting spree commencing with the arrest of Judith, then Caleb, before they arrested the plaintiff.

The onus remains on the plaintiff to prove malice on a balance of probabilities. In our law, malice has been definitively defined in many cases. I refer to the E following cases: *Monckten* v *British South Africa Co* 1920 AD 324 at 331- 332, *Bande* v *Muchinguri supra* at 484 B-D, 484G-484A and 487E-488A, *Mugwadi* v *Nhari* 2001 (1) ZLR 36 (H) at 42E, *Mugadziwa* v *Shoko* HH-34-06 at p 12-13 of the judgment and *Garwe* v *Zimind Publishers (Pvt) Ltd* 2007 (2) ZLR 207 (H) at 234F-236D. Malice in delict has a wide meaning. It covers spite and ill-will, often referred to as express malice or *dolus directus;* F indirect and improper motive, often referred to as implied malice or *dolus indirectus,* and "statements that he did not know to be true, reckless whether the statements were true or false" (*dolus eventualis*).

It was not disputed that Innocent Mango, an account manager employed by the first defendant and the second defendant, were present during the G arrests of Judith, Caleb and the plaintiff. They took an active as opposed to a passive role. The second defendant and, through him, the first defendant went beyond merely making a report and identifying the plaintiff. He provided transport to the police. He provided an interrogation room at Pegasus House, situated at a distance far greater than Harare Central Police Station from Flamsrock offices. By his own admission, the second defendant interviewed H the plaintiff in the presence of police officers. He drove the handcuffed

---

plaintiff to Gweru and threatened him with a long jail term for declining to A name an employee of the first defendant, whom he believed had provided him with the recharge pins.

Charges were withdrawn by a prosecutor in the exercise of his own professional judgment on 17 August 2009. The first and second defendants were prompted to act by the plaintiff's letter of demand of 24 August 2009. In exh 4, on 27 B August 2009, the defendants' erstwhile legal practitioners of record expressed their intention to seek a certificate declining prosecution to facilitate a private prosecution insisting that there was an overwhelming case of theft against the plaintiff. The letter from the Director of Public Prosecutions, exh 7, demonstrates that the defendants entered into communication with her office. The Director of Public Prosecutions did not act of her own accord to review C the decision made by her subordinate on 17 August 2009.

The defendants did not have any new evidence to supplement the evidence upon which the withdrawal was based. Chido Kwande, the legal officer of the first defendant, knew, as did the external counsel, that the onus to prove theft of the recharge pins by the plaintiff lay on the State. The plaintiff did D not bear any onus to prove his innocence. All that was required of him was to proffer a story that was reasonably possibly true. He had informed the second defendant two weeks before his arrest how Tony had left the recharge vouchers with Tendai Handiro, a manager with Flamsrock for sale on commission. The plaintiff was not personally involved having met Tony once. At the time the first defendant used to pay for services rendered in E airtime vouchers rather than cash. The fact that the second defendant did not cause his arrest at the time demonstrated the reasonableness of the plaintiff's story. It was the same story he told the police after Caleb Majiri's airtime was traced back to him. He was consistent. It was the duty of the police to find evidence to contradict the plaintiff's story. It does not appear that his F version was contradicted by Tendai Handiro, otherwise the State would have called him to witness against the plaintiff. Tendai Handiro does not appear to have disputed the existence of Tony or the register of walk-in suppliers of airtime for sale on commission. Of the total of 130 200 stolen recharge pins, worth US$651 000,

only 600, worth US$3 000, were sold by the plaintiff's runners. This miniscule number did not warrant the conclusion that the G plaintiff stole all or any of the missing recharge pins. In any event, there was no evidence to show that the plaintiff had access to the passwords held by the four personnel in the Inventory and Information System departments. The plaintiff did not have access to the first defendant's computer system. The first and second defendants were aware that security had been compromised by the failure of Tawanda to deactivate the airtime. The airtime had been H

A loaded into a customer's system, and was apparently attached to the e-mails dispatched to some of the first defendant's employees. Amerigo had loaded some of the recharge pins on his flash stick. There was no way of knowing what he did with that information between 25 February and 24 March 2009.

These factors demonstrate the utter weakness of the criminal case against B the plaintiff. This must have been glaringly apparent to the first and second defendants and their legal advisors; hence the attempt to link the plaintiff by some alleged telephone call history with Emmanuel Gonde in para 10 of the second defendant's summary of evidence: an averment that was abandoned during the trial. In my view, the first and second defendant did not pursue his arrest and prosecution with any intention to see justice prevail. The C second defendant was driven by spite that a man he believed was a thief was escaping from his grip, as he had done in the 2008 theft charge. He had him incarcerated and prosecuted to force him to reveal the thief or thieves embedded in the first defendant. Chipo Kwande testified for the first defendant that she worked as a team with the second defendant. The second defendant D at all times acted in the course of his duties. The external lawyers acted on the first defendant's instructions.

I find that the first and second defendant acted out of spite in instigating the arrest and prosecution of the plaintiff. Neither did they have reasonable and probable cause. The arrest and prosecution was clearly based on untrue facts and was pursued recklessly without regard to whether they were true E or false. All the three bases for malice have been demonstrated by the words and conduct of the second and first defendant, respectively. The improper motive that drove the initial arraignment in the remand court was to force the plaintiff to reveal the employee of the first defendant who had supplied him with the recharge pins. The charges were again resuscitated with the F improper motive of punishing him for failing to disclose the insider in first defendant, who both the first and second defendant believed had supplied him with the recharge pins.

Accordingly, I find that the prosecution of the plaintiff for two counts of theft of recharge pins belonging to the first defendant was actuated by malice G attributable to the first and second defendant.

The measure of damages due to the plaintiff

In *Bande supra* at 488D Malaba J approved the formulation in Joubert *The Law of South Africa* vol 15 para 617 that:

> "The successful plaintiff in an action for malicious prosecution is entitled to H damages for both injury to personality and pecuniary loss suffered. The former

are awarded as a *solatium* under the *actio injuriarum* while the latter constitute A compensation under the *actio legis Aquilia*."

The plaintiff claimed pecuniary loss suffered in the form of loss of earnings in the sum of US$300 000 and legal fees in the sum of US$10 000. His major loss was in the Musina Burial Society Project, whose full proposals and projections are set out in exhibit 6, in which he had a 25 per cent share. B His involvement was cancelled on 7 May 2009 by exh 3 after he failed to attend the board meeting of 24 April 2009. His application for the release of his passport, surrendered as part of his bail conditions, failed. His projected earnings in the Musina Project in the form of dividends and payouts over a period of five years were calculated at ZAR14 934 750, the equivalent of US$1 991 300 at the cross rate of ZAR7.5 to US$1. He claimed a much lower C figure of US$300 000 on the basis of erroneous legal advice that Zimbabwean courts were loath to award such a high amount. Loss of earnings falls into the category of special damages where a party is awarded the actual loss that he proves. The project commenced on 1 June 2009 and another consultant was appointed in his

place. The plaintiff failed to access the actual results of the project. Mr *Nkomo* submitted and Mr *Chikono* conceded that the D plaintiff failed to prove his actual loss in the Musina project. He thus failed to establish his actual loss from the project.

The plaintiff also suffered loss of earnings during the period he attended trial after the charges were resuscitated. He established that he commenced employment in Kimberley with the company which had withdrawn his contract E in the Musina Project. He commenced employment on 1 December 2009 and worked with the company as a consultant until November 2011. In terms of his contract of employment, exhibit 1, he was, amongst other things, entitled to 19 per cent commission for any underwritten business above budget and a performance based annual bonus. He lost out on earning higher commission and performance bonus by his attendance of trial at Gweru. He also incurred F travelling and accommodation expenses each time he attended trial. He, however, failed to quantify his losses on the Kimberley project arising from his travels for trial to Gweru and the cost of those travels.

The plaintiff further averred that he operated an internet café from which airtime was sold and a medical consultancy in the name of Flamsrock. The G internet café and airtime sales were under the direct supervision of Tendai Handiro while the medical consultancy fell under his personal purview. It was common cause that the airtime business collapsed on 12 May 2009 after the third defendant cancelled the pre-paid airtime agreement. He estimated that Flamsrock lost net earnings of US$ 7 800 per 26 day month. He alleged that by the time he closed down the internet café in April 2011, business earnings H

Kudya J

A had dropped from between US$600 and US$800 a day before his arrest to US$300 a day by the time he closed down. He did not time frame the losses suffered by Flamsrock. He did not attempt to quantify the loss he suffered in the medical consultancy. He attributed his local losses to his arrest and that of his employees which affected production. He did not produce any documentary evidence to establish Flamsrock's earnings and losses such as B cash flow statements, bank statements or tax returns. He did not indicate how these earnings and losses affected his personal income. Again, Mr *Chikono* conceded that the plaintiff failed to prove his local losses.

He was represented by two legal practitioners during his initial remand and later during trial proceedings. He paid legal fees and was issued receipts. C He did not produce these receipts nor call the legal practitioners in question to establish the actual amount he paid in legal fees. He thus failed to prove his claim of US$10 000.

According to *Mbundire* v *Buttress* 2011 (1) ZLR 501 (S) at 506, where a party suffered actual loss but fails to produce evidence which is within its power, D the court has no other option than to absolve the defendant from the instance.

The claims for pain and suffering and *contumelia* fall under general damages. They arise from injury to the personality of a plaintiff. They are often referred to as infringements or impairments to the reputation and dignity of a plaintiff. They cover the pain arising from both physical and psychological injury to his personality. The plaintiff claimed the sum of US$220 000 for pain and E suffering and humiliation caused to his personality, reputation and dignity by the malicious prosecution.

He was handcuffed from Gweru to Harare. He was also handcuffed and placed in leg irons at Gweru magistrates court and Hwahwa prison. He suffered physical pain from the handcuffs and leg irons but did not sustain F visible injuries. He spent six days in police cells in Harare and Gweru and two days in Hwahwa prison. The conditions were unpleasant, traumatic and tortuous. He did not bath during this ordeal. He slept on the floor. His body was sore. The police cells were overcrowded. It was a painful and discomforting experience. He experienced anxiety associated with arrest and prosecution. As a chartered accountant, certified with Serge International G since 2009, he feared that his reputation that he had built and achieved as an ethically minded accountant would be destroyed.

According to *Bande's* case, the actual detention and prosecution accompanied by a serious denial of rights to personal liberty of the plaintiff, without reasonable and probable cause, aggravates the damages. The plaintiff lost H his liberty for one week. He underwent the embarrassment, humiliation and

Kudya J

expense of a bail application and trial. He lost an opportunity to participate in a A lucrative project in South Africa. Even during the present proceedings the first and second defendant characterised him as a criminal. These considerations justify a punitive award of damages that overshadow the equivalent amounts in United States dollars in comparable cases such as *Bande's* case and *Nheta* v *Fernandes* HB-29-94 of approximately US$2 000, respectively. In any B event, the present matter was more serious than *Bande's* case and had more disastrous consequences than *Nheta's* case. The damages I estimate as fair and adequate compensation are in the sum of US$20 000.

2. Whether the third defendant defamed the plaintiff

Exhibit 2 formed the basis of the claim of defamation against the third C defendant. It was written on the letterhead of the third defendant. It sets out the physical, electronic mail address, and website and telephone numbers of the third defendant. I reproduce the letter written by Ophias Sherewa, the managing director of the third defendant. It read:

> "12 May 2009
>
> Mr Ngoni Sanangura D
>
> Chief Executive Officer
>
> Flamsrock Trading (Pvt) Ltd
>
> Carlton Building
>
> 84 R Mugabe Road
>
> HARARE
>
> Dear Sir E
>
> RE: TERMINATION OF PREPAID AIRTIME AGREEMENT
>
> This letter serves to advise you that your contract with Transaction Payment Solutions has been terminated with immediate effect.
>
> The decision follows the fraudulent activities on your account that prejudiced Econet Wireless Zimbabwe (Pvt) Ltd of prepaid airtime. We can confirm we have retrieved the two TPS terminals from your site. F
>
> We regret that our relationship had to be prematurely terminated under such circumstances.
>
> Yours sincerely
>
> Signature
>
> Ophias Sherewa
>
> **MANAGING DIRECTOR** G
>
> cc: Mr Mangezi-Loss control and investigations officer
>
> cc: Mrs S Mugugu-General Counsel
>
> cc: Mr Toro-HOD Business risk
>
> cc: Mr I Chadyiwa-Risk and loss control manager".

The plaintiff averred that the letter was highly defamatory and was copied to four people. He also stated that it was read by his fellow employees. H

Kudya J

A Subsequently, the plaintiff's customers ended up knowing of the cancellation of the dealership licence since the plaintiff was no longer selling airtime. In para 19 of the declaration the plaintiff averred that:

> "The third defendant was reckless in writing and publishing the letter since the matter was pending before the courts and there was no allegation pertaining to the actual amount or any evidence directly involving the amount".*(sic)*

B In evidence, the plaintiff stated that his personality was his biggest brand in business. He was born on 16 October 1982 and is a chartered accountant. In 2009 he was certified with Serge International, an ethics regulatory body for chartered accountants. He averred that the letter was addressed to him in his personal capacity and that it damaged his reputation by labelling him C as a fraudster. Ophias Sherewa, who wrote the letter for the third defendant, disputed that it defamed the plaintiff. He stated that he wrote the letter to the plaintiff in his official capacity as the

managing director of Flamsrock, the company with a prepaid airtime agreement with the third defendant. He stated that the letter was written on the recommendations of the second defendant. He cancelled the agreement on the basis of allegations of theft D of airtime belonging to first defendant. He further copied the letter to four internal employees of the first defendant who had a right to receive the letter and an interest in the airtime agreement. He conceded that he wrote the letter without full knowledge of the facts. He also conceded that labelling a businessman a fraudster impaired his reputation and dignity.

E The context in which the letter was written was that the plaintiff was facing criminal allegations of theft of recharge pins belonging to the first defendant. He had been arrested, detained, placed on remand and was on bail awaiting trial. The fact of the matter was that Flamsrock had not committed theft against the first defendant. It was not facing any allegations of fraud on its account that had prejudiced the first defendant. In my view, an ordinary reasonable F reader of the letter in context would conclude that it was written to the plaintiff personally and that his title and place of business were merely written to confirm his identity and location. That the managing director of the third defendant addressed the letter personally to the plaintiff is highlighted in para 14 of the defendants' summary of evidence. An unidentified witness, who in my view could only have been the writer of exh 2, would tell the court that:

> G "He is employed by third defendant … He will also set out the circumstances under which the dealership agreement with plaintiff's company was cancelled and this was a result of the *plaintiff's breach of same by engaging in fraudulent and dishonest activities prejudicial to the first and third defendants***.** He will testify that the letter was copied to those employees who had a duty to receive it in the course of their work and for purposes of ensuring that the cancellation H was effected by all relevant departments"(emphasis my own).

Kudya J

I hold that the letter was written to the plaintiff in his personal capacity. A

The test for defamatory matter was set out in *Zvobgo* v *Kingstons Ltd* 1986 (2) ZLR 310 (H) at 317A thus:

> "The test that has been long accepted by our courts is whether the imputations made would lower the reputation of the plaintiff in the eyes of ordinary, right-thinking persons of normal intelligence." B

The words "fraudulent activities on your account" in my view are *per se* defamatory of the plaintiff. They portray him as a fraudster. They lower his estimation and injure his standing and reputation in the eyes of the four people to whom it was copied. The letter was published to four internal employees of the first defendant. The averment in the plaintiff's declaration that it was C also read by other employees of Flamsrock was not proved in evidence.

In *Tekere v Zimbabwe Newspapers (1980) Ltd & Anor* 1986 (1) ZLR 275 (H) at 278H-279A Sandura JP, as he then was, stated:

> "It is a well established principle in our law that once it is proved or admitted that a defamatory statement was published the presumption arises that such publication was wrongful and that the defendant acted *animo injuriandi*." D

And at 279E-F

> "In the circumstances, I am satisfied that where, as in the present case, the words complained of are defamatory in their natural and ordinary meaning the plaintiff need prove nothing more than their publication. There is a presumption that the publication of the defamatory statements by the defendants was wrongful and E that the defendants acted *animo injuriandi.* It is for the defendants to rebut that presumption by establishing either of the two defences which they have raised."

To the same effect is *Zvobgo* s*upra* at 319H-320A:

> "As I understand the position, however, if a statement is proved to be defamatory, *animus injuriandi* is presumed or inferred (*Suid-Afrikaanse Uitsaaikorporasie* F *v O'Malley* 1977 (3) SA 394 (A) at 401-2; *May v Udwin* 1981 (1) SA 1 (A) at 10; *Nydoo v Vengtas* 1965 (1) SA 1 (A) at 20)."

The presumption of an intention to injure is negated by the defence raised by the third defendant of qualified privilege. In stating that he had a duty or legitimate interest to make the statement to persons who had a duty or G legitimate interest to receive it the third defendant raised the defence of qualified privilege. See *Mugadziwa* v *Shoko supra* at p 11-12 of the judgment; *Mugwadi* v *Nhari* supra at 41D. The negation of the presumption simply means that the plaintiff remains with the onus

to prove *animus injuriandi* on a balance of probabilities. The plaintiff discharges this onus by establishing in the words of Chinhengo J in *Nhari supra* at 42E that: H

Kudya J

> A "the defendant published the letter *mala fide* or with ill-will or that the defendant was actuated by any indirect or improper motive or that he stated what he did not know to be true, reckless whether what he stated was true or false."

In the present matter, the plaintiff's task of proving malice was simplified by the concession by Ophias Sherewa that he wrote the letter without full knowledge of the facts. In other words, he conceded that "he stated what he B did not know to be true, reckless whether what he stated was true or false". The reckless abandon displayed by the third respondent is apparent from its treatment of mere allegations, and false allegations at that, as fact. Accordingly, the defence of qualified privilege does not avail the third defendant. I hold that the third defendant defamed the plaintiff.

C **The measure of damages due to the plaintiff**

The calculation of damages due to the plaintiff is a matter in the discretion of the court. However, the court is guided by the eight criteria set out in *Butau* v *Madzianike* HH-378-12 at p 9 of the judgment and *Macheka* v *Metcalfe & Anor* HH-62-07 at p 8 of the judgment.

D In applying these criteria, I find that the defamatory matter was in written form and it labelled the plaintiff as a fraudster. The publication was, however, restricted to four people who worked for the holding company of the third defendant. His image as an honest and ethical businessman was tarnished in the eyes of these four apparently influential employees of the first defendant. The plaintiff is a businessman who held 90 per cent shareholding in a company E that enjoyed a lucrative business arrangement with the third defendant. The defendant must have been personally benefitting from the arrangement in his capacity as chief executive officer and majority shareholder.

The probable consequences were in the loss of an un-quantified sum of money due to the plaintiff. I have already found that it was published with F reckless disregard to the truth. The third defendant did not render any apology to the plaintiff.

Mr *Chikono* referred to the comparable case of *Nkala* v *Sebata & Anor* 2009 (2) ZLR 203 (H) in which the plaintiff was labelled by the defendants a stock thief at a village meeting presided over by the chief with the improper motive of his eviction from the village, was awarded defamation damages G of US$2 000. In recent defamation cases such as *Moyo* v *Nkomo & Anor* HB-8-11 and *Manyange* v *Mpofu & Ors* 2011 (2) ZLR 87 (H) damages have been awarded on their particular facts in the sum of US$5 000 and US$6 000 respectively.

I estimate that a fair and appropriate sum that will help assuage the plaintiff's H injured feelings and compensate him reasonably for the injury is US$2 000.

Kudya J

Costs, in line with the sentiments expressed *Zvobgo supra* at 330B-D, A follow the cause.

Accordingly, it is ordered that:

1. The first and second defendant be and are hereby absolved from the instance from loss of earnings and legal fees incurred by the plaintiff for malicious prosecution. B
2. The first and second defendant shall jointly and severally the one paying the other to be absolved pay the plaintiff:
   a. The sum of US$20 000 in general damages for malicious prosecution;
   b. Interest thereon at the prescribed rate from the date of the service of summons to the date of payment in full. C
3. The third defendant shall pay to the plaintiff the sum of US$2 000 defamation damages and interest thereon at the prescribed rate from the date of the service of summons to the date of payment in full.

4. The first, second and third defendant shall jointly and severally, the one paying the others to be absolved pay the plaintiff's costs of suit. D

Ngarava Moyo & Chikono, plaintiff's legal practitioners

Mtetwa & Nyambirai, defendant's legal practitioners

© 2015 Juta and Company (Pty) Ltd.

Document 42 of 60

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2012/Volume 2/THE PRESIDENT v BHEBHE & ORS 2012 (2) ZLR 323 (H)

THE PRESIDENT v BHEBHE & ORS 2012 (2) ZLR 323 (H)

Citation	2012 (2) ZLR 323 (H)
Case No	Judgment No. HH-400-12
Court	High Court, Harare
Judge	Chiweshe JP
Heard	28 September 2012; 2 October 2012; *CAV*
Judgment	17 October 2012
Counsel	*R Goba,* with him Mrs *F Chimbaru,* for the applicant *T Zhuwara*, with him *J Bamu* and *D Chimbwa,* for the respondents
Case Type	Chamber application
Annotations	No case annotations to date

Flynote

Court – judicial officer – *functus officio – when court is functus officio – court order giving party until stated date to comply with legal obligations – appeal court upholding such order but setting new date – order of lower court still extant – lower court entitled to grant further extension of time*

Headnote

D The three respondents were elected members of Parliament but, following their expulsion from the party they represented, their membership of Parliament was terminated at the behest of the party. The speaker of the House of Assembly notified the President (the applicant *in casu*) of E the vacancies so created, as required of him in terms of s 39(1) of the Electoral Act [*Chapter 2:13*]. The applicant did not take the necessary steps to fill the vacancies as required by law. The respondents obtained an order compelling the applicant, within 14 days of the order, to gazette a date for by-elections to fill the vacancies in the three constituencies. The applicant appealed. The Supreme Court dismissed the appeal and F ordered that dates for the by-elections be published not later than 30 August 2012. By consent, the date was extended to 1 October 2012. The applicant then brought another application to extend the date to 31 March 2013. The reason given – which was the same as that given previously – was lack of funds to conduct the by-elections.

The respondents, despite consenting to the previous extension, argued that G the High Court had no jurisdiction to alter the judgment given by a superior court, the Supreme Court.

Held, that this matter originated in the High Court and the High Court issued the original order directing the applicant to issue the notice to hold the three by-elections within 14 days from the date of that order. H The Supreme Court confirmed that order and directed that the applicant

should comply with it within a prescribed period. Although the Supreme A Court order altered the judgment of the court *a quo*, it did not do so in any material respect. At most it confirmed substantially the same order of the High Court, though in different words. The order being confirmed was the order of the High Court. It would be different if the Supreme Court had set aside the High Court order and substituted it with its own. B Under those circumstances, the High Court would have no jurisdiction to entertain an application such as the present.

Held, further, that the alteration of the High Court's original order to reflect a new time scale was necessitated by the passage of time. A new time frame was introduced because the original time frame had been overtaken by events, and, having lapsed, could no longer be complied with. That C alteration did not substantially change the nature of the original order, which remained extant and the High Court retained jurisdiction. This was not an alteration of the order of the court in circumstances where the court had become *functus officio*; rather, it was an extension of time within which to execute that order. It was a procedural rather than substantive matter in which the court may, on good cause shown, exercise D its discretion in favour of the applicant.

Held, further, that the applicant had offered a reasonable explanation for the indulgence he sought and, by approaching the court timeously, had demonstrated his wish to abide by the court's order but for the constraints he alluded to. The application would therefore be granted. E

Case information

R Goba, with him Mrs *F Chimbaru,* for the applicant

T Zhuwara, with him *J Bamu* and *D Chimbwa,* for the respondents

Judgment

Chiweshe JP: The background facts to this urgent chamber application are as follows: F

The three respondents were elected members of the National Assembly in the 2008 general elections. They were elected under the ticket of their party the MDC and were duly sworn in as Members of Parliament for Nkayi South, Lupane East and Bulilima East constituencies respectively. They were subsequently expelled from the party and their membership of Parliament terminated at the behest of the party. G

As a result the speaker of the House of Assembly proceeded to notify the applicant of the three Parliamentary vacancies so created, as required of him in terms of s 39 (1) of the Electoral Act [*Chapter 2:13*]. The applicant did not take the necessary steps to fill the vacancies as required by law. The respondents, under case number HC 1485/10, then approached this court H

A for an order compelling the applicant to gazette a date for elections to fill the vacancies in the three constituencies. After hearing arguments from the parties, Ndou J granted the relief sought in the following terms:

"IT IS ORDERED THAT:

1. The third respondent (applicant in the instant case) be and is hereby directed to gazette a date for elections within fourteen days of service of this order B on him in the following House of Assembly constituencies, Nkayi South, Lupane East and Bulilima East.
2. There is no order as to costs."

The order was granted on 13 October 2011. The applicant, displeased with that result, filed an appeal with the Supreme Court. After hearing argument C from counsel, the Supreme Court, under

Civil Appeal No. SC 267 of 2011, made the following order on 12 July 2012:

"IT IS ORDERED THAT:

(1) The appeal is dismissed with costs.

(2) The order of the lower court is altered to read as follows– D

'(a) The application is granted.

(b) The respondent (the President of the Republic of Zimbabwe) is hereby ordered to publish in the Gazette a notice ordering new elections to fill the vacancies as soon as possible but by no later than 30 August, 2012.

(c) There will be no order as to costs.'"

E Under case No. HC 9781/12 the applicant sought and was granted, by consent of the parties, the following order:

"1. The period within which to comply with the order granted in case No. SC 267/11 be and is hereby extended to the 1st October 2012.

2. There be no order as to costs."

F This order is dated 30 August 2012.

In the present case the applicants have sought yet another extension. The grounds upon which they rely are the same grounds as those cited in case No. HC 9781/12. They seek the indulgence of this court to further extend the period within which to comply with the order granted under SC 267/11 G to 31 March 2012 because the State is yet to mobilise the resources with which to conduct the three by-elections.

The respondents oppose the grant of that indulgence. They have raised the following preliminary issues:

Firstly, they argue that the matter is not urgent and, in any event, the H certificate of urgency filed of record is defective in that it is signed by a

---

legal practitioner who is also a member of the Attorney-General's Office, A the applicant's legal practitioners.

Secondly, the respondents aver that the Minister of Justice and Legal Affairs, the deponent to the founding affidavit, has not placed before this court written authority from the applicant authorising him to depose to this affidavit on his behalf. For that reason, argue the respondents, there is no founding affidavit B supporting the application. It is necessary that the Minister first obtains such authority from the applicant himself or from the Secretary to the President and Cabinet, contend the respondents.

However, for reasons I shall spell out later in this judgment, I am of the view that nothing much turns on the preliminary issues raised by the respondents. C

On the merits, the respondents, despite consenting to the order of this court granted on 30 September 2012, now argue that this court had and still has no jurisdiction to alter the judgment under SC 267/11 as it was an order of a superior court, the Supreme Court. I disagree that this court lacks jurisdiction to entertain this matter. This matter originated in this court under case No HC 1485/10 where Ndou J directed that the applicant (first respondent in that D case) issues the notice to hold the three by-elections within 14 days from the date of that order. The applicant appealed that decision. The Supreme Court confirmed the order of this court and directed that the applicant comply with it within a prescribed period. Although the Supreme Court order alters the judgment of the court *a quo*, it does not do so in any material respect. At E most it confirms substantially the same order of this court, be it expressed in different words. The phrase "The application be and is hereby granted" refers essentially to the order granted by Ndou J. For that reason, the order being confirmed is the order of this court. It would be different if the appeal court had set aside the High Court order and substituted it with its own. Under those circumstances, this court would have no jurisdiction whatsoever F to entertain an application such as the present.

The alteration of Ndou J's order to reflect a new time scale was necessitated by the passage of time. A new time frame was introduced because the original time frame had been overtaken by events, and, having lapsed, could no longer be complied with. That alteration in my view does not

substantially change G the nature of Ndou J's order. For that reason I would hold that Ndou J's order remains extant and that this court retains jurisdiction notwithstanding the order given under SC 267/11.

I agree with the applicant that what is being sought is not an alteration of the order of this court under circumstances where the court has become *functus officio*, but rather an extension of time within which to execute that order. H

2012 (2) ZLR p327

Chiweshe JP

A It is a procedural rather than substantive matter in which the court may, on good cause shown, exercise its discretion in favour of the applicant.

Applications such as the present are not uncommon and have been entertained by the courts in various criminal and civil matters. They may be made formally in writing and where appropriate, may be made orally from the B bar. There are no specific rules governing the form or content that all of them must take, although some of them may be regulated in one way or another. Where the application is lodged before the expiry of the period within which a party must perform, as in the present case, it can be treated as an application for directions.

In the instant case the applicant avers that despite previous extensions the C resources necessary for the conduct of the by-elections are not yet at hand. It stands to reason that, without resources, the by-elections cannot be held, notwithstanding any order of this court to the contrary. This court is not in a position to reject the applicant's explanation that he does not have the resources needed to perform as ordered. The respondents have not even D suggested that the applicant is acting dishonestly when he pleads lack of resources, or, put differently, impossibility of performance by virtue of that reason. Save for stating that the applicant is duty bound in its budgetary allocation to set aside funds for this sort of expenditure, the respondents are unable to say whether such funds are available or whether if so, the same had been made available in the budget and whether, if that be the case, the E applicant is reluctant or for some reason, ill disposed towards expending the same for the purpose for which they were intended.

In the circumstances I have no reason to doubt the sincerity of the applicant's explanation and his reason for seeking an extension of the time within which he is required to execute the order of this court. He has offered a reasonable F explanation for the indulgence he seeks and, by approaching this court timeously, he has demonstrated his wish to abide by the court's order but for the constraints he alludes to.

Finally I turn to the preliminary issues raised by the respondents. The Minister of Justice is the Minister for the time being charged with the administration of the electoral laws of the country. By virtue of that fact he has political G oversight over the Zimbabwe Electoral Commission. Further, he is answerable to cabinet and to the applicant. By virtue of his position I would hold that he has authority to speak on behalf of the applicant and, for purposes of this application, on behalf of the Zimbabwe Electoral Commission as well. In the absence of any information to the contrary, I would dismiss the respondents' H averment that the Minister, in embarking upon this application of immense

---

2012 (2) ZLR p328

Chiweshe JP

national importance and public interest, might well be acting on a frolic A of his own, merely because no written authority has been furnished by the applicant nominating the minister to act on his behalf.

That this matter is of national importance admits of no doubt. The urgency of the application arises from that fact and from the further fact that the applicant, for plausible reasons, is unable to conduct an election within the B time ordered by the court. The respondents seek to hold the applicant strictly to his word primarily because in previous applications he has himself given a date by which he would be able to execute the order of this court. I do not however understand the applicant, by making such previous commitments, to have meant that the resources required would have been found without fail. At most what can be said is that the applicant anticipated that such would C have been mobilised. By suggesting the dates in which he expected to have put resources in place, it cannot be said that the applicant is the author of the urgency in this application. Rather the

application is urgent because the applicant has not achieved the expected capacity and may, on that account, be held in contempt of court. It is of utmost importance that the applicant approaches the court to appraise it and the nation at large of the hurdles in D his way and seek directions on how best to proceed.

The propriety or impropriety of a legal practitioner belonging to the same firm of legal practitioners certifying the urgency of the matter has been the subject of various conflicting decisions of this court. In my view no prejudice has arisen in this case as a result thereof. I would therefore condone it. E

It was for these reasons that I granted the application and ordered as follows:

It is ordered that:

1. The period within which to comply with the order granted in case No. SC 267/11 be and is hereby further extended to 31 March 2013.
2. There will be no order as to costs. F

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

Zimbabwe Lawyers for Human Rights, respondents' legal practitioners G

© 2015 Juta and Company (Pty) Ltd.

Document 43 of 60

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2012/Volume 2/MPOFU v TEVESTRAND INVESTMENTS (PVT) LTD & ORS 2012 (2) ZLR 329 (H)

MPOFU v TEVESTRAND INVESTMENTS (PVT) LTD & ORS 2012 (2) ZLR 329 (H)

Citation	2012 (2) ZLR 329 (H)
Case No	Judgment No. HB-211-12
Court	High Court, Bulawayo
Judge	Cheda J
Heard	23 October 2012
Judgment	23 October 2012
Counsel	*V Majoko*, for the applicant Miss *N Ncube*, for the first respondent
Case Type	Opposed application
Annotations	No case annotations to date

Flynote

C **Court – contempt** – *failure to obey court orders – duty to obey court order even if apparently wrong*

Court – officer – *Deputy Sheriff – special relationship with court – must be scrupulous to obey orders of court – failure to obey such orders – should be met by punishment*

Headnote

D Contempt of court is an act or omission calculated to interfere with the due administration of justice. Any person who without just cause or excuse fails to comply with a court order of a competent jurisdiction is in contempt of court and he remains so until he purges the contempt. In our E jurisdiction, a court order should be obeyed even if the person affected by it is of the view that it is a wrong order or is against him. In simple terms, you first obey the order and complain later. When an allegation of a contempt of court is made, the person so accused should be given an opportunity to explain his conduct. Where the court finds that the person has no reasonable excuse it must either punish or coerce the contemnor.

F The Deputy Sheriff is an officer of the court and as such the court places reliance on him for the purposes of furthering the interests of justice. He falls under the umbrella of the Ministry of Justice, which Ministry is charged with the proper administration of justice. It is upon that basis that the court expects utmost good faith in respect of all his services. A person who is an officer of the court, like a legal practitioner, or has G a special relationship with a court, like a liquidator, or in a position of a trustee, should be scrupulous to obey the orders of the court. If he fails to do so his special breach will require punishment. The Deputy Sheriff is charged with effecting court orders and is deemed to know what disobedience means. If he himself disobeys a court order, he cannot H expect non-informed litigants to obey such orders.

2012 (2) ZLR p330

Cheda J

Case referred to A

Chuck v Cremer (1846) Cooper temp. Cottenham 205

Hadkinson v Hadkinson [1952] 2 All ER 567 (CA)

Case information

V Majoko, for the applicant

Miss *N Ncube*, for the first respondent B

Judgment

Cheda J: The main matter in this instance being case number HC 3247/12 is an urgent camber application filed on the 25 September 2012 and it was placed before me on the same day. Upon perusal I formed an opinion that it was in the interest of justice that the respondent should be served. I issued an order to that effect on 25 September 2012. C

In his founding affidavit the applicant stated that the Deputy Sheriff (Mr J Ndebele) had in his return of service misled the respondent and consequently the court that he had served the applicant with an order to compel discovery when he had not done so. He further stated that in fact the Deputy Sheriff admitted having written a false return of service. D

On 25 September 2012, the application was opposed for reasons which will be dealt with in the main matter later. However, the respondent (represented by one John Pietersen) in his opposing papers stated that the Deputy Sheriff advised him that the applicant has been frustrating him, in that on the 23 September 2012 he let loose his vicious dogs on him, thereby making it E impossible for him to effect service regarding the eviction.

This was, however, disputed by the applicant's legal practitioner, Mr *Majoko*, as he brought to my attention that it seems that the Deputy Sheriff is somehow misleading as there now appears to be two, if not more, contradictory returns of service. F

This complaint was made on 17 October 2012. In light of this anomaly, I postponed the matter to 22 October 2012 and wherein I issued the following order:

> "Order (by consent)
>
> 1. The matter is postponed to 22 October 2012 at 09:30 hours. G
> 2. The Deputy Sheriff is ordered to furnish the court with a return of service stating what transpired when he attempted to effect an eviction order on the applicant.

3. The Deputy Sheriff is further ordered to depose to an affidavit clarifying the correct position regarding the apparent contradiction of returns of service filed of record regarding the supposedly service on applicant." H

2012 (2) ZLR p331

Cheda J

A On 22 October 2012 the Deputy Sheriff had not complied with paras 2 and 3 of the said order. Upon enquiry as to why we did not have the explanation from the Deputy Sheriff, Mr *Majoko* and Miss *Ncube* advised that the Deputy Sheriff was not forthcoming with an explanation.

What was clear in the circumstances is that the Deputy Sheriff had defied B the court order. In order to get him to court I ordered that he be picked up/arrested by a member of the Zimbabwe Republic Police and be brought to court. This was done and an enquiry was made as to his failure to attend. All he could say was that he thought he could attend to it later on and he apologized. I concluded that he had no reasonable excuse for his conduct and I therefore ordered that he be detained for 24 hours, that is, overnight C and my reasons were to follow and these are they.

The Deputy Sheriff was aware that he was obliged to comply with the court order, but chose not to do so for whatever his reasons were.

The correct position is that any person who without just cause or excuse fails D to comply with a court order of a competent jurisdiction is in contempt of court and he remains so until he purges the said contempt. This principle was well stated in *Hadkinson* v *Hadkinson* [1952] All ER 567 (CA) at 569C-E where Romer LJ stated:

> "It is the plain and unqualified obligation of every person against, or in respect of whom an order is made by a court of competent jurisdiction to obey it unless E and until that order is discharged …"

He then went on to quote the words of Lord Cottenham LC in *Chuck* v *Cremer* (1846) Cooper temp. Cottenham 205:

> "A party, who knows of an order, whether null and void, regular or irregular, cannot be permitted to disobey it … It would be most dangerous to hold that F the suitors, or their solicitors, could themselves judge whether an order was null or void – whether it was regular or irregular. That they should come to the court and not take upon themselves to determine such a question: that the course of a party knowing of an order, which was null or irregular, and who might be affected by it, was plain. He should apply to the court that it might be discharged. As long as it existed it must not be disobeyed."

G The courts have inherent powers to coerce those who obstruct the proper administration of justice. Contempt of court is an act or omission calculated to interfere with the due administration of justice. *In casu* the Deputy Sheriff's action was calculated to impede service of a court process which ultimately is a necessary ingredient of the proper and smooth running of the H administration of justice..

2012 (2) ZLR p332

Cheda J

It is now settled law in our jurisdiction that a court order should be obeyed A even if the person affected by it, is of the view that it is a wrong order or is against him. In simple terms, you first obey the order and complain later.

When an allegation of a contempt of court is made, the person so accused should be given an opportunity to explain his conduct. Where the court finds that he has no reasonable excuse it must either punish or coerce the B contemnor. The Deputy Sheriff was accorded that opportunity.

Contempt of court is no doubt very serious and the courts exhibit their displeasure by imposing harsh sentences. The rationale is that the streams of justice must at all times be allowed to flow with purity and cleanliness. Contempt of court being criminal in nature, requires proof beyond reasonable C doubt.

In casu, the Deputy Sheriff was served with the court order and was further reminded to comply but in his wisdom decided to defy it. Therefore, the fact that he is in contempt is beyond question. The Deputy Sheriff is an officer of the court and as such the court places all its reliance on him for the purposes D of furthering the interest of justice. He falls under the umbrella of the Ministry of Justice which Ministry is charged with the proper administration of justice. It is upon that basis that the court expects utmost good faith on all his services. For that reason he is the special interest group

from which the court relies in order to fairly determine the dispute at hand. In *The Law* E *of* Contempt by A Arlidze and D Eady (Sweet & Maxwell, 1982) at p 54 the learned authors state:

> "A person who is an officer of the court like a solicitor, or has a special relationship with a court like a liquidator or in a position of a trustee, should be scrupulous to obey the order of the court. If he fails to do so his special breach will require punishment." F

The Deputy Sheriff, in my view, squarely fits into this category of people referred to by the esteemed authors. The Deputy Sheriff is no ordinary man but an officer of the court who is expected to discharge his duty without fear, favour affection or ill will.

The court needs to be strict with regards to those who disobey their orders, G failing which their dignity will be impaired and its orders will be without force or effect.

The Deputy Sheriff is charged with effecting court orders and is deemed to know what disobedience means. If he himself disobeys a court order, how does he expect non-informed litigants to obey the said orders? H

2012 (2) ZLR p333

Cheda J

A This is a very serious defiance of a lawful order. He was aware that the court required the truth about what he did or did not do in order to determine the rights of the parties.

In order to show the court's indignation the following order is made.

Order (Contempt of Court)

1. The B Officer-In-Charge of Bulawayo Prison be and is hereby ordered to hold and detain Jongile Ndebele in his prison from 22 October 2012 to 23 October 2012 and ensure that he appears at the High Court on 23 October 2012 at 09:30 hours.
2. A further 30 days imprisonment is wholly suspended on condition the C Deputy Sheriff (Mr Jongile Ndebele) files an affidavit on or before 16:00 hours on the 26 October 2012 explaining his conduct regarding his service of court process in this matter and allegations being leveled against him.

Majoko & Majoko, applicant's legal practitioners

D *Webb, Low & Barry*, first respondent's legal practitioners

---

© 2015 Juta and Company (Pty) Ltd.

Document 44 of 60

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2012/Volume 2/HAMTEX INVESTMENTS (PVT) LTD v KING 2012 (2) ZLR 334 (H)

HAMTEX INVESTMENTS (PVT) LTD v KING 2012 (2) ZLR 334 (H)

2012 (2) ZLR p334

Citation	2012 (2) ZLR 334 (H)
Case No	Judgment No. HH-403-12
Court	High Court, Harare
Judge	Mathonsi J
Heard	9 October 2012; *CAV*
Judgment	24 October 2012

Counsel *T Mpofu,* for the applicant
T Magwaliba, for the respondent

Case Type Opposed application

Annotations No case annotations to date

Flynote

Contract – *stipulatio alteri* *– formation – requirements – need for contract to show that third party should have option to accept contract – need for third party to accept contract and communicate acceptance to offeror*

Property and real rights *– vindicatory action – requirements – what owner* D *must show – defences to claim – what possessor must show to defeat claim – owner not pursuing claim for some years – whether can be taken to have waived his rights in respect of property*

Headnote

The respondent occupied a flat in a block of flats in Harare. He originally occupied the flat by virtue of his employment with the then owner of E the block. He had to retire prematurely due to ill-health, and one of the benefits he received from his employer was to be entitled to occupy the flat for the rest of his life. Several years later, the applicant company bought the block. After some more years, the applicant sought the eviction of the respondent from the property on the basis that it had permitted him F to remain in occupation "at the request of its predecessor in title" in the expectation that a servitude would be registered. This had not been done as the respondent was un-cooperative. In addition, the respondent had not been paying rates, water and electricity charges, which the applicant had been forced to pay on the respondent's behalf. The applicant further alleged that the respondent was not actually in occupation but had moved G to a house in another part of Harare. It alleged that another person was now occupying the flat. The respondent, in addition to opposing the application, filed a counter-application, seeking an order declaring that he was entitled to occupy the property and compelling the applicant to register a lifetime usufruct in his favour and directing it to pay all outstanding owner's charges. He denied having relocated and said that H

2012 (2) ZLR p335

Mathonsi J

A the person seen at the flat was his carer, he being a quadraplegic. It was argued on his behalf that he was entitled to remain in occupation, by virtue of a usufruct or servitude of *habitatio*, a *stipulatio alteri* and a waiver by the applicant of any right to remove him.

Held, that on the evidence, the respondent had indeed moved out of the flat and was now resident elsewhere and that he had indeed installed a third B party at the property.

Held, further, that the *actio rei vindicatio* is an action that is founded in property law, aimed at protecting ownership. It is based on the principle that an owner shall not be deprived of his property without his consent. So exclusive is the right of an owner to possess his property that, at law, C he is entitled to recover it from wherever found and from whomsoever is holding it, without alleging anything further than that he is the owner and that the defendant is in possession of the property. It is an action *in rem*, enforceable against the world at large. The owner, in instituting a *actio rei vindicatio*, need, therefore, do no more than allege and prove that he is the owner and the defendant is holding the *res* – the onus D being on the defendant to allege and establish any right to continue to hold against the owner. There are two defences to such an action, each aimed at destroying each of the two essential elements of the rights of the owner. The first one seeks either to destroy the claim of ownership completely (by denying that the plaintiff is the owner of the property E in question) or to diminish his rights in the property (by admitting his ownership but by alleging that the plaintiff has parted, under some recognized law, with the right to exclusive possession of the property). The second one is to deny possession of the property at the time the action is brought or the claim is instituted.

Held, further, that when the applicant took transfer of the block, the parties F took quite some time negotiating the terms of a servitude they intended to register. The applicant's legal practitioners drew up a deed in terms of the proposal made by the applicant. Nothing came of that activity and a servitude was never registered. The result was that an agreement between the parties did not exist. The respondent had himself to blame, because it was his obstinacy and refusal to have the servitude which left him with G nothing to enforce. If a servitude existed before transfer of the property to the applicant and the servitude was inherited by the applicant upon registration, then there would have been no need to seek registration.

Held, further, that a person who is not a party to an agreement is not liable and is unable to claim on it as he enjoys no privity of contract. A contract H for the benefit of a third party, or a *stipulatio alteri,* is an extension of

---

Mathonsi J

the doctrine of privity of contract. For such to exist, there are certain A requirements which must be met. The intention that the third party should have this option must appear from the contract. When the third party adopts the contract as his own, he is not only entitled to its benefits but bound by its obligations. To adopt the contract he must accept the option or offer contained in the contract and communicate his acceptance to B the promissor. The validity of his acceptance will be tested in the same way as the acceptance of any other offer. The offer must still be open for acceptance. The facts alleged by the respondent did not even begin to satisfy the requirements of such a contract.

Held, further, that as to the allegation of waiver, there are no equities in the application of the *actio rei vindicatio*. Once it is accepted that the C plaintiff is the owner of the property and does not consent to the defendant holding it, the court may not accept pleas for mercy or for extension of possession of the property by the defendant against an owner for the convenience or comfort of the possessor. D

Case cited

Agrochem Dealers (Pvt) Ltd v Gomo & Ors 2009 (1) ZLR 255 (H)

Alspite Invstms (Pvt) Ltd v Westerhof 2009 (2) ZLR 226 (H)

Chetty v Naidoo 1974 (3) SA 13 (A)

Document Support Centre (Pvt) Ltd v Mapuvire 2006 (2) ZLR 232 (H)

Mashingaidze v Mashingaidze 1995 (1) ZLR 219 (H) E

Willoughby's Consol Co Ltd v Copthalls Stores Ltd 1918 AD 1

Zimbabwe Bonded Fibreglass (Pvt) Ltd v Peech 1987 (2) ZLR 338 (S)

Case information

T Mpofu, for the applicant

T Magwaliba, for the respondent F

Judgment

Mathonsi J: The applicant is the owner of a certain property known as No 38 Wansford Townhouses being an undivided share of Stand 15125 Salisbury Township ("the property") which it holds by Deed of Transfer No 2893/2002. It was previously owned by the Mining Industry Pension Fund ("MIPF"). G

Up until 1 November 1991 the respondent was employed by the MIPF and, in terms of his employment contract, he enjoyed the benefit of occupying the property. When he was allowed to proceed on early retirement due to ill-health, MIPF set out the agreement between the parties in a letter of 24 October 1991, which reads in relevant part as follows :

"Dear Kilborn H

Mathonsi J

A Following a recommendation by the Principal Officer, the Board of Trustees have (*sic*) agreed to allow you to go on early retirement on grounds of ill health, on the following terms :

(a) You will retire with effect from 1 November 1991.

(b) Your pension will be boosted by an injection of $20 000.

(c) You will be allowed to take a maximum of $10 000 by way of a commutation.

(d) You will be on a joint and survivorship guaranteed (*sic*) for 10 years. B

(e) *You will be allowed to live in the Fund Flat you presently occupy, which is number 38 Wansford Flats, rent free for the rest of your life plus one year*

(f) The Fund will continue paying your contributions with the Medical Society" (The emphasis is mine.)

C The respondent remained in occupation of the property in terms of the above arrangement. However, MIPF sold the property to the applicant, which then took transfer in 2002. The applicant now seeks the eviction of the respondent from the property on the basis that it had permitted him to remain in occupation "at the request of its predecessor in title" in the expectation that a servitude would be registered, which was however not D registered as the respondent was uncooperative. According to the applicant, the respondent's failure to accede to registration of the servitude meant that he lost out. What is more, the respondent has not been paying rates, water and electricity charges. In fact, the applicant has been forced to pay these charges on the respondent's behalf.

E In addition the applicant stated, in the founding affidavit of its director, that the respondent has since vacated the property and given possession to a third party. The respondent has now purchased a house of his own, being 22 Cheshire Road, Mount Pleasant, where he now resides with his family. The applicant therefore maintains that, as registered owner, it is entitled to an order for the eviction of the respondent and those claiming occupation F through him and for the payment of the arrears which have accrued. Not only has the respondent opposed the application, he has also filed a counter-application seeking an order declaring that he is entitled to occupy the property and compelling the applicant to register a life time usufruct in his favour and directing it to pay all outstanding owner's charges.

G In his opposing affidavit to the main application, the respondent denies having relocated to 22 Cheshire Road, Mount Pleasant, which house he says belongs to a Mr Jogi who is a relative of his. That averment is contained at paras 3 and 4 of the respondent's opposing affidavit where he states :

"3 Ad Paragraphs 1 up to 3 of the Applicant's founding affidavit

No issues arise herefrom save to state that I do not reside at No 22 Cheshire H Road, Mount Pleasant. The house at No 22 Cheshire Road, Mount Pleasant,

---

belongs to Mr Jogi who is a relation of mine. The property is therefore not my A residence and during the moments that I have spent time living at the House, I have not all (*sic*) abandoned my residence at No 38 Wansford Mansions, J Chinamano Avenue, Harare.

4. Ad Paragraphs 5 & 6

If at all the applicant believes that I reside at No 22 Cheshire Road, Mount Pleasant, there is therefore no basis upon which the applicant may seek my B ejectment from the immovable property known as No 38 Wansford Mansions, J Chinamano Avenue. It is therefore imperative for the applicant to have sought the identity of the present occupant of that immovable property and to have sued that person. This simply confirms that I am still residing at the above address. Accordingly therefore the order sought is not competent…"

I might as well dispose of the argument that the third party who allegedly C occupies the property should have been cited in the application. In advancing that argument, the respondent relies on the authority of *Document SupportCentre (Pvt) Ltd* v *Mapuvire* 2006 (2) ZLR 232 (H) at 245B where Makarau JP (as she then was) ruled that, as it was common cause that the property from where the respondent was to be evicted was by then occupied by another D family and that the respondent was no longer in occupation, the head of that other family should have been cited.

Without commenting on that analogy, I am of the view that *Document Support Centre (Pvt) Ltd supra* is distinguishable from the present case. Here, we are dealing with a situation where the respondent is claiming to be in occupation of the property and that a certain individual spotted on the property is his E caregiver. We have a situation where the respondent claims the existence of a servitude. Whoever is on that property is claiming through the respondent. There is therefore no

need to cite a party who is sheltering under a personal right, if any, of the respondent. In my view that argument is without merit.

The respondent went on at para 9 of his opposing affidavit : F

> **"Ad Paragraph 10**
>
> I deny that I have vacated the property in issue. I have remained in occupation of the property. However, for a temporary period of time, I was requested by the owners of an immovable property at No 22 Cheshire Road, Mount Pleasant, Harare to be caretaker at their house while they were out of the country. I did not occupy that immovable property on a rental basis. It was purely to maintain G their property in the condition that it was in pending their return …"

He went to say :

> "I deny that I have abandoned my rights in respect of the occupation of the property. At all times that I have left the place, I have been travelling out of the country or caretaking at the Mount Pleasant house indicated above. My property remained in the flat and it is still my place of residence" H

Mathonsi J

A When the applicant pointed out in its answering affidavit, and submitted supporting affidavits from other residents of the block of flats that the respondent does not reside at the property any more, he having vacated and carried away his property in 2007, and that the current occupant is one "Baba waKelly" from Chipinge and went on to produce more evidence pointing B to the respondent's interest in the house in Mount Pleasant, the respondent shifted ground.

At para 6 of his answering affidavit deposed to on 15 November 2011 he stated :

> "6(i) The immovable property at No 22 Cheshire Road Mount Pleasant Harare is owned by a certain Mr Joggie (*sic*). He has offered to sale (*sic*) the said C immovable property to me and I am in the process of purchasing it. The fact that my wife was found at that address or that I am buying the property does not constitute an abandonment of my rights in respect of No 38 Wansford Townhouses …..
>
> (ii) I confirm that I have not installed any tenant at No. 38 Wansford Townhouse. The person referred to as my tenant is one Frank King who is my cousin D and personal caregiver.
>
> (iii) I am a quadraplegic and cannot use both hands and both legs. I therefore require assistance to get on and off the bed, to go on or off the toilet, to go in or out of the car or to do any other thing that I may require to do where hands and legs are used …"

E The respondent did not explain how he was able to act as a caretaker at the Mount Pleasant house in that condition. Neither did he explain how the said Frank King was able to perform the function of caregiver by remote control from the flat when he, the respondent, is elsewhere. Clearly therefore, the respondent is not being truthful and is demonstrably unreliable.

F On the issue of arrears, the respondent insisted that he occupied the property in terms of an agreement with MIPF and that his "occupation was on terms that (he) was not paying for water, electricity and other owners charges in respect of the property". He would like the applicant to settle these liabilities because, having bought the property from MIPF, the applicant has "stepped into the shoes" of MIPF.

G The respondent conceded that the parties tried to register a notarial deed of servitude on the property but could not do so, partly because he had objected to the inclusion of a provision that he was to pay the "tenant's obligations" in the deed, as he wanted to occupy the property free of any charges, including water and electricity bills. He maintained that there was H an agreement between the applicant and MIPF for his benefit which he is

---

Mathonsi J

entitled to enforce. However, he could not set out the terms of such contract A or give any particularity to it.

In the counter-application, he stated that the property was a terminal benefit from MIPF and, for that reason, he was entitled to occupy it for the rest of his life without paying anything. Any charges in respect of his occupation are for the account of the applicant. In light of that, upon purchasing the property, B the agreement between himself and MIPF was "adopted and accepted" by the applicant.

It is therefore binding upon the applicant, which should be compelled to register a life time usufruct in his favour, albeit 10 years after taking transfer.

I have already stated that the evidence of the respondent has been shown C to be unreliable, full of inconsistencies and at times contradictory. I have not been able to find any fault in the story presented by the applicant and therefore have no reason to doubt it. Adverse inferences should therefore be drawn against the respondent, who has given an unreliable story.

Mr *Magwaliba,* for the respondent, submitted that there are disputes of fact D in the matter which cannot be determined on the papers. He bases such dispute on what he regards as new evidence introduced in the answering affidavit and the supporting affidavits of Wilson Nyamadzawo and Elliot Mubi. He also alluded to, but without showing where the dispute of fact resides, the lack of clarity in the founding affidavit of what the cause of action is and the dispute over the basis upon which the respondent occupies E the property. He would therefore want the application dismissed on those grounds: *Zimbabwe Bonded Fibre Glass (Pvt) Ltd* v *Peech* 1987 (2) ZLR 338 (S) and *Mashingaidze* v *Mashingaidze* 1995 (1) ZLR 219 (H). I do not agree. The applicant's answering affidavit addresses issues already stated in the founding affidavit, namely that the respondent has relocated to Mount F Pleasant and installed a third party at the property. The respondent himself admits that he is purchasing a property in Mount Pleasant and that he has stayed there, which explains why his wife was found there. He also admits that a third party resides at the property with his blessing. Nothing new comes out of this and certainly there is no dispute of fact which cannot be resolved on the papers. I agree with Mr *Mpofu* for the applicant that the perceived G dispute of fact is illusory.

More importantly, the respondent has not contested the story of Elliot Mubi that he carried his property away in 2006. This, together with the fact that adverse inferences can be drawn from the respondent's prevarications and untruths already referred to, leads me to the conclusion that the respondent H

Mathonsi J

A has indeed moved out of the property and is now resident in Mount Pleasant and that he has indeed installed a third party at the property.

It is common cause that the applicant is the registered owner of the property. Indeed the applicant's title has not been impugned in anyway. Instead Mr *Magwaliba* has raised a three-legged argument which, he says, entitles the respondent to remain in occupation, namely, that there exists a usufruct or B servitude of *habitatio*, a *stipulatio alteri* and a waiver by the applicant of any rights to remove the respondent. While conceding the ownership of the property by the applicant, Mr *Mangwaliba* relies on the authority of *Alspite Investments (Pvt) Ltd* v *Westerhof* 2009 (2) ZLR 226 (H) and *Agrochem Dealers (Pvt) Ltd* v *Gomo and Ors* 2009 (1) ZLR 255 (H) to argue that the applicant C has gone beyond alleging merely ownership and alleged unlawfulness of occupation by the respondent and or that occupation is against the applicant's will. For that reason, he insists that the applicant must prove entitlement to the eviction order which he has not done.

In *Alspite Investments supra,* at 236D-E, Makarau JP stated in relation to the *actio rei vindicatio.*

> D "The *rei vindicatio* is an action that is founded in property law. It is aimed at protecting ownership. It is based on the principle that an owner shall not be deprived of his property without his consent. So exclusive is the right of an owner to possess his or her property that, at law, he or she is entitled to recover it from wherever found and from whomsoever is holding it, without alleging anything further than that he or she is the owner and that the defendant is in E possession of the property. Thus it is an action *in rem*, enforceable against the world at large. This is settled law in this jurisdiction which hardly requires authority".

In *Chetty* v *Naidoo* 1974 (3) SA 13 (A) at 20B-D, Jansen JA stated :

> "It is inherent in the nature of ownership that possession of the *res* should normally be with the owner and it follows that no other person may withhold F it from the owner unless he is vested with some right enforceable against the owner (e.g. a right of retention or a contractual right). The owner, in instituting a *rei vindicatio*, need therefore do no more than allege and prove that he is the owner and the defendant is holding the *res* – the onus being on the defendant to allege and establish any right to continue to hold against the owner."

The above pronouncement was quoted with approval in *Alspite Investments* G *supra* where the learned Judge President went on to say at 237A-B.

"There are primarily two defences to the *rei vindicatio*, each aimed at destroying each of the two essential elements of the action. The first one seeks to destroy the claim of ownership completely by denying that the plaintiff is the owner of the property in question or seeks to diminish his rights in the property by admitting his or her ownership but by alleging that the plaintiff has parted, under, H some recognized law, with the right to exclusive possession of the property. The

Mathonsi J
second defence of course is to deny possession of the property at the time the A action is brought or the claim is instituted".

See also *Agrochem Dealers (Pvt) Ltd* v *Gomo supra* at 259E-G.

Mr *Magwaliba* submitted that the respondent has a usufruct or *habitatio* in his favour which he obtained from MIPF. This usufruct subsisted until the property was transferred to the applicant. When the transfer took place the B applicant inherited the liability of MIPF for his benefit. Although conceding the efforts of the parties to register a servitude, which efforts came to naught, he maintained that the applicant is bound by the *habitatio* he already enjoyed prior to transfer. Alternatively, there was a contract between MIPF and the applicant, a *stipulatio alteri* for the respondent's benefit.

Mr *Mpofu* countered that argument by saying that the contract that existed C between the respondent and MIPF was only valid *inter partes*. He relies on the pronouncement of Innes CJ in *Willoughby's Consolidated Co Ltd* v *Copthalls Stores Ltd* 1918 AD 1 at 16 where he stated :

"Now a servitude, like any other real right, may be acquired by agreement. Such an agreement however, though binding on the contracting parties, does not by itself D vest the legal title to the servitude in the beneficiary any more than a contract of sale of land passes the dominium to the buyer. The right of the beneficiary is to claim performance of the contract by delivery of the servitude, which must be effected *coram lege loci* by an entry in the register and endorsed upon the title deeds of the servient property",

It is common cause that at no time did the respondent enjoy the benefit of a E registered servitude. He was in occupation of the property by agreement with MIPF. The property was then transferred to the applicant, which was not a party to the agreement between the respondent and MIPF, which contract was only binding *inter partes*.

The issue of whether the respondent's right of occupation extended to the applicant can only be understood by consideration of the conduct of F the parties when the applicant took transfer. The parties took quite some time negotiating the terms of a servitude they intended to register. The applicant's legal practitioners drew up a deed in terms of the proposal made by the applicant. Nothing came of that activity and a servitude was never registered. In fact, the respondent rebuffed the advances of the applicant. G He stated in defence of that rebuff at para 6(vi) of his founding affidavit to the counter-application;

"Any reduction in respect of my benefit in that regard was neither agreed upon and therefore not contractual nor sustainable on any recognised ground in the law".

And at para 6(viii) : H

Mathonsi J

A "I rejected that attempt in clear terms and the respondent has then retaliated by refusing to register the usufruct".

In my view, it was always the intention of the parties to register the usufruct. They could not agree on the terms and it was never registered. The outcome of the aborted endeavour is the non existence of an agreement between the parties. The respondent has himself to blame because it is his despondency B and refusal to have the servitude which has left him with nothing to enforce. If a servitude existed before transfer of the property to the applicant which was inherited by the applicant upon registration as argued by the respondent, then there would have been no need to seek registration as frantically attempted by the parties. I therefore come to the inescapable conclusion that whatever C subsisted between the respondent and MIPF was only valid *inter partes* and not against the applicant.

It has also been argued in the alternative that a *stipulatio alteri* exists which the respondent is entitled to enforce against the applicant. It is asserted that MIPF and the applicant entered into an

agreement that the respondent be D allowed to remain in occupation of the property until his death and that his family would continue enjoying that benefit for a further year after his death.

In our jurisdiction, a person who is not a party to an agreement is not liable and is unable to claim on it as he or she enjoys no privity of contract. What is usually referred to as a contract for the benefit of a third party or a *stipulatio alteri* is an extension of the doctrine of privity of contract. For such to exist, E there are certain requirements which must be met. These are set out by R H Christie *Business Law in Zimbabwe* 2 ed at pp 75-76 in the following terms:

> "The relationship between the parties is that A and B enter into a contract which C, the third party, may at his option adopt as his own. The intention that the third party should have this option must appear from the contract …. This is the true nature of what is sometimes misleadingly called intention to benefit the third party. Misleadingly because it is clear that when F the third party adopts the contract as his own he is not only entitled to its benefits but bound by its obligations. To adopt the contract the third party must accept the option or offer contained in the contract (*Old Mutual* above at 95, 328) and communicate his acceptance to the promisor (*Brown Executrix* v *McAdams* 1914 AD 231) and the validity of his acceptance will be tested in the same way as the acceptance G of any other offer .. Especially, the offer must still be open for acceptance…".

In my view, the facts alleged by the respondent do not even begin to satisfy the requirements of such a contract. He has not even stated when such contract was created and what its terms were. He has not shown when he adopted the contract as his own and when and how he communicated his H acceptance. The closest the papers come to shed some light on the issue is

---

Mathonsi J

what is contained in para 6 of the applicant's founding affidavit, which reads A in pertinent part thus :

> "The applicant permitted the respondent, at the request of its predecessor in title, the Mining Industry Pension Fund, to remain in occupation of the above premises in the expectation that a servitude would be registered against the property, giving the respondent the right of occupation". B

Clearly therefore there was no valid *stipulatio alteri* in this matter. Indeed, the fact that the respondent rejected the terms of the servitude proposed by the applicant is indicative of the non-existence of such contract. In any event, MIPF has not been cited.

Which bring me to the argument that the applicant waived its right to seek C the eviction of the respondent by waiting for eight years before asserting its rights. This cannot be taken seriously at all. I agree with the words of Makarau JP (as she then was) in *Alspite Investments* s*upra* at 237 that :

> "There are no equities in the application of the *rei vindicatio*. Thus, in applying the principle, the court may not accept and grant pleas of mercy or for extension of possession of the property by the defendant against an owner for the convenience D or comfort of the possessor, once it is accepted that the plaintiff is the owner of the property and does not consent to the defendant holding it. It is a rule or principle of law that admits no discretion on the part of the court. It is a legal principle heavily weighted in favour of property owners against the world at large and is used to ruthlessly protect ownership".

Here is a party that wants to occupy the property of another but has refuses E to accept the terms offered to it; a party that over-rates its entitlement to the property of another, to the extent of wanting to dictate terms, including the inexplicable demand that the owner should pay rates and taxes as well as pay for water and electricity consumed by that party when there exists no obligation whatsoever for that. The respondent may have certain rights against MIPF but those surely do not extend to the applicant. F

Even if I am wrong in that conclusion, I am persuaded that the respondent has abandoned the property in preference of the comfort of a house he is purchasing in Mount Pleasant. Therefore even the request made by MIPF to the applicant to allow him to occupy the property cannot be used to defeat the applicant's vindicatory action against the respondent. G

I am of the view that the applicant is entitled to the relief that it seeks. It is the issue of costs on an attorney and client scale which I do not agree with. The parties were negotiating the terms of a servitude to be registered which negotiations failed. The applicant sat on its right to remove the applicant, thereby misleading him into believing that he could stay. The applicant was H

Mathonsi J

A therefore complicit. For that reason the respondent should bear the costs on an ordinary scale.

In the result, it is ordered that :

1. The respondent, together with his assigns, invitees and any other person who is claiming through the respondent, are directed to vacate the B applicant's premises, being an undivided 1.7209544 per cent share of Stand 15125 Salisbury Township, also called 38 Wansford Mansions, Josiah Chinamano Avenue, Harare.
2. In the event that they fail to vacate forthwith the applicant's premises, then the Sheriff for Zimbabwe or his lawful deputy is hereby directed and authorised to evict them from the applicant's premises described C above, and place the applicant in the possession and control thereof.
3. The respondent's counter application is hereby dismissed with costs.
4. The respondent shall bear the costs of this application.

Gill Godlonton & Gerrans, applicant's legal practitioners

D *Magwaliba & Kwirira*, respondent's legal practitioners

© 2015 Juta and Company (Pty) Ltd.

Document 45 of 60

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2012/Volume 2/MAGUWU v CO-MINISTERS OF HOME AFFAIRS & ORS 2012 (2) ZLR 346 (H)

MAGUWU v CO-MINISTERS OF HOME AFFAIRS & ORS 2012 (2) ZLR 346 (H)

2012 (2) ZLR p346

Citation	2012 (2) ZLR 346 (H)
Case No	Judgment No. HH-404-12
Court	High Court, Harare
Judge	Mathonsi J
Heard	10 October 2012; *CAV*
Judgment	24 October 2012
Counsel	*T S Manjengwa,* for the applicant. *O Dodo*, for the first, second, third and fifth respondents No appearance for the fourth respondent
Case Type	Civil application
Annotations	No case annotations to date

Flynote

Aviation – *Civil Aviation Authority of Zimbabwe – status of – proceedings against – Authority may sue and be sued in own name – no need to cite Minister of Transport in such proceedings*

Constitutional law – *Constitution of Zimbabwe 1980 – Declaration of* D *Rights – freedom of movement – freedom from deprivation of property – constitutional rights thereto – State security – of paramount importance but must be justifiable and conform to the rule of law*

Criminal procedure – *search and seizure – when may be carried out – need to suspect that articles concerned are connected to commission of an* E *offence – what may effect seizure – agents of State security organisation – required to act in terms of law*

Practice and procedure – *application – urgent – alleged disputes of fact – submission by respondent that applicant should have proceeded by way of action – respondent not prepared to lead evidence on alleged matters in dispute – application procedure justifiable* F

Practice and procedure – *parties – parastatal body – action against parastatal body corporate which is capable of being sued – no need to cite Minister under whose portfolio parastatal operates – Minister not responsible for any such acts or omissions*

Headnote

While endeavouring to leave the Harare International Airport in order to attend G an international conference on human rights in Ireland, the applicant, a human rights activist, was apprehended by two officials from the Central Intelligence Organization employed by the fifth respondent, the Minister of State for National Security. The applicant and his baggage were searched and articles including*, inter alia,* a laptop, a camera, H

Mathonsi J

A business and bank cards and cash were removed. The officials neither identified themselves nor provided the applicant with any inventory of the goods taken nor any reason for the search. As a result, the applicant was unable to attend the conference. He sought an order from the High Court seeking provisional relief. Pending a final order, the respondents, including the fifth respondent, were ordered to return his property to B him, to cease interfering with his freedom of movement and to allow him full protection of the law.

The grant of a final order was opposed by the fifth responded and a procedural point was taken concerning the third respondent, the Minister of Transport, who alleged a misjoinder. He submitted that, in terms of s 4 of the Civil C Aviation Act [*Chapter13:16*], the Civil Aviation Authority of Zimbabwe, the fourth respondent, was a legal person in its own right, capable for suing and being sued. There was, therefore, no cause to sue the third respondent because the fourth respondent was a parastatal but simply existing under his ministerial portfolio. In respect of a further procedural point, the fifth respondent submitted that the applicant should not have D proceeded by way of application, but rather by a trial action, because of serious disputes of facts concerning exactly what property was taken from him. Notwithstanding this, however, the fifth respondent indicated that he did not wish to call any witnesses as to his version of events. On the merits of the application for the grant of a final order, it was evident E that the version of the fifth respondent was wholly untrustworthy as he had proffered different and contradictory accounts of what property was removed from the applicant.

Held, that in terms of s 4 of the Civil Aviation Act [*Chapter 13:16*], the Civil Aviation Authority was a body corporate capable of suing and being sued in its own name and, subject to the Act, of performing all acts that F bodies corporate may by law perform. To the extent that the Minister had been cited merely as the Minister responsible for the Authority, there had been a misjoinder. He should not have been cited for the acts of commission or omission of the Authority.

Held, further, that the appellant had been prevented from proceeding with his G journey and could not be faulted for seeking relief by means of an urgent application. The fifth respondent had no cause to object to the procedure adopted. No inventory of the goods removed from the applicant was taken and as the fifth respondent did not intend to call witnesses on the point, there was no point in referring the matter for trial.

Held, further, that the applicant was entitled to the protection of the law and H that included the right to free movement and to property as enshrined in the

---

Mathonsi J

Constitution. If the property of an individual is to be seized, such seizure A must be under the authority of the law. While the rights of an individual to possession and enjoyment of his property

can be derogated from, that can only be done in accordance with the law. The fifth respondent could no cite law under which the State agents acted; in fact, counsel for the fifth respondent admitted that the State agents did not operate under any B law. It had not been shown how the State agents were able to reasonably suspect that any of the articles in the possession of the applicant could be the subject of the seizure in terms of s 49 of the Criminal Procedure and Evidence Act or any other law for that matter. The fifth respondent contented himself with hedging behind vague allegations of subverting the Government of Zimbabwe. How this subversion could be deduced C from the articles the applicant was carrying had not been demonstrated. The seizure of applicant's property was unlawful and all the items which were removed from him must be returned to him by the fifth respondent and those acting for him.

Held, further, that if a person is to be deprived of his property, it is a basic tenet of our law that he must be informed of the reasons for doing so D and the law under which such deprivation is being done. State security is undeniably paramount but what is done in pursuit of State security must be justifiable in a democratic society and must conform to the rule of law.

Cases cited E

Leader Tread Zimbabwe (Pvt) Ltd v Smith 2003 (1) ZLR 139 (H)

Mangwiza v Ziumbe NO & Anor 2000 (2) ZLR 489 (S)

R v Tumahole Bereng [1949] AC 253 (PC)

Woods & Ors v Min of Justice & Ors 1994 (2) ZLR 195 (S)

Legislation considered F

Civil Aviation Act [*Chapter 13:16*], s 4

Criminal Procedure and Evidence Act [*Chapter 9:07*], ss 49 & 296

Case information

T S Manjengwa, for the applicant.

O Dodo, for the first, second, third and fifth respondents

No appearance for the fourth respondent G

Judgment

Mathonsi J: On 12 September 2011 this court, per Kudya J, issued a provisional order in favour of the applicant, a human rights activist, who had certain items of his property seized by unnamed officials at Harare International Airport in the early hours of 10 September 2011 as he tried to board a flight H

Mathonsi J

A en route to a Human Rights Defenders Conference in Dublin, Republic of Ireland. The provisional order issued by the court is in the following terms:

> **"Terms of the Final Order**
>
> That the respondents show cause, if any, why a final order should not be made in the following terms :
>
> 1. The seizure and deprivation of the applicant's property by the respondents B be and is hereby declared wrongful, unlawful and unjustified.
> 2. The respondents and all those acting for them be and are hereby ordered to permanently return the items seized from the applicant, namely HP 625 laptop, power pack, wallet, Olympus Digital camera, US$2 000, business cards and bank cards, notebooks, laptop bag and all its contents to the applicant or his lawful representatives. C
> 3. The respondents be and are hereby ordered to disclose to the applicant and his lawyer, the court, the identities of the State security agents who unlawfully and unjustifiably seized the applicant's items.
> 4. The respondents pay the costs of this application on the legal practitioner- client scale, the one paying the others to be absolved.
>
> **Terms of interim relief sought**

D It is hereby ordered that, pending the determination by this Honourable Court of the issues referred herein above, it is ordered that;-

1. The respondents be and are hereby ordered and specially directed to cause the immediate return of the applicant's HP laptop, power pack , wallet, Olympus digital camera, US$2 000, business cards, and bank cards, notebooks, laptop bag and all its contents. E
2. The respondents are hereby ordered to desist and stop from interfering with the applicant's freedom of movement, association, right to property and protection of the law."

The circumstances leading to the grant of the above provisional order are that the applicant checked in at the Kenya Airways counter at Harare International F Airport intending to board a flight to Nairobi en route to Dublin, Republic of Ireland. After being issued with his boarding passes, he went through all the immigration formalities required by the second respondent's immigration officials in terms of the law and complied with all civil aviation procedures required by the fourth respondent, the Civil Aviation Authority of Zimbabwe.

The applicant states in his founding affidavit that no sooner had he complied G with the procedures than he was confronted by two persons in civilian attire, a man and a woman, who demanded to conduct a body search on his person and also to search his luggage. Those people did not identify themselves but it is common cause that they are State security agents from the Central Intelligence Organisation, falling under the fifth respondent, the Minister of H State for National Security in the President's Office.

Mathonsi J

The applicant says he was not informed of the reasons for the search. After A the search, certain items of his property listed in the provisional order referred to above were seized from him and the security agents disappeared, leaving him stranded at the security check point as Kenya Airways was calling his name to approach and board the flight. He says later he followed the agents to their office where they refused to advise him of any offence that he was B suspected of having committed and seized his property without issuing him with any warrant of seizure or even an inventory listing the property they had confiscated from him.

He says the agents were hostile, causing him to fear for his safety. He could not proceed with his journey as his property, money and boarding passes were taken and was assisted by immigration officials to re-enter Zimbabwe, but C not before he observed that even his bulk luggage which had been loaded on the plane had been tampered with. The handles of his bag had been broken. He reported the matter to the police.

As a result, the applicant approached the court on an urgent basis, seeking provisional relief which was granted and is quoted above. He submitted D that the seizure of his property was unlawful and unjustified. It is the confirmation of that provisional order which is contested, but the first and fourth respondents did not file any opposition. On 14 September 2011, two days after the provisional order was granted, counsel for the respondents addressed a letter to the applicant's legal practitioners which reads in relevant part as follows: E

> **"RE: FARAI MAGUWU VS THE CO-MINISTER OF HOME AFFAIRS AND 4 OTHERS CASE NO: HC 8895/2011**
>
> We make reference to the matter cited above and hereby acknowledge receipt of a copy of the provisional order issued by Honourable KUDYA J.
>
> Kindly note that we are instructed by the first, second and third respondents F as follows;-
>
> The respondents aforementioned cannot comply with interim relief granted by the learned judge, and would be unable to do so even if they wanted to, because they simply do not have the items of property referred to in the interim order, and know nothing about them whatsoever ...
>
> The fifth respondent is also of the view that the provisional order issued by G the learned judge is incapable of complying with (*sic*) even if one wanted to comply with it. Whereas the applicant alleges that his items as listed were taken illegally by the fifth respondent's officers, *the fifth respondent for his part denies that all the items mentioned in the urgent chamber application were taken by his officers as alleged or at all. The fifth respondent admits that his officers lawfully took only two reports from, and compiled by the applicant. Clearly* H

Mathonsi J

such a material dispute of fact will need to be resolved by adducing viva voce evidence"(emphasis is mine).

The second and third respondents filed opposing affidavits, in essence dissociating themselves from the action taken against the applicant.

The second respondent insisted that the "applicant passed through the immigration counter without any problem". In his view, there is nothing wrong his officers did.

The essence of the third respondent's defence is that he has been wrongly cited, regard being had to the fact that, as much as the fourth respondent, the Civil Aviation Authority of Zimbabwe, is a parastatal under his ministerial portfolio, it is a legal *persona* constituted in terms of an Act of Parliament and can sue and be sued in its own right. I agree.

The fourth respondent is established in terms of the Civil Aviation Act [*Chapter 13:16*] and exists independently of the Minister of Transport. Section 4 of the Act provides :

> "There is hereby established an authority to be known as the Civil Aviation Authority of Zimbabwe, which shall be a body corporate capable of suing and being sued in its own name and, subject to this Act, of performing all acts that bodies corporate may by law perform."

To the extent that the third respondent has been cited merely "as the Minister responsible for the Civil Aviation Authority of Zimbabwe," a body corporate, there has been a misjoinder. The applicant had no business citing the third respondent for the acts of commission or omission of the Authority. The application against the third respondent has to be dismissed with costs.

In his opposing affidavit, deposed to on September 2011, the fifth respondent stated in paragraph 5 :

> "I admit the import and purpose of the application. The fifth respondent admits taking some of the items listed which include, 3 x blank Sakunda Cash Sale slips, 1 x Sakunda Cash Sale N0 85980, 1 x Interfin Bank account numbers, 1 x Zimnat Lion Company Travel Insurance Policy, 1 x VISA Application Receipt No. 191, ref 7401062 dated 24 August 2011 attached to the Note Pads, 1 x Standard Chartered Transaction Receipt dated 24 August 2011 and 1 x Quittance De Frais De Dossie E T Receipisse No. HRE 201124900005. These have since been returned to the applicant.
>
> Further the fifth respondent denies ever taking a laptop bag, HP 625 laptop, power pack, wallet, Olympus digital camera, US$2000, business cards and bank cards."

It is not true that at the time the fifth respondent deposed to the affidavit, which, although undated, was filed on 26 September 2011, the items had been returned to the applicant. In fact, it is common cause that by then nothing had been returned to the applicant.

Mathonsi J

It is also curious that the fifth respondent was now admitting under oath having more items belonging to the applicant when, in the letter from his legal practitioner dated 14 September 2011, which I have quoted above, he denied having taken any of the applicant's property except "two reports from, and compiled by the applicant".

It is appropriate at this stage to also make reference to the letter from the fifth respondent's counsel to the applicant's legal practitioners dated 8 November 2011 which reads in pertinent part as follows :

> "Kindly find herewith the documents / items listed below, which our client, the fifth respondent had confiscated from yours in the discharge of the former's mandate.
>
> 1. Short hand notebook
> 2. Note book
> 3. Sakunda Energy cash sale receipts
> 4. Standard Chartered Bank transaction receipt
> 5. Standard settlement instructions
> 6. Travel Insurance Policy Certificate (ZIMNAT)
> 7. ZIMNAT payment receipt
> 8. Visa application receipt".

It is significant that the items the fifth respondent was returning to the applicant are dominated by receipts and generally unimportant, if not valueless, papers. Significantly the two reports he

admitted earlier as having taken were not included in the list. More importantly, the above list is completely different E from what the fifth respondent admitted in the letter of 14 September 2011.

The inescapable conclusion is that the fifth respondent has not been truthful in respect of the items that were taken from the applicant. One cannot help observe as well that all the valuable items which the applicant claims were seized from him have been denied. It is a principle of our law of evidence F that where a witness has been shown to be untruthful, as the fifth respondent has been demonstrably shown to be, an adverse interference has to be drawn against such witness: *Leader Tread Zimbabwe (Pvt) Ltd* v *Smith* 2003 (1) ZLR 139 (H); *R* v *Tumahole Bereng* [1949] AC 253 (PC).

The basis of that legal principle resides in the fact that the witness would be G unreliable and the court would not know when the truth is told and when not.

In his opposing affidavit, the fifth respondent explained the role of the Department of State for National Security as being to detect, assess and neutralise security threats against the country. He stated that owing to the fact that subversive elements operate covertly, the State Security Organisation has to operate covertly in order to discharge its responsibility. He made H

Mathonsi J

A reference to the Official Secrets Act [*Chapter 11:09*] generally and s 296 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] as legal instruments protecting classified information.

The fifth respondent stated that his department had received intelligence information that the applicant was travelling to Dublin " to attend to (*sic*) a Human Rights Workshop for the purposes of subverting the Government of B Zimbabwe". For that reason he was searched and documents seized. That search was therefore not wrongful. He said at para 26 :

> "The applicant was not deprived of all the property he alleges was taken. The movable property that was confiscated from him was taken in the interest of national security. As aforesaid, the said documents were returned to him after verification. There is nothing amiss or illegal in searching a subject of security C interest."

We now know of course that the said documents of "national security" other than two reports, were receipts which do not commend themselves favourably as security threats. On the merits of the matter the fifth respondent submitted as follows : D

> "32(i) It is my submission that the application is devoid of merit. The applicant was searched by security agents as he was suspected of being in possession of information that threatens the bearing (*sic*) of the country.
>
> (ii) He is a well known human rights activist who is not only a defender of the same but also strongly opposed to the selling of the country's wealth, to wit, diamonds. E
>
> (iii) There was reasonable apprehension that the applicant was indeed in possession of subversive material which he intended to deliberate on his excursion to Dublin, Ireland.
>
> (iv) The instruction was lawful and not unlawful as the applicant alleges
>
> (v) The allegations by the applicant are without basis at all and hence should F not be entertained."

Mr *Dodo*, for the respondents, submitted that there were serious disputes of fact which could not be resolved on the papers and that the applicant should have proceeded by action and not application procedure. The dispute is mainly in the form of the specific items which the state agents seized from the applicant, as what he claims was taken is disputed by the fifth respondent. G He conceded that when the property was seized the applicant was not issued with a warrant of seizure or any inventory outlining that which had been taken from him.

Asked whether the applicant would be able to call, as witnesses at the trial, the State agents who took the property from the applicant for the court to H test their credibility, Mr *Dodo* was adamant that the State agents would not

---

Mathonsi J

be called as doing so would prejudice their operations. It is therefore not A clear what counsel thinks would be achieved by referring the matter to trial.

It is common cause that the applicant was prevented from proceeding with his journey on 10 September 2011 to attend a conference which was commencing on 11 September 2011 and ending

on 17 September 2011. To the extent that he was of the firm view that his rights had been interfered B with, it was prudent for him to approach the court on an urgent basis seeking relief. There is no way the procedure employed can be faulted.

In addition, the so called dispute of fact is in fact a creation of the fifth respondent's agents. If they were acting lawfully and were entitled to seize the applicant's property, it was only natural that they document the process C by producing an inventory of the seized property and getting the applicant to sign it. Instead, they proceeded rough shod over the rights of the applicant without consideration whatsoever to the consequences of their actions.

In doing so, they made their bed and must surely lie on it. They cannot be allowed to benefit from their own default, as it were. The objection to the procedure used is without merit. D

I now turn to consider the lawfulness or otherwise of the seizure of the applicant's property. Mr *Manjengwa,* for the applicant, submitted that subjecting the applicant to a further search and ultimately seizure of his property after he had undergone the normal immigration and civil aviation procedure was unlawful. This was particularly so as that exercise was carried E out by people in civilian attire who refused to identify themselves.

Mr *Dodo* countered this by saying that the Department of State Security does not operate under any statute and, therefore, he could not identify any law under which the exercise was conducted. This argument is unfortunate indeed. Zimbabwe is a democratic country which subscribes to the rule of law. F

The applicant is a citizen of Zimbabwe who is entitled to the protection of the law. He enjoys certain rights, including the right to property and free movement as enshrined in the Constitution of Zimbabwe. If the property of an individual is to be seized, such seizure must be under the authority of the law.

While it is true that the rights of an individual to possession and enjoyment G of his property can be derogated from, that can only be done in accordance with the law. The fifth respondent has not cited any law under which the State agents acted in this matter. Counsel for the fifth respondent has submitted the State agents do not operate under any law. His submissions are therefore exceedingly unhelpful.

In terms of s 49 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]; H

2012 (2) ZLR p355

Mathonsi J

> "The A State may, in accordance (with) this part, seize any article –
>
> (a) which is concerned in or is on reasonable grounds believed to be concerned in the commission or suspected commission of an offence, whether within Zimbabwe or elsewhere; or
>
> (b) which it is on reasonable grounds believed may afford evidence of the commission or suspected commission of an offence, whether within B Zimbabwe or elsewhere; or
>
> (c) which is intended to be used or is on reasonable grounds believed to be intended to be used in the commission of an offence."

It has not been shown how the State agents were able to reasonably suspect that any of the articles in the possession of the applicant could be the subject of the seizure in terms of s 49 or any other law for that matter. The fifth C respondent, who has flatly refused to disclose the identity of the State agents who conducted the seizure, has contented himself with hedging behind vague allegations of subverting the Government of Zimbabwe. How this subversion could be countenanced from the articles the applicant was carrying has not been demonstrated.

D In order to assess the reasonableness of the suspicion, the court must be taken into confidence as to what exercised the mind of the agents, which, as things stand, remain a mystery. What is known, however, is that the State agents admit taking a number of receipts, an insurance policy, bank transaction slips and two reports compiled by the applicant. I am not persuaded that these items could be regarded as subversive

E In my view, the manner in which the search was conducted by agents (who did not identify themselves) was not only arbitrary but also heavy handed. If you are to deprive an individual of his property, it is a basic tenet of our law that he must be informed of the reasons for doing so and the law under which such deprivation is being done. Surely State security is undeniably F paramount but what is done in pursuit of State security must be justifiable in a democratic society and must

conform to the rule of law. After all, the applicant had rights whose enjoyment is guaranteed by the law. *Woods & Others* v *Minister of Justice & Others* 1994 (2) ZLR 195 (S).

I conclude therefore that the seizure of the applicant's property was unlawful. In doing so, I am fortified by the fact that, more than a year after his property G was seized on suspicion of subversiveness, no charges have been preferred against him and no other action has been taken against him by the State.

The next issue relates to the identity of the items that were seized from the applicant. I have already stated that the State agents acted in an heavy-handed manner, without regard to any recognised procedure and the interests of the H applicant. They did not secure the signature of the applicant on a warrant

---

2012 (2) ZLR p356

Mathonsi J

or inventory confirming what it is that was seized. This has given rise to a A dispute as to the identity of what was taken.

The fifth respondent has been shown to be completely unreliable on what was taken. He first admitted taking two reports; he later he admitted taking more items, claiming he had returned them when that was not the case and eventually returned worthless receipts and cash slips with nothing to do with B the reason for seizure. I have no reason to doubt the applicant at all when he says his laptop, wallet, money and other property were seized. Those items would ordinarily be in the possession of a traveller attending a conference.

I am persuaded that the property the applicant has listed was indeed seized from him unlawfully. It should be returned. The applicant has half-heartedly submitted that the identity of the State agents must be disclosed. Mr *Manjengwa* C argued that this was for purposes of closure. I say "half-heartedly" because, other than a reference to it in the draft order, the founding affidavit is silent on the issue. It is trite that an application stands or falls on its founding affidavit: *Mangwiza* v *Ziumbe NO & Anor* 2000 (2) ZLR 489 (S).More importantly, the fifth respondent has taken ownership of the activities of the State agents D and the relief the applicant seeks can be effectively enforced through the fifth respondent. In taking that route I am mindful of the provisions of s 296 of the Criminal Procedure and Evidence Act [*Chapter 9:07*], which, although of no direct application to this matter, recognise the authority of a Minister to depose to an affidavit stating his opinion that disclosure affects the security of the State. This is what the fifth respondent has stated in his E opposing affidavit.

There is also the issue of the roles of the other respondents who have dissociated themselves from the actions of the state agents. Thankfully, the fifth respondent has honourably accepted responsibility for that unfortunate exercise. It is therefore unnecessary for me to determine the liability of the first, second and fourth respondents. F

Accordingly, I make the following order, that –

1. The seizure of the applicant's property by State agents operating under the fifth respondent be and is hereby declared wrongful, unlawful and unjustified.
2. The fifth respondent and those acting for him be and are hereby directed G to return the items seized from the applicant, namely HP 625 laptop, power pack, wallet, Olympus digital camera, US$2 000, business cards, bank cards, notebooks, laptop bag and all its contents to the applicant or his lawful representatives.
3. The fifth respondent shall pay the costs of this application. H

2012 (2) ZLR p357

Mathonsi J

A *Wintertons Legal Practitioners*, applicant's legal practitioners

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

---

© 2015 Juta and Company (Pty) Ltd.

Document 46 of 60

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2012/Volume 2/KWARAMBA v BHUNU NO 2012 (2) ZLR 358 (S)

KWARAMBA v BHUNU NO 2012 (2) ZLR 358 (S)

Citation	2012 (2) ZLR 358 (S)
Case No	Judgment No. S-46-12
Court	Supreme Court, Harare
Judge	Chidyausiku CJ (in chambers)
Heard	1 November 2012
Judgment	1 November 2012
Counsel	Details not supplied
Case Type	Civil application
Annotations	No case annotations to date

Flynote

Court – contempt – *what is – statement ascribing political motivation to* C *court – such statement a clear contempt*

Court – Supreme *Court – jurisdiction – review powers – when may be exercised – need for an irregularity or misdirection to be alleged – concurrent jurisdiction with High Court – whether Supreme Court can order review of decision of decision of a High Court judge* D

Legal practitioner – *conduct and ethics – statements on matter which is sub judice – when statements may be made – statement ascribing political motives to the court – gross transgression of prohibition against making comments on pending matter – practitioner misrepresented by press – courses to follow* E

Headnote

The applicant was one of the team of legal practitioners representing 29 persons who were accused of murdering a police officer. The trial of the accused persons had commenced in the High Court. The applicant, on behalf of the accused persons, made a bail application, which the F State opposed. The court, presided over by the respondent, reserved its judgment. The trial continued while awaiting judgment on the bail application. While judgment was pending on the bail application, an article appeared in a newspaper, stating the applicant had said that the law was not being applied fairly and that justice was being politicised because the accused belonged to a particular political party. The applicant G admitted being asked to comment on the manner in which the wheels of justice were turning in the matter and that he expressed disappointment at the lengthy stay of his clients in remand prison. He said that although the article was to some extent true, it contained several inaccuracies, which inaccuracies probably created the wrong impression in the minds of readers, including the presiding judge. The respondent, disturbed H

Chidyausiku CJ

A by the article, summoned all the legal practitioners in the matter to his chambers. There he expressed his concern over the contents of the article and asked the legal practitioners to comment. The applicant indicated to the respondent that the article was inaccurate and that there

was no intention whatsoever on his part to attack the court or make adverse comments. He tendered his apology to the respondent if the B wrong impression had been created. He alleged that the newspaper had misquoted him or misrepresented him. He assumed that the matter had been resolved, but when the respondent gave his decision on the bail application in court, he castigated the applicant for his communication with the newspapers, accusing him of "demonising and attacking the C dignity and integrity of this court and the judiciary of this country in general". He described the applicant's remarks as being "ill conceived" and "malicious" and said that the applicant was bent on bringing the due administration of justice into disrepute. He concluded by describing the applicant as "dishonest, slanderous, contemptuous and unethical".

The applicant, aggrieved by the remarks, requested that a judge of the Supreme D Court give directions in terms of s 17(h) or s 25(3) of the Supreme Court Act [*Chapter 7:13*] that a review of the matter be instituted.

Held, that before a judge of the Supreme Court issues directions in terms of s 25(3) of the Act, he has to be satisfied of the existence of an irregularity that needs determination or correction which has occurred. Generally E speaking, an irregularity occurs when a judicial officer takes into account factors that he should not take into account or fails to take into account factors he should take into account in the process of the making of a determination the judicial officer is seized with. An irregularity also occurs where the law is misapplied or an incorrect procedure is followed. The court *a quo* was seized with a bail application. No misdirection or F irregularity in the determination of the bail application was alleged. The respondent's remarks about the applicant were *obiter*.

Held, further, that ss 17(h) and 25 of the Act confer concurrent review jurisdiction on the Supreme Court with the High Court over inferior tribunals. What this means is that a Supreme Court judge, in the exercise of jurisdiction conferred by ss 17 and 25 of the Act, has the same review G jurisdiction as a High Court judge. A judge cannot order the review of a judgment of another judge of the same jurisdiction. Thus, from a jurisdictional standpoint, the request was not competent.

Held, further, that the applicant did not seem to appreciate what is expected of him as a legal practitioner and an officer of the court. The remarks H ascribed to him did not only scandalise the respondent but were also

---

Chidyausiku CJ

made while the matter was *sub judice*. A time-honoured practice which A has crystallised into law prohibits the making of inappropriate statements on matters pending before the courts. The statements ascribed to the applicant grossly transgressed the *sub judice* rule and clearly constituted contempt of court, in that they scandalised the court by ascribing to it political motivation in its judgment. The inescapable inference is that B the remarks were made not only to bring the court into contempt in the eyes of the public but also in an attempt to influence the outcome of the bail application and consequently the course of justice. The applicant was lucky that he was not prosecuted for contempt of court. He should have immediately issued a statement disassociating himself from the contents of the article and denying that he ever uttered the words ascribed C to him by the newspaper. He should also have urgently sought audience with the judge to assure him that he never said the words ascribed to him. Instead, he only offered a wishy-washy explanation upon being asked about the matter.

Cases referred to D

Chrmn, ZEC & Anor v Bennett & Anor 2005 (2) ZLR 296 (S)

Nherera v Kudya NO 2007 (2) ZLR 253 (S)

S v Madzokere & Ors 2012 (1) ZLR 538 (H)

Legislation considered E

Supreme Court Act [*Chapter 7:13*], ss 17(h) & 25(3)

Judgment

Chidyausiku CJ: The legal practitioners representing Mr Charles Kwaramba (hereinafter referred to as "the applicant") placed before the Registrar of this court the following letter: F

> **"Request for directions**
>
> We act on behalf of Mr Charles Kwaramba at whose instance we write.
>
> Mr Kwaramba, who is a legal practitioner and an officer of this Court, was representing accused persons in the case of *Tungamirai Madzokere and 28 Others* Case No. CRB 55/12. G
>
> He applied for bail on their behalf and in the judgment dismissing the bail application the court also made adverse findings against Mr Kwaramba. A copy of the judgment is attached.
>
> Some time ago we received instructions from Mr Kwaramba to seek a review of the decision as he felt that there were irregularities in the manner the court arrived at the decision affecting him. H

Chidyausiku CJ

> A As we were preparing the application, we noticed that there is a challenge with regard to review proceedings before the Supreme Court. Section 25(3) of the Supreme Court Act seems to suggest that there is no right to approach the Supreme Court for review as a court of first instance. However, sections 17(h) and 25(1) of the same Act both seem to confer review powers on the Supreme Court.
>
> In light of the above, we became very averse to filing an application without B first seeking the Court's directions on the matter.
>
> We note, however, that, in terms of section 25(3) of the Act, the Supreme Court or a Judge of the Supreme Court can give directions whether a review in the nature of this one can be instituted before it in the first instance.
>
> We attach a draft copy of the application which is intended to be filed.
>
> We therefore request you to kindly place our request before a Judge for directions.
>
> C We look forward to your urgent attention to the matter."

It would appear to me that two requests emerge from the above correspondence:

(1) The legal practitioners for the applicant are seeking the opinion of a judge of the Supreme Court as to whether in terms of s 17(h) or s 25(1) of the Supreme Court Act [*Chapter 7:13*] (hereinafter referred to as "the Act") D the applicant can launch a court application for review of the judgment of the Honourable Mr Justice Bhunu (hereinafter referred to as either "the respondent" or "the learned judge") in a bail application made by the applicant on behalf of his clients in the High Court. Put differently, the legal practitioners are enquiring whether their client has a cause of E action in terms of s 17(h) or s 25(1) of the Act; and

(2) The legal practitioners for the applicant request that a judge of this court give directions in terms of s 17(h) or s 25(3) of the Act that a review of this matter be instituted.

Section 17(h) of the Act provides: F

> **"17 Supplementary powers of Supreme Court**
>
> For the purposes of this Part, the Supreme Court may, if it thinks necessary or expedient in the interests of justice –
>
> …
>
> (h) exercise any of the powers of review conferred upon the High Court by G section 29 of the High Court Act [*Chapter 7:06*]: …".

While s 25 of the Act provides:

> **"25 Review powers**
>
> (1) Subject to this section, the Supreme Court and every judge of the Supreme Court shall have the same power, jurisdiction and authority as are vested in the High Court and judges of the High Court, respectively, to review the proceedings H and decisions of inferior courts of justice, tribunals and administrative authorities.

Chidyausiku CJ

> (2) The power, jurisdiction and authority conferred by subsection (1) may be A exercised whenever it comes to the notice of the Supreme Court or a judge of the Supreme Court that an irregularity has occurred in any proceedings or in the making of any decision notwithstanding that such proceedings are, or such decision is, not the subject of an appeal or application to the Supreme Court.

(3) Nothing in this section shall be construed as conferring upon any person any right to institute any review in the first instance before the Supreme Court B or a judge of the Supreme Court, and provision may be made in rules of court, and a judge of the Supreme Court may give directions, specifying that any class of review or particular review shall be instituted before or shall be referred or remitted to the High Court for determination."

I will not entertain the first request because it is essentially a request for legal C advice. This court does not proffer legal advice to litigants. The applicant will have to make his own decision whether or not it is competent to make such an application in the light of the relevant provisions of the law and the previous decisions of this court.

As regards the second request, applications for directions are made by way of chamber application. It is inappropriate to do so by way of a letter addressed D to the registrar of this court for placement before a judge of this court. I will, however, overlook that inadvertence and deal with this request for directions as if it has been made by way of a chamber application, hence this judgment.

I have considered the request for directions and concluded that on the facts of this case it is not competent for a judge of this court to issue directions E for the review of a High Court judgment in terms of s 25 of the Act. See *Chairman, Zimbabwe Electoral Commission and Anor* v *Bennett and Anor* 2005 (2) ZLR 296 (S) and *Nherera* v *Kudya NO* 2007 (2) ZLR 253 (S).

The background facts to this request are as set out by the applicant in his proposed court application for review. The proposed court application for F review is attached to the letter to the Registrar. The following are the facts.

The applicant is a legal practitioner practising law in Harare in partnership with others under the name and style of Zimbabwe Lawyers for Human Rights. He was one of the legal practitioners representing accused persons who are accused of murdering a police officer in June 2011. He is one of a team of G about four legal practitioners representing about 29 accused persons. The trial of the accused persons commenced on 4 June 2012 in the High Court. The applicant, on behalf of the accused persons, made a bail application, which the State opposed. The court, presided over by Mr Justice Bhunu, reserved its judgment. The trial continued while awaiting judgment on the bail application. H

Chidyausiku CJ

A The incident that gave rise to this application for directions then occurred. It would appear that, while awaiting judgment on the bail application, there was an article in the *Daily News* newspaper stating the following:

"Human rights lawyer Charles Kwaramba, who is representing the 29 MDC activists, said the law is not being applied fairly. B

'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 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 C 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.'

Kwaramba said the moment that a person is labelled MDC justice is politicised."

The newspaper article, by use of quotation marks, purports to quote the D applicant as the origin of the above remarks. The applicant admits that he was asked to comment on the manner in which the wheels of justice were turning in the matter. He also admits that he expressed disappointment at the lengthy stay of his clients in remand prison. He contends that any other lawyer would have felt the same. The applicant's stance on the *Daily News* article is contained in paras 4.6 to 4.12 of the founding affidavit of his E proposed court application. He states the following:

"4.6 I then made the bail application which the State opposed. The court reserved its judgment. The trial went on while awaiting judgment on the bail (application). The incident which gave rise to these allegations then occurred. F

4.7 It is true that there was an article in the *Daily News* stating what the Honourable Judge repeated at p 3 of his (cyclostyled) judgment.

4.8 It is also true that the article quoted lawyers including Dewa Mavhinga and myself.

4.9 It is true that I was asked to comment (on) the manner that the wheels of justice were turning in the matter. It is true that I expressed disappointment G at the lengthy stay of my clients in remand prison. I do not think any lawyer could have felt otherwise.

4.10 It is true that I was invited to make a comparison of our case with the Shamva case. I declined the invitation indicating that I did not know much about that case but commented that if the cases were similar then like-accused must be treated alike as this is the position of the law. In H fact, I got much of the details of the Shamva case from the interviewing

---

journalist. I did not know about it. I did not even know much about the A circumstances of the murder.

4.11 So, while the article contained some correct information, it also contained inaccuracies. Statements such as 'THE LAW IS NOT BEING APPLIED FAIRLY', (and) 'THERE IS NO EQUAL APPLICATION OF THE LAW' were wrongly attributed to me. I deny using these words.

4.12 Although the article was to some extent true, it contained several B inaccuracies, which inaccuracies probably created the wrong impression in (the) minds of readers including the Honourable Judge."

The learned judge, disturbed by the above article, summoned all the legal practitioners in the matter to his chambers on the Monday following publication of the article. In his chambers he expressed his concern over the contents C of the article and asked the legal practitioners to comment on the issue. The applicant indicated to the learned judge that the article was inaccurate and that there was no intention whatsoever on his part to attack the court or make adverse comments. He tendered his apology to the respondent if the wrong impression had been created. He advised the respondent that newspapers were notorious for writing stories with a twist that sold papers. In short, the D applicant alleged that the newspaper had misquoted him or misrepresented him. He assumed that the matter had been resolved.

However, on 19 June 2012 the court delivered its judgment in the bail application [1]. In the course of that judgment the learned judge castigated the applicant for his communication with the newspapers. The learned judge E has this to say at 540C-541E:

"There has been, however, an unfortunate development in this trial in that one of the defence team of lawyers, Mr *Kwaramba*, instead of adducing the required evidence according to law, has now decided to play to the gallery 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 F of this country in general. He is quoted in an article in the *Daily News on Sunday* of June 10 (2012) at p 4 as follows:

'Human rights lawyer Charles Kwaramba, who is representing the 29 MDC 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 G 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 that points at them, but the speed of arrests shows that the police wanted

---

A 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.

Kwaramba said the moment that a person is labelled MDC justice is politicised.'

B 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 State* HH-254-12.

It is a well documented truth and our court records and law reports are replete C 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 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* D *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.
>
> 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 E his arch rival the President of ZANU PF and Zimbabwe.
>
> That puts to shame Mr *Kwaramba*'s ill-conceived malicious remarks in 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 inflammatory but baseless attack on the bench and the judiciary in general. The F simple answer to his insincere rhetoric question is that Parliament has 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 (or her) release. The same considerations do not apply to a person or police officer who is alleged to have G killed any person other than in circumstances falling under s 117(6) of the Act."

The learned judge further stated at 541H-542C:

> "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 lengthy addresses and submissions in open court he never mentioned the Shamva case or sought to draw any similarities between the two or any other case because H he knew that they were different and that different legal considerations applied.

2012 (2) ZLR p366

Chidyausiku CJ

> In S v *Madzokere & Ors* HH-182-12 I took the trouble to draw his attention to A 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 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. B
>
> For him to then turn around, attack and denigrate this court on the basis of a case reference 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 learned judge, after an analysis of the facts and applying the law to the C facts, dismissed the bail application.

The applicant objects to the learned judge's remarks on four grounds, set out in the proposed court application for review, namely –

> "1. There are/were gross irregularities in the proceedings or decision.
>
> 1.1 The applicant was not given an opportunity to be heard. D
>
> 1.2. The findings against the applicant were made in a case in which he was not a party.
>
> 1.3 The applicant's rights to the protection of the law and to legal representation were violated.
>
> 1.4 The respondent's findings were not borne out by the facts before him." E

It is on the basis of these facts that I am now requested to give directions in terms of s 25(3) of the Act that a review be instituted or the matter be referred or remitted to the High Court for determination.

Before a judge of the Supreme Court issues directions in terms of s 25(3) of the Act, he or she has to be satisfied of the existence of an irregularity that needs determination or correction which has occurred. Generally speaking, F an irregularity occurs when a judicial officer takes into account factors that he should not take into account or fails to take into account factors he should take into account in the process of the making of a determination the judicial officer is seized with. An irregularity also occurs where the law is misapplied or an incorrect procedure is followed. G

The court *a quo* was seized with a bail application. The learned judge had to determine whether or not bail should be granted. There is no allegation that in making the determination to grant or refuse bail the learned judge took into account wrong factors or failed to take into account factors which he should have taken into account. No misdirection in the determination of the bail application is alleged. Put differently, no irregularity is alleged H

Chidyausiku CJ

A in the determination of the bail application. The remarks complained of by the applicant were *obiter* and were not part of the *ratio decidendi* of the determination of the bail application. Sections 17(h) and 25 of the Act confer concurrent review jurisdiction on the Supreme Court with the High Court over inferior tribunals. What this means is that a Supreme Court judge, in the exercise of jurisdiction conferred by ss 17 and 25 of the Act, has the B same review jurisdiction as a High Court judge. A judge cannot order the review of a judgment of another judge of the same jurisdiction. Thus, from a jurisdictional standpoint, the request is not competent. See *Chairman, Zimbabwe Electoral Commission and Anor* v *Bennett and Anor supra* and *Nherera* v *Kudya NO supra*.

C Essentially, the applicant's complaint is that the learned judge should not have severely reprimanded him for his conduct or misconduct. The applicant does not seem to appreciate what is expected of him as a legal practitioner and an officer of the court. On the applicant's own account, the *Daily News* ascribed to him the remarks it published in its newspaper. The remarks ascribed to him do not only scandalise the learned judge but were also made D while the matter was *sub judice*. There is a time-honoured practice which has crystallised into law that prohibits the making of inappropriate statements on matters pending before the courts. I have no doubt in my mind that the statements ascribed to the applicant grossly transgressed the *sub judice* rule and clearly constitute contempt of court, in that they scandalise the court by ascribing to it political motivation in its judgment. The inescapable inference E is that the remarks were made not only to bring the court into contempt in the eyes of the public but also in an attempt to influence the outcome of the bail application and consequently the course of justice. The applicant should consider himself lucky that he was not prosecuted for contempt of court.

Legal practitioners who show such blatant disrespect and contempt for the F courts have no business appearing before the courts. In my view, serious consideration should be given to the introduction of more stringent measures to protect the dignity of the courts from being impaired by reckless utterances.

Upon the publication of the article in the *Daily News* I would have expected the applicant to immediately issue a statement disassociating himself from G the contents of the article and denying that he ever uttered the words ascribed to him by the *Daily News* newspaper. That is what one would expect of a person falsely accused of saying things he never said. I also would have expected the applicant to have urgently sought audience with the learned judge to assure him that he never said the words ascribed to him. Instead, he only offered a wishy-washy explanation upon being asked about the matter H by the learned judge. He made no effort to correct the impression conveyed

Chidyausiku CJ

to the public that the court is partial and that the applicant was the source of A the allegation. The applicant is the author of his own misfortune. He should be more circumspect in the way he conducts himself.

I accordingly decline to give the directions requested.

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

1 See *S* v *Madzokere & Ors* 2012 (1) ZLR 538 (H). – *Editor.*

© 2015 Juta and Company (Pty) Ltd.

Document 47 of 60

Source:

S v ISAAC 2012 (2) ZLR 369 (H)

Citation	2012 (2) ZLR 369 (H)
Case No	Judgment No. HH-424-12
Court	High Court, Harare
Judge	Uchena J
Heard	2 November 2012
Judgment	2 November 2012
Counsel	Details not supplied
Case Type	Criminal review
Annotations	No case annotations to date

Flynote

C **Criminal procedure** – *plea – not guilty – requirement to request accused to make statement outlining defence – accused already having given explanation resulting in alteration of plea from guilty to not guilty – requirement not thereby dispensed with*

Headnote

D The accused pleaded guilty to a charge of theft but, after the facts had been put to the accused and he was asked whether he had anything to add, he gave a lengthy explanation inconsistent with guilt. The magistrate thereupon altered the plea to one of not guilty and proceeded E to trial without asking the accused to outline the defence case. At the conclusion of the trial the accused was convicted. The magistrate, in answer to a query from the scrutinising regional magistrate, said that, in view of the detailed response which the accused had already given, it was not necessary to ask him to outline the defence case.

Held, that in terms of s 188 of the Criminal Procedure and Evidence Act [*Chapter 9:07*], whether the accused person pleads not guilty or his plea F is altered to one of not guilty, the prosecutor *shall* make a statement outlining the nature of his case and the material facts on which he relies; and the accused *shall* be requested by the magistrate to make a statement outlining the nature of his defence and the material facts on which he relies. The fact that the convicted person had given a detailed explanation did not entitle the magistrate to dispense with this mandatory procedure G which, in a trial of an unrepresented accused, imposes on a magistrate the duty to explain to him the provisions of s 189(2), which authorises a court to draw adverse inferences if an accused person fails to mention any relevant fact he would have been expected to mention in his defence outline. The failure to request the accused to make a statement was an H irregularity necessitating a trial *de novo*.

Uchena J

Legislation considered A

Criminal Procedure and Evidence Act [*Chapter 9:07*], ss 188,189

Judgment

Uchena J The convicted person initially pleaded guilty to a charge of theft as defined in s 113 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. The facts on which he was being charged were read to him. B The magistrate asked him if he understood them and in response he said he did. The magistrate further asked him if he had anything to add or subtract. In response, the convicted person told the court that the complainant had employed him as an ice-cream vendor and given him ice cream pads for sale and a push-cart. He fell ill and took the proceeds of the ice cream sales and push cart to his house. He used the proceeds of the sales to buy medication C He requested his young brother to phone the complainant and inform him of his illness. The complainant came with the police and caused his arrest.

On hearing the convicted person's additions to the State's outline which was used in place of the agreed facts, the magistrate altered his plea to one of not guilty. He immediately asked the State to open its case without giving the convicted person an opportunity to give his defence outline. The D trial progressed to the defence case, after which the convicted person was convicted and sentenced to six months' imprisonment. A sentence of four months' imprisonment which had been suspended after a previous conviction was brought into effect

The record of proceedings was forwarded to the senior regional magistrate E Harare for scrutiny, who inquired from the trial magistrate why he had not given the convicted person an opportunity to give his defence outline as provided by s 188 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] (the CP&E ACT).

In response the trial magistrate said since the convicted person had given F a detailed response which led to his plea being altered to not guilty, he felt that it was no longer necessary to give the convicted person that opportunity and to comply with ss 188 and 189 of the CP&E Act.

Section 188 of the CP&E Act provides as follows

> "In a trial before a magistrate, if the accused pleads not guilty or a plea of not guilty is entered in terms of section *one hundred and eighty-two* – G
>
> (a) the prosecutor shall make a statement outlining the nature of his case and the material facts on which he relies; and
>
> (b) the accused shall be requested by the magistrate to make a statement outlining the nature of his defence and the material facts on which he relies and, if he is not represented by a legal practitioner, the provisions of subsection (2) of section *one hundred and eighty-nine* shall be explained to him." H

Uchena J

A A reading of s 188 of the CP&E Act reveals that, whether the accused person pleads guilty or his plea is altered to one of not guilty, the prosecutor shall make a statement outlining the nature of his case and the material facts on which he relies; and the accused shall be requested by the magistrate to make a statement outlining the nature of his defence and the material facts on which he relies. The fact that the convicted person had given a detailed explanation B did not entitle the magistrate to dispense with this mandatory procedure, which in a trial of an unrepresented accused imposes on a magistrate the duty to explain to him the provisions of s 189(2).

The failure by the magistrate to comply with the provisions of s 188 is an irregularity. The convicted person proceeded to his defence case without C having been given an opportunity to give an informed defence outline, and without being informed of the provisions of s 189(2). Section 189(2) authorises a court to draw adverse inferences if an accused person fails to mention any relevant fact he would have been expected to mention in his defence outline.

In this case, the convicted person was prejudiced by the magistrate's failure D to comply with the procedure laid down in s 188. His conviction and sentence will be set aside, and the case will be referred back to the magistrate's court for trial *de novo* before a different magistrate.

In the result the convicted person's conviction and sentence are set aside. The case is referred back to the magistrate's court for trial *de novo* before E a different magistrate.

Chitakunye J agrees

© 2015 Juta and Company (Pty) Ltd.

Document 48 of 60

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2012/Volume 2/JOHANNE v CLARION INSURANCE COMPANY & ORS 2012 (2) ZLR 372 (H)

JOHANNE v CLARION INSURANCE COMPANY & ORS 2012 (2) ZLR 372 (H)

Citation	2012 (2) ZLR 372 (H)
Case No	Judgment No. HH-429-12
Court	High Court, Harare
Judge	Mathonsi J
Heard	6 November 2012; *CAV*
Judgment	14 November 2012
Counsel	*P Chiutsi,* for the plaintiff Ms *F Mupanduki,* for the first defendant
Case Type	Civil trial
Annotations	No case annotations to date

Flynote

Insurance – *motor – insurer's liability – policy issued in terms of Part IV of Road Traffic Act [Chapter 13:11] – insurer liable only to extent of sum insured – no limitation as to nature of liability claimable*

Road traffic – *insurance – third party insurance under Part IV of Road* D *Traffic Act [Chapter 13:11] – liability of insurer – insurer liable only to extent of sum insured – no limitation as to nature of liability claimable*

Headnote

In enacting Part IV of the Road Traffic Act [*Chapter 13:11*], the lawgiver wanted to provide victims of accidents involving a motor vehicle driven on a road in Zimbabwe, whether they are on board or pedestrians, a E remedy to sue the insurer directly for recourse. The lawgiver then made it compulsory for such insurance to be issued before a motor vehicle may be driven on a road. An injured person is therefore entitled to sue the insurer for "any liability", whether in the form of special damages or general damages. The use of the word "any" in s 25 simply means F that the *nature* of the liability claimable in respect of a statutory policy is unlimited. To say that "any" means that the *extent* of the liability *vis-à-vis* the quantum is unlimited is to stretch the word to elasticity limit. Under s 25, the amount claimed from an insurer under a statutory policy can be any amount "not exceeding the amount covered by the statutory policy". In terms of s 25(1)(b), any excess should be recovered from G the insured. The liability of the insurer is limited to the amount covered.

Cases cited

Eagle Ins Co Ltd v Grant 1989 (3) ZLR 278 (S)

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

Mathonsi J

Legislation considered A

Road Traffic Act [*Chapter 13:11*], ss 23 and 25(1)

Case information

P Chiutsi, for the plaintiff

Ms *F Mupanduki,* for the first defendant

Judgment

B **Mathonsi J:** This matter came before me as a special case in terms of Order 29 of the High Court Rules, 1971. At the pre-trial conference of the parties held before a judge the parties identified the issue for determination as :

> "Whether the first defendant (the insurer) is contractually/statutorily obligated to pay the plaintiff the damages claimed and if not, the extent of the first defendant's statutory liability".

C The parties then agreed that the matter proceeds in terms of Order 29 of the Rules. They also filed a statement of "Agreed and Undisputable (*sic*) facts" between them which are that on 5 October 2009, the second defendant, who is the owner of a commuter omnibus registration number AAF 3232 and the employer of the third defendant, took out a third party motor insurance D for his vehicle in terms of Part IV of the Road Traffic Act [*Chapter 13:11*] ("the Act").

The said third party insurance was for a limited insurance cover of US$800 and the insurance was for the period of 5 October 2009 to 30 September 2010. During that period, specifically on 11 May 2010, the vehicle which E was being driven by the third defendant, a driver of the second, knocked down the plaintiff's minor daughter, Joyline Johanne.

The minor child sustained injuries as a result thereof, requiring treatment for which the plaintiff now claims special damages in the sum of US$4 492 and general damages in the sum of US$9 000.

F The parties also identified the dispute as being whether the first defendant, being the insurer, is liable to pay the damages claimed by the plaintiff. I must add, for the sake of completeness, that on 29 June 2011 the plaintiff obtained default judgment against the second defendant in the sums I have already mentioned. Not content with that, he pursued the claim against the first defendant as the insurer.

G Mr *Chiutsi*, who appeared for the plaintiff, submitted that the plaintiff derives his rights to sue the insurer directly from the provisions of s 23(2) of the Act. Section 23 provides:

> "**23: Requirements in respect of statutory policies of insurance**
>
> (1) A statutory policy shall be issued by a person who is approved by the H Minister as an insurer for the purposes of this Part.

> (2) Subject to this section, a statutory policy shall insure such persons or classes A of persons as may be specified in the policy in respect of any liability which may be incurred by them in respect of –
>
> (a) the death of, or bodily injury to, any person; and
>
> (b) the destruction of, or damage to, any property caused by or arising out of the use of the motor vehicle or trailer concerned on a road. B
>
> (3) A statutory policy shall not be required to cover –
>
> (a) any contractual liability; or
>
> (b) liability in respect of the death of, or bodily injury to, persons who were being carried in or on or entering or getting on to or alighting from the vehicle or trailer concerned when the event out of which the claims arise occurred, to an amount exceeding – C
>
> (i) US$1 000 in respect of any one such person killed or injured; or
>
> (ii) US$ 5000 in respect of any one accident or series of accidents due to or arising out of the occurrence of any one such event, where the vehicle concerned is a vehicle other than an omnibus, or D

(iii) US$ 10 000 in respect of any one accident or series of accidents due to or arising out of the occurrence of any one such event, where the motor vehicle concerned is an omnibus or a commuter omnibus;

or

(c) … E

(d) …

(4) Notwithstanding any other law, a person who issues a statutory policy shall be liable to indemnify the persons or classes of persons specified in the statutory policy in respect of any liability which the statutory policy purports to cover in the case of those persons or classes of persons." F

Mr *Chiutsi* interpreted that provision to mean that the limit to statutory policy cover only relates to those classes of persons referred to in subs (3); that is only those persons who were being carried in, or boarding or alighting from the vehicle concerned when they were either killed or injured. In his view, the use of the words "any liability" in subs (2) means that the liability of G the insurer in a statutory policy is unlimited where the person claiming does not fall under the category of people being carried, or entering or alighting from the vehicle. He strongly submitted that any other construction would fall short of the legislative intent.

According to Mr *Chiutsi*, the plaintiff's daughter, having been "outside" the vehicle, is not subject to the limits set out in subs (3) and is therefore H

Mathonsi J

A entitled to recover more than the amount of the insurance cover of US$800 given by the first defendant.

The plaintiff should therefore be awarded the special damages of US$4 492 and general damages of US$9 000 which have already been proved to the satisfaction of the court against the second defendant.

B Ms *Mupanduki,* who appeared for the first defendant, contested that interpretation. She submitted that s 23(3) should be read in conjunction with s 25 of the Act. Insurers are entitled to limit their liability in the insurance cover and where the third party's claim exceeds the insured amount, the injured party must claim the excess from the insured. She conceded that the first defendant is liable to the plaintiff only in the event that the second C defendant is liable, but only to the extent of US$800 aforesaid.

Section 25(1) of the Act is a clear and unambiguous provision. It provides:

"25 Right of injured parties to proceed against insurers

(1)A person who has a claim against a person insured or indemnified in respect of any liability in relation to which a statutory policy has been issued shall be entitled – D

(a) in his own name to recover from the insurer any amount, not exceeding the amount covered by the statutory policy for which the person insured or indemnified is liable; and

(b) to claim and recover from a person insured or indemnified only so much E of his claim as exceeds the amount recovered by him from the insurer

Provided that –

(i) the rights of any such person who claims directly from the insurer shall, subject to subs (2), be no greater than the rights of the insured against the insurer;

(ii) the right of recovery directly from the insurer shall become prescribed F upon the expiry of a period of two years from the date on which the claim arose".

Obviously stung by the foregoing provision, Mr *Chiutsi* sought to argue that the plaintiff's claim is not covered by s 25(1) as it has been made in terms of s 23. I agree with Ms *Mupanduki* that the plaintiff cannot be allowed to G approbate and reprobate at the same time.

Care must be taken, in interpreting the provisions of the Act which form the basis of this dispute, not to lose sight of the legislative intent. As stated by the Supreme Court in *S* v *Nottingham Estates (Pvt) Ltd* 1995 (1) ZLR 253 (S) 256E:

"The primary rule of interpretation is, of course, to endeavour to ascertain H the intention of the law maker from an examination of the provision under

---

Mathonsi J
consideration placed in proper context. A court will commence its enquiry by A giving the word its grammatical signification, unless it is clear that the literal sense, when so applied, defeats the legislative intendment. In such event a deviation from the ordinary meaning is justified provided always that the word is sufficiently flexible to admit of another meaning by which such intention can be better effected".

In my view, in enacting Part IV of the Act, the law giver wanted to provide B victims of accidents involving a motor vehicle driven on a road in Zimbabwe, whether they are on board or pedestrians as is the case *in casu*, a remedy to sue the insurer directly for recourse. The law giver then made it compulsory for such insurance to be issued before a motor vehicle can be driven on a road. An injured person is therefore entitled to sue the insurer for "any liability", be it in the form of special damages or general damages. C

The use of the word "any" in that section simply means that the nature of the liability claimable in respect of a statutory policy is unlimited. To say that "any" means that the extent of the liability *vis-à-vis* the *quantum* is unlimited is to stretch the word too far.

Clearly the plaintiff has proceeded against the insurer in terms of s 25(1) D of the Act because it is that section which accords an injured person the right to proceed directly against the insurer. It is incorrect to say that the plaintiff's claim is in terms of s 23 because that provision does not create an entitlement to sue.

To the extent that a person is suing an insurer directly in his or her own E name, s 25 applies and the amount claimed under a statutory policy can be any amount "not exceeding the amount covered by the statutory policy".

We have here an insurer who has issued a statutory policy limiting its liability to US$800 but the plaintiff wants to recover much more than that from the insurer, when s 25(1)(b) specifically directs that any excess should F be recovered from the insured. It makes no sense whatsoever to expect an insurer to be liable to an extent above the amount insured. If that was the case, insurers would therefore peg insurance premiums at very high levels to cover any eventuality. There are other forms of insurance cover available to a prospective insured, which would cover much more than the statutory cover.

This application of s 25 has long been adopted by the Supreme Court. In *Eagle* G *Insurance Co Ltd* v *Grant* 1989 (3) ZLR 278 (S) at 280H-281A, it it stated:

> "Section 25 of the Act confers on a claimant the right to recover directly from the insurer, within a period of two years commencing from the date on which such claim arose, *any amount not exceeding the amount covered by the statutory policy.* The right to proceed against the insurer directly is purely a statutory provision given to a claimant who issues in respect of a statutory policy. It differs H

Mathonsi J
A from the situation at common law where an injured third party cannot proceed against the insurer directly because there is no contract of insurance between the third party and the insurer" (the emphasis is mine).

I therefore conclude that the liability of the first defendant is limited to the amount covered, namely, US$800.

Regarding the issue of costs, I do not think the first defendant can escape B that because it had the opportunity to make an unequivocal tender of that amount but elected to impose conditions in its plea. In fact, there was no clear tender of that amount right up to the time the matter was argued. Only then did Ms *Mupanduki* tender the US$800. The plaintiff is therefore entitled to his costs, even though his success is very limited.

C In the result, it is ordered that:

1. The first defendant shall pay the plaintiff the sum of US$800 together with interest thereon *a tempore morae* from the date of the summons to date of payment.
2. The remainder of the plaintiff's claim is hereby dismissed. D
3. The first defendant shall bear the costs of suit.

P Chiutsi, plaintiff's legal practitioners

Coghlan, Welsh & Guest, defendant's legal practitioners

© 2015 Juta and Company (Pty) Ltd.

Document 49 of 60

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2012/Volume 2/TRANSPORT OPERATORS ASSOCIATION OF ZIMBABWE v MINISTER OF TRANSPORT & ANOR 2012 (2) ZLR 378 (H)

TRANSPORT OPERATORS ASSOCIATION OF ZIMBABWE v MINISTER OF TRANSPORT & ANOR 2012 (2) ZLR 378 (H)

Citation	2012 (2) ZLR 378 (H)
Case No	Judgment No. HH-455-12
Court	High Court, Harare
Judge	Bere J
Heard	14 November 2012
Judgment	14 November 2012
Counsel	*S Bhebhe,* for the applicant *Z W Makwanya,* for the respondents
Case Type	Opposed application
Annotations	No case annotations to date

Flynote

Statutes – regulations – *validity – regulations purportedly enacted by relevant Ministry – enabling Act providing for enactment by Minister – regulations invalid in toto*

Statutes – regulations – *validity – when ultra vires – regulation going further* D *than enabling provision in Act*

Headnote

The applicant sought a declaratur to the effect that the Road Traffic (Construction and Equipment Use) Regulations 2010 (SI 154 of 2010) and the amendments thereto were invalid, null and void, alternatively, E that s 10(2) of the Regulations was *ultra vires* the Road Traffic Act [*Chapter 13:11*] and therefore null and void. That section purported to prohibit the use of left hand drive heavy vehicles in Zimbabwe after a future date. The applicant's argument was that the Regulations were enacted in completed violation of s 81 of the Act, in that, according to the preamble to the Regulations, they were enacted by the second F respondent (the Ministry of Transport) when in fact the Act requires that they be made by the first respondent (the Minister).

Held, that the Minister's power to enact regulations is derived from s 81(2) of the Act, which allows him to make regulations in respect of matters specified in the Third Schedule. Paragraph 6 of that Schedule allows for G the prohibition of the use on roads of any left hand drive motor vehicle, "*unless such motor vehicle is provided with an apparatus to enable the driver thereof efficiently to signal his intention to change direction or stop*". The wholesale prohibition of heavy

left-hand drive vehicles in the manner provided by s 10(2) of the Regulations was clearly never intended by the legislature. H

2012 (2) ZLR p379

Bere J

A *Held*, further, that s 81(2) requires that regulations be enacted or made by the Minister. This power cannot be delegated. Although the respondents alleged that there had been an error, no evidence was adduced in support of that explanation. The preamble is part of any enactment and cannot be treated as insignificant. Given the clear and unambiguous language in s 81 of the Act, the legislature's intention was to repose the discretion B to make appropriate regulations in the Minister and no one else. It was only the Minister who could have exercised that power and this would accord with public policy which requires, among other things, that the Minister should apply his mind to the desired regulations and that he be held accountable. The effect of such improper enactment was to render C the regulations invalid, as they were *ultra vires* the enabling Act.

Cases cited

Cargo Carriers (Pvt) Ltd v Zambezi & Ors

Macfoy v United Africa Co Ltd [1961] 3 All ER 1169

Mugwebie v Seed Co Ltd & Anor 2000 (1) ZLR 93 (S)

D *Trust Insurance Brokers (Pvt) Ltd v Min of Finance & Anor* HB-13-07

Legislation considered

Interpretation Act [*Chapter 1:1*], ss 6 & 26

Road Traffic Act [*Chapter 13:11*], s 81(2) & (3)

E Road Traffic (Construction and Equipment Use) Regulations 2010 (SI 154 of 2010), s 10(2)

Case information

S Bhebhe, for the applicant

Z W Makwanya, for the respondents

Judgment

F **Bere J:** In this application the applicant seeks relief in the form of a declaratur to the effect that the Road Traffic (Construction and Equipment Use) Regulations 2010 (SI 154 of 2010) ("the Regulations") and the amendments thereto are invalid, null and void, alternatively, that s 10(2) of the Regulations is *ultra vires* the Road Traffic Act [*Chapter 13:11*] ("the G RTA") and therefore null and void.

The brief background is that, after holding a number of consultative discussions on the mooted fundamental changes to the Regulations with the applicant and other stakeholders, the second respondent proceeded to enact the Regulations, whose main thrust was to ban the importation of and the eventual phasing H out of heavy left-hand drive motor vehicles in Zimbabwe, as these were

---

2012 (2) ZLR p380

Bere J

purportedly deemed to be a threat to road safety on our roads.The regulations A in question were purportedly enacted in terms of s 81 of the RTA.

Alarmed by the manner in which the Regulations were enacted and the general impact of the Regulations on its membership, the applicant sought legal intervention in challenging the legality of such subsidiary legislation.

As indicated, the applicant has taken issue with the legality of the whole B statutory instrument in the main, alternatively with s 10(2) thereof. I now propose to deal with these issues in detail.

Strange as it might appear, I prefer to deal first with the alternative order sought. In doing so, I am proceeding on the assumption that SI 154 of 2010 was properly enacted (which point I must stress I am not conceding to). In C fact, as I will demonstrate later in my judgment it is not possible for one to conclude that SI 154 of 2010 was properly enacted.

The legality of s 10(2) of SI 154 of 2010 ("the Regulations")

The applicant has alleged in the alternative that s 10(2) of the Regulations is *ultra vires* the RTA in that it went beyond the powers conferred on the D first respondent by the enabling Act. Despite his spirited effort in his heads of argument to oppose this position, Mr *Makwanya,* for the respondent, in his submissions to court and, after some probing from the court, realised the fallacy of his opposition and made a concession that indeed s 10(2) of the regulations could not be defended in its current form as it was indeed *ultra vires* the RTA. E

The very strong and persuasive argument put forward by Mr *Bhebhe* for the applicant, becomes clearer if one examines s 10(2) of the Regulations *vis-à-vis* s 81(2) and (3) of the RTA.

For starters s 10(2) of the Regulations provides as follows:

> "No person shall drive on a road any motor vehicle registered in terms of the F Vehicle Registration and Licensing Act [*Chapter 13:14*] for the first time in Zimbabwe on or after the 31st of March, 2011, if the steering wheel of the vehicle is on the left hand side;
>
> *Provided that no heavy vehicle fitted with a steering wheel on the left-hand side shall be driven on a road after 31 December 2015"* (my emphasis). G

It is common cause that the first's respondent's power to enact regulations is derived from s 81(2) of the RTA. This section gives the first respondent powers to provide for all matters which are specified thereunder. However, the legislature in its wisdom did not give the first respondent sweeping or wholesale powers in the making or formulation of such regulations, naturally because of the inherent dangers of doing so. H

Bere J

A The first respondent's powers are specifically limited by s 81(3) of the RTA, which provides as follows:

> "In the exercise of the powers conferred upon him by subsection (2), the Minister may provide for all or any of the matters set out in the Third Schedule".

The Third Schedule specifies matters in which the Minister may make B regulations. Of relevance to this case is para 6 of the Third Schedule which provides as follows:

> "6. The prohibition of the use on roads of any motor vehicle which is fitted with a steering apparatus on the left (or rear) side, *unless such motor vehicle is provided with an apparatus to enable the driver thereof efficiently to signal his intention to change direction or stop*" (my emphasis).

C It is abundantly clear that s 6 s*upra* curtails the powers of the first respondent in making the Regulations. The first respondent is only empowered to regulate for the prohibition (if need be) of left-hand drive motor vehicles with no "*apparatus to enable the driver to efficiently signal an intention to change direction or stop*" (my emphasis).

The wholesale prohibition of heavy left-hand drive vehicles in the manner D captured by s 10(2) of the Regulations was clearly never intended by the legislature.

The purported ban itself is a nullity because the first respondent no doubt went beyond the dictates of the law giver, the legislature. If it is intended to do so, then the first respondent must go back to Parliament and ask that same E Parliament to grant him more powers than he is allowed to enjoy at this stage.

In determining this point, I have been properly referred by the applicant's counsel to a number of decided cases on the point. I am grateful for it has made my task easier. Thus in *Trust Insurance Brokers (Pvt) Ltd* v *Minister of Finance & Anor* HB-13-07 Kamocha J remarked as follows :

> F "… The legislature had given the Minister only limited administrative powers to enable him to carry out its wishes but these powers did not include the power to override, alter, add to or subtract from the express wishes of Parliament as set forth in the Act…"

In my view, the provisions of s 81(2) and (3) of the Act are quite clear. The clear language used does not leave room to the first respondent to read into G the Act anything other than what the Act says in its clear and unambiguous language. The position is commented upon by *Maxwell on Interpretation of Statutes when he observes that, where the language used by the legislature is unambiguous, "it is hardly necessary to go beyond such language".*

2012 (2) ZLR p382

Bere J

I am more than satisfied that s 10(2) of the Regulations is *ultra vires* the A enabling Act (RTA) as argued by the applicant.

The legality of the Road Traffic (Construction And Equipment Use) Regulations 2010 (SI 154 of 2010)

Having dealt with the alternative prayer, let me go back and deal with the main relief desired by the applicant. B

The main thrust of the applicant's case is that the Regulations were enacted in completed violation of s 81 of the RTA in that they were enacted by the second respondent, when in fact the Act requires that they be made by the first respondent. It is extremely difficult for one to decipher the nature of the respondents' defence to this averment, given the poorly drafted notices C of opposition which were evidently just duplicated and whose cumulative effect amounts to no more than a bare denial.

The RTA requires that the Regulations be enacted or made by the first respondent and, in this regard, s 81(2) of the RTA provides as follows:

> "The Minister may by regulation provide for all matters which – D
>
> (a) by this Act are required or permitted to be prescribed; or
>
> (b) in his opinion, are necessary or convenient to be prescribed for carrying out or giving effect to this Act" .

Both the applicant's counsel and the respondents' counsel are agreed that the legislature clearly intended that the Minister (the first respondent) be E responsible for the making or enacting of such regulations.

Who made the regulations?

The question as to who made the regulations cannot be an issue of conjecture and speculation. The answer must be found in the regulations themselves. It will be noted that the preamble to the regulations in issue is framed as follows : F

> "It is hereby notified that *the Ministry of Transport, Communications and Infrastructural Development,* in terms of s 81 of the Road Traffic Act [*Chapter 13:11*] has made the following regulations" (my emphasis).

Faced with this clear position in the regulations, both the respondents could only respond in their opposing affidavits by stating: G

> "The Statutory Instrument was not enacted by the second respondent but by the Minister. *However, the error does not necessarily nullify the application of the Regulations given the fact that it is found in the Preamble of the Regulations"* (my emphasis).

This same position was repeated by the respondents' counsel in submissions made in open court. H

2012 (2) ZLR p383

Bere J

A Two issues arise from the position adopted by the respondents. Firstly, there is an unsolicited admission that the regulations could not possibly have been made by the second respondent but by the first respondent. The second point that is raised in the notice of opposition, as captured above, requires one to consider the effect of a preamble to an enactment. I will deal with these B issues one after the other.

Firstly, I wish to emphasize the point that s 81(2) of the RTA makes it clear that it is in the Minister (the first respondent) that the delegation of such subsidiary legislation is reposed . The word "Minister" is defined in the RTA itself and there is a world of difference between "Minister" and "Ministry". The two cannot be interchangeably used. They are different. The "Minister" C in this

situation cannot delegate his functions to the Ministry. It remains the Minister's prerogative to make the necessary regulations as dictated by the RTA.

The alleged mistake

To simply allege that "there was a mistake" in a matter that must be decided on D papers is, in my view, the lazy way out of trouble which confirms the absence of a *bona fide* defence. I am not surprised, because this position confirms the bare denial which runs through both the respondents' opposing affidavits.

It is not surprising, either, that there was no effort made by the respondents to explain through their papers or supporting affidavits their basis for alleging E a mistake. There was no evidence recorded or otherwise furnished to me to try and sustain this defence.

What in fact one finds is that when there was need to subsequently amend SI 154 of 2010, the amending instrument, SI 44 of 2011, re-stated that the amending regulations were being made not by the Minister but by the F "Ministry of Transport, Communications and Infrastructural Development", which again the second respondent is not competent to do. In my view, all this lends credence to the allegations raised by the applicant that the regulations were enacted by the second respondent.

The effect of a preamble to an enactment

G The value to be attached to a preamble in interpreting statutes is well documented and one needs to go no further than the Interpretation Act [*Chapter 1:01*], s 6 of which provides as follows:

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

Bere J

This being the case, the joint position adopted by the respondents in trying A to render the preamble insignificant does not assist them. If anything it enhances the applicant's position.

I am more than satisfied that, given the clear and unambiguous language used by the lawmaker in s 81 of the RTA, the legislature's intention was to repose the discretion to make appropriate regulations in the first respondent and B no one else. It was only the first respondent who could have exercised that power and this would accord with public policy which requires among other things that the first respondent applies his mind to the desired regulations and that he be held accountable.

This elementary position in the interpretation of statutes is made clear by C reference to s 26 of the Interpretation Act which is worded in the following manner.

> "**26 Holders of offices**
>
> Where any enactment confers a power, jurisdiction or right or imposes a duty, on the holder of an office as such, then the power, jurisdiction or right may be exercised and the duty shall be performed, from time to time, by the holder D for the time being of the office or the person lawfully acting in the capacity of such holder."

In this regard, counsel for the applicant drew my attention to the instructive position adopted in *Cargo Carriers (Pvt) Ltd* v *Zambezi and Ors* 2000 (1) ZLR 93 (S) at 97A-B, where Gubbay CJ remarked as follows: E

> "As Innes ACJ (as he then was) was careful to point out in *Shidiack* v *Union Government (Minister of the Interior*) 1912 AD 642 at 648:
>
> > '… where the legislature places upon any official the responsibility of exercising a discretion which the nature of the subject matter and language of the section show can only be properly exercised in a judicial spirit, then that responsibility cannot be vicariously discharged". F

Having specifically made the finding that the Regulations were made by the second respondent as opposed to the first respondent, what then remains is to consider the fate of such regulations.

I am satisfied by the well-presented and forceful submissions by the applicant's counsel Mr *Bhebhe* that the effect of such improper enactment was to render the Regulations fatally defective as they are *ultra vires* the enabling Act. G

Again in this regard I derive comfort by religiously following the position adopted by the Supreme Court in *Mugwebie* v *Seed Co Ltd & Anor* 2000 (1) ZLR 93 (S) at 97 AB, where Sandura JA, with the concurrence of Ebrahim and Muchechetere JJA, re-stated the eloquent words of Lord Denning MR in *Macfoy* v *United Africa Co Ltd* [1961] 3 All ER 1169 at 11721: H

2012 (2) ZLR p385

Bere J

> A "If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse".

B Consequently, the enacted regulations, SI 154 of 2010, is hanging in the air. It is not supportable by s 81 of the RTA because of the manner in which it was enacted. Its enactment was a violent assault on the clear provisions of the RTA. It must not be allowed to be recognised in this country.

Both the main and the alternative reliefs sought are clearly sustainable. This application ought not to have been opposed in the first place. It was C misplaced adventurism on the part of the respondents to oppose the relief sought by the applicant.

Costs

This is one rare case where one has to fight hard to avoid taking the initiative to grant costs on an attorney-client scale.

D IT IS ORDERED BY WAY OF A DECLARATUR:

(a) that the Road Traffic (Construction and Equipment Use) Regulations 2010 (Statutory Instrument 154 of 2010) and the amendments thereto be and are hereby declared invalid, and null and void.

(b) that the first and second respondents, jointly and severally the one paying E the other to be absolved, pay the costs of suit.

Kantor & Immerman, applicant's legal practitioners

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

1 *Maxwell on Interpretation of Statutes* 11 ed by Roy Wilson and Brian Galpin (Sweet and Maxwell, London) p 192.

© 2015 Juta and Company (Pty) Ltd.

Document 50 of 60

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2012/Volume 2/WHITBY v WHITBY 2012 (2) ZLR 386 (H)

WHITBY v WHITBY 2012 (2) ZLR 386 (H)

2012 (2) ZLR p386

Citation	2012 (2) ZLR 386 (H)
Case No	Judgment No. HH-423-12
Court	High Court, Harare
Judge	Uchena J
Heard	24 September 2012; *CAV*

Judgment 15 November 2012

Counsel *A Mutsiwa*, for the plaintiff
F Girach, for the defendant

Case Type Opposed application

Annotations No case annotations to date

Flynote

Family law – *husband and wife – divorce – domicile – loss of – when domicile lost – Immigration Act [Chapter 4:02] – application of in determining whether domicile lost*

Headnote

The plaintiff brought an action in the High Court for divorce. She and D the defendant were married in Zimbabwe in 2007. They had both left Zimbabwe in 2002 and were living in the United Kingdom. They only came back to marry in Zimbabwe as the plaintiff's parents were still living in Zimbabwe and wanted to attend the wedding. The defendant was born in Zimbabwe but emigrated in 2002 and had been permanently E resident in England ever since. He had acquired Portuguese citizenship. When the parties came to Zimbabwe on holiday in 2011 they entered as visitors and obtained visas. The defendant pleaded in bar that the court had no jurisdiction to determine the case as he was not domiciled in Zimbabwe.

Held, that in law one can only have one domicile at a time. A person loses F his domicile of origin when he acquires a domicile of choice. The issue of domicile is factual and can be determined by the facts of each case. Domicile is not the same as residence. As distinct from residence, domicile does not only involve a physical element. There is also a mental element consisting of an intention to settle in a certain country. Domicile is the G place which is or which the law considers to be the permanent home of a person. Two principles flow from this: every person must have a domicile and no person can have more than one domicile at a particular time, although a person may be homeless or have more than one residence.

Held, further, that where the facts on which the issue of domicile is to be determined involve immigration or emigration, one has to consider the H

Uchena J

A provisions of the Immigration Act [*Chapter 4:02*] to determine whether such immigration has established a domicile of choice, or whether such emigration has caused the loss of a domicile of origin. In such circumstances, the Act is of critical importance in determining whether or not one is domiciled in Zimbabwe. The facts of the defendant's departure from Zimbabwe fell within the provisions of s 3(4)(a)(i) and B (ii) of the Act. He voluntarily left Zimbabwe in 2002 and had since that time been residing in England, where he intended to reside permanently. He departed with an intention of making his home outside Zimbabwe. In terms of s 3(4)(a)(ii) a person loses his domicile in Zimbabwe if he is absent from Zimbabwe for a continuous period of five years for purposes C other than those referred to in s 3(5). The defendant had been absent from Zimbabwe for more than five years, for purposes other than those referred to in s 3(5). The defendant had lost his domicile in Zimbabwe and the court had no jurisdiction.

Case cited

D *de Jager v de Jager* 1998 (2) ZLR 419 (H)

Legislation considered

Immigration Act [*Chapter 4:02*], s 3(4)(a) & (5)

Case information

E *A Mutsiwa*, for the plaintiff

F Girach, for the defendant

Judgment

Uchena J: The plaintiff issued summons against the defendant her husband, seeking a decree of divorce and ancillary relief. The plaintiff and the defendant were married in Zimbabwe on 6 January 2007. They had both F left Zimbabwe in 2002 and were living in London in the United Kingdom. They only came back to marry in Zimbabwe as the plaintiff's parents are still living in Zimbabwe and wanted to attend the wedding.

The defendant pleaded in bar that this court has no jurisdiction to determine their case as he is not domiciled in Zimbabwe. His plea in bar is premised G on the following facts:

(1) that he is a citizen of Portugal rather than a citizen of Zimbabwe.

(2) that he permanently emigrated from Zimbabwe in 2002 and has been permanently resident in England ever since.

(3) that the plaintiff herself is a naturalized British citizen and has also been H permanently resident in England since 2002.

Uchena J

(4) that their marriage was only effected in Zimbabwe for the convenience A of the plaintiff's parents who are still resident in Zimbabwe and wished to attend the wedding.

(5) the plaintiff and the defendant travelled from England to Zimbabwe for the wedding and went back to England two weeks after the wedding.

(6) the plaintiff travelled to Zimbabwe with the couple's minor child on 14 B December 2011 on her British passport and required a visitor's visa to enter Zimbabwe.

The facts on which the defendant pleaded in bar are confirmed by the defendant's passport, and the visa through which he entered Zimbabwe. The plaintiff's passport and the visa through which she entered Zimbabwe confirms what the defendant said in 3 above. C

Mr *Mutsiwa*, for the plaintiff, did not dispute these facts but submitted that the defendant's domicile of origin is Zimbabwe and that he has not yet abandoned it, therefore this court has jurisdiction over him. He also submitted that the defendant has not yet established a domicile of choice, therefore he is still domiciled in Zimbabwe. D

Mr *Girach*, for the defendant, submitted that the facts of this case clearly establishes that the defendant abandoned his Zimbabwean domicile and has decided to permanently reside in England, which is his domicile of choice.

The defendant was born in Zimbabwe and grew up in Zimbabwe. He says he permanently emigrated from Zimbabwe in 2002. He and his wife lived in E England till December 2011, when his wife, the plaintiff, came to Zimbabwe using her British passport as a visitor. He followed her and visited Zimbabwe on his Portuguese passport on a visitor's visa.

At law one can only have one domicile at a time. That is why one loses his domicile of origin when he acquires a domicile of choice. The issue of F domicile is factual and can be determined by the facts of each case. In *de Jager v de Jager* 1998 (2) ZLR 419 (H) at 421B-F Garwe J (as he then was) said;

> "Whether a litigant is domiciled in Zimbabwe is a question of fact. Accordingly, all the relevant facts must be placed before the court so that the court can determine whether or not a litigant is so domiciled. The fact that a litigant stays in Zimbabwe does not necessarily mean he is domiciled in Zimbabwe. A statement such as: G
>
> > 'Defendant was born in Zimbabwe, has lived in Zimbabwe most of his life and considers Zimbabwe to be his permanent home'
>
> or
>
> > 'Defendant immigrated to Zimbabwe in 1980. He has lived in Zimbabwe since then. He has no intention of emigrating and considers Zimbabwe his permanent home" H

Uchena J

> A would put it beyond doubt that this court has jurisdiction. It is not sufficient to simply state that a particular party is domiciled in Zimbabwe without giving the facts which support such a statement. A person is said to be domiciled in that country which the law regards as his permanent home. This is frequently also the country in which he in fact lives permanently, though it may also be a country in which he has never dwelt or which he has never heard of. The latter possibility arises with domiciles of origin and of dependence: *The Law* B *of Persons and the Family supra* at p 63.
>
> It is important to stress that domicile is not the same as residence. As distinct from residence, domicile does not only involve a physical element. There is also a mental element consisting of an intention to settle in a certain country. *Domicile is the place which is or which the law considers to be the permanent home of a person.* Two principles flow from this: every person must have a C domicile and no person can have more than one domicile at a particular time, although a person may be homeless or have more than one residence: E Spiro *Law of Parent and Child* 4 ed pp 131-132" (emphasis added).

In a case where the facts on which the issue of domicile is to be determined involve immigration or emigration one has to consider the provisions of the D Immigration Act [*Chapter 4:02*], to determine whether such immigration has established a domicile of choice, or whether such emigration has caused the loss of a domicile of origin. In such circumstances the Immigration Act is of critical importance in determining whether or not one is domiciled in Zimbabwe.

E The facts which indicate whether or not one has lost one's domicile in Zimbabwe, are specified in s 3(4) of the Immigration Act.

In this case the issue is whether or not the defendant has lost his domicile of origin in Zimbabwe. He says he has, while the plaintiff says he has not. As I have already said the question can be resolved by considering the provisions of s 3(4) of the Immigration Act. Section 3(4) provides as follows: F

> "(4) Subject to subsection (5) –
>
> (*a*) a person shall, for the purposes of this Act, lose his domicile in Zimbabwe if he –
>
> (i) has voluntarily departed from and resides outside Zimbabwe with the intention of making his home outside Zimbabwe; or G
>
> (ii) is absent from Zimbabwe for a continuous period of five years or such longer period as the Minister may, at his request, fix before the expiry of that period:
>
> Provided that the Minister may, in special circumstances, fix a longer period in terms of this subparagraph after the expiry of the period of five years;
>
> (*b*) the fact that a person has taken up residence outside Zimbabwe shall be H *prima facie* evidence of his intention of making his home outside Zimbabwe

Uchena J

> and the onus of proving otherwise shall be on the person whose status is A in question;
>
> (*c*) the fact that a person who was domiciled in Zimbabwe has made any statement, whether for the purposes of this Act or any other enactment or otherwise, to the effect that he is no longer a resident or no longer regards himself as a resident of Zimbabwe shall be *prima facie* evidence that he has lost his domicile in Zimbabwe." B

The defendant left Zimbabwe in 2002. He said he did so intending not to return to Zimbabwe as a permanent resident of this country. He has acquired citizenship of Portugal. He is living in England where he says he intents to permanently reside. He only came back to Zimbabwe to marry the plaintiff, whose parents stay in Zimbabwe. The marriage therefore took place in C Zimbabwe, not for their attachment to this country, but for the convenience of the plaintiff's parents. The plaintiff herself has acquired citizenship in the United Kingdom. She has also stayed in England since 2002. These facts tend to prove an intention to permanently reside in England on the part of the defendant and his family

The facts of the defendant's departure from Zimbabwe fall within the D provisions of s 3(4)(a)(i) and (ii). He voluntarily left Zimbabwe in 2002 and has since that time been residing in England. He told this court that he departed with an intention of making his home outside Zimbabwe. The defendant has in terms of s 3(4)(c) made a statement that he no longer regards himself as a resident of Zimbabwe. That statement is "*prima facie* evidence that he has lost his domicile in Zimbabwe." Such a statement need E not be for purposes of the Immigration Act or any other Act. It can be any

other statement as the one in this case. The use of the words "or otherwise" in s 3(4)(c) qualifies statements other than those made for purposes of the Immigration Act or any other enactment.

In terms of s 3(4)(a)(ii) one loses his domicile in Zimbabwe if he is absent F from Zimbabwe for a continuous period of five years for purposes other than those referred to in s 3(5). The defendant has been absent from Zimbabwe for more than five years, for purposes other than those referred to in s 3(5).

In terms of s 3(4)(b) of the Immigration Act, the fact that a person has taken up residence outside Zimbabwe shall be *prima facie* evidence of his intention of making his home outside Zimbabwe and the onus of proving otherwise G shall be on the person whose status is in question. The defendant's intention to permanently stay in England where he has taken up residence is therefore *prima facie* evidence that he intends to make his home outside Zimbabwe. He has confirmed it by his evidence. He has openly declared that he abandoned his domicile of origin in Zimbabwe. The facts of this case are consistent with his declared intention. H

Uchena J

A The defendant's circumstances fit perfectly into the provisions of s 3(4) of the Act. His conduct and declared intention are supported by the Act. He has, according to the Immigration Act, clearly, abandoned and lost, his domicile of origin in Zimbabwe. This court does not have jurisdiction over him. His plea in bar must succeed.

B The plaintiff's case is therefore dismissed with costs.

Donsa-Nkomo & Mutangi, plaintiff's legal practitioners

Atherstone & Cook, defendant's legal practitioners

© 2015 Juta and Company (Pty) Ltd.

Document 51 of 60

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2012/Volume 2/CHURCH OF THE PROVINCE OF CENTRAL AFRICA v DIOCESAN TRUSTEES, HARARE DIOCESE 2012 (2) ZLR 392 (S)

CHURCH OF THE PROVINCE OF CENTRAL AFRICA v DIOCESAN TRUSTEES, HARARE DIOCESE 2012 (2) ZLR 392 (S)

Citation	2012 (2) ZLR 392 (S)
Case No	Judgment No S-48-12
Court	Supreme Court, Harare
Judge	Malaba DCJ, Ziyambi JA & Omerjee AJA
Heard	22 October 2012; *CAV*
Judgment	19 November 2012
Counsel	*A P de Bourbon SC*, with him *T Mpofu,* for the appellant *T M Kanengoni,* with him *C Nyika,* for the respondent
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Church – *government of – constitution – members required to adhere to constitution – failure to do so – diocese seceding from church without following proper procedures – persons involved thereby voluntarily* D *ceasing to be members of church – church property – persons seceding having no rights in respect of such property*

Church – *property – diocese seceding from church – persons involved thereby voluntarily ceasing to be members of church – church property – ownership remains with church – persons seceding having no rights in respect of such property* E

Headnote

The appellant church was formed in 1955 out of four dioceses of the Anglican Church. The Church now has, as its administrative area, the whole of Botswana, Malawi, Zambia and Zimbabwe, under the control of an ecclesiastical authority headed by an archbishop. It is governed by a F constitution. Membership of the Church is a declaration of commitment to act at all times and places in accordance with the doctrines and the rules of the Constitution, the contract in terms of which each person binds himself to others as a member and office-bearer in the Church.

The Church is under the general authority of the Archbishop, who sits in the Provincial Synod. He also sits on the Episcopal Synod, which deals G with matters of faith and is made up of bishops of the Province only. The Archbishop administers all the functions of the Church through bishops, who are the heads of the several dioceses. A diocesan bishop is a member of, and presides over, the proceedings of the Diocesan Synod. He also administers property rights owned by the Church through a Board of Trustees which he heads. Under the supervision of the Archbishop, a H

2012 (2) ZLR p393

Malaba DCJ

A Diocesan Bishop is "chief in superintendency" in matters ecclesiastical within the diocese. Members of the Diocesan Board of Trustees are appointed by the Diocesan Synod.

As at 4 August 2007, the Diocesan Bishop of Harare was Dr Nolbert Kunonga. He was a member of the board of trustees responsible for holding, managing and using Church property in trust and on behalf of B the Province. Under art 18 of the Church's Constitution, the Provincial Synod has the full power and authority to determine in what manner and upon what conditions such property shall be used or occupied. Under art 24 no-one is allowed to be admitted to any office in the Province, or be entitled to receive any income, emolument or benefit from or out of C any property held under the authority of the Provincial Synod, unless he has signed a declaration of submission to the canons or rules of the Province relating to such office.

The respondent was made up of Dr Kunonga and those people with whom he constituted the Board of Trustees for the Diocese of Harare before 21 September 2007.

D A controversy arose within the Church over the issue of homosexuality and the extent, if any, to which it should be tolerated and the approach that should be taken towards homosexual people. The result of the debates which followed was that on 21 September 2007 Dr Kunonga wrote a letter to the Archbishop, notifying him of the withdrawal of the Diocese E of Harare from the Province with effect from 4 August 2007. It was clear from the letter that the object was the creation of Zimbabwe as a Province. The Church responded by pointing out that such a move was constitutionally and canonically impossible, the proper procedures not having been followed. The see was declared vacant and Dr Kunonga was asked to hand over the Church's property to a vicar general, pending F the election of a new bishop.

An extraordinary meeting of the Episcopal Synod of the Church decided that Dr Kunonga and his followers had left the Church and that he had, as a result of his behaviour, resigned as a Bishop of the Province. They revoked his pastoral licence.

G Dr Kunonga and his followers responded by forming a new ministry which they called the Anglican Church of the Province of Zimbabwe, with five dioceses, each headed by a Bishop consecrated

and enthroned by Dr Kunonga. He and his followers did not surrender possession of the property of the Church upon secession.

The parties took the dispute over the Church property to the High Court. The H Church sought orders directing the respondents to vacate or surrender

---

2012 (2) ZLR p394

Malaba DCJ

possession of its property. The respondents sought orders declaring A that they were still members of the Board of Trustees for the Diocese of Harare entitled to the control of Church property in the diocese. The High Court found for Dr Kunonga. The Church appealed.

Held, that by definition, a church is a voluntary and unincorporated association of individuals, united on the basis of an agreement to be bound in their B relationship to each other by certain religious tenets and principles of worship, governance and discipline. The existence of a constitution is testimony to the fact that those who are members of the church agree to be bound and guided in their behaviour as individuals or office-bearers on ecclesiastical matters by the provisions of the constitution and the canons made under its authority. C

Held, further, that the words and actions of the individuals as members and office bearers indicate whether there is conformity with the articles of faith. Just as a person would have exercised the right to freedom of choice in becoming a member of a church, he has the right to leave it of his own free will. A church has no right to compel a person to remain D a member. When looked at in the light of the distinctive principles on homosexuality which the parties adopted in relation to the requirements of faith under the Constitution, the only reasonable inference to be drawn from the contents of his letter is that Dr Kunonga and his followers gave notice of having withdrawn their membership from the Church.

Held, further, that it was not for the court to say whether the principles adhered E to by either party on the question of homosexuality were bad or good. The court does not discuss the truth or reasonableness of any of the doctrines of the religious group. Disputes over ownership or possession and control of Church property must be resolved on the basis of the interpretation and application of the law of voluntary associations. That law requires consideration and application of the terms and provisions F of the Constitution of the body concerned, as well as the rules made under its authority.

Held, further, that adherence to the fundamental principles on which the Church is founded must be the factor on which disputes of ownership or possession and control of Church property are determined. Almost G all constitutions of churches have, as their subject-matters, the faith, worship, governance and discipline to be observed. The constitution would invariably make provision for matters of faith as expressed in ecclesiastical doctrines and embodied in all the rules governing matters of worship, governance and discipline. It cannot be correct to say that whilst the Church considers the Word of God to be embodied as the primary H

2012 (2) ZLR p395

Malaba DCJ

A command in the doctrines which are incorporated in the constitution by reference, they should not constitute the standard to be considered and applied by the court in determining the rights and obligations of the parties over the property in dispute.

Held, further, that adherence to the fundamental principles on which a church is founded is the critical factor to be considered in the determination of a B dispute over church property. This means that those who have departed from the standards and principles on which the church is founded are more likely to leave it. For the purposes of establishing the fundamental principles of a church, it is not only the accepted interpretation of scriptures that counts. An accepted interpretation of, or inference from, C subordinate standards may just as well be an article of faith as any other opinion. There is no tenable distinction for the purpose between one religious principle or opinion and another.

Held, further, that the exclusionary and distinctive principle to the effect that it is unlawful to associate with homosexuals and their supporters or sympathisers was put forward as a fundamental principle by Dr Kunonga D and his followers. It was later to be the original principle on which the Church of the Province of Zimbabwe would be founded and became the creed or

doctrine in terms of which their religious belief was expressed and on the basis of which they associated in the new church. The issue of associating with homosexuals and supporters or sympathizers of them E which they had raised was about personal religion. They had originally agreed to associate with others on the terms and conditions contained in the constitution. They were now in effect saying that they did not want to be associated with the other members, with whom they disagreed, because they were said to tolerate homosexuality. They could only avoid contact by withdrawing themselves from the Church. It is not F unusual for people to value separation from a church as a safeguard for doctrines which they hold intensely and as to which they know that the surrounding world is indifferent or hostile. Respect for human dignity is a fundamental principle of faith. It must have been clear to Dr Kunonga and his followers that the position they had taken contradicted the basis of this material particular of the accepted expression of the doctrine of G the Church, which requires that every person be treated with respect and dignity. Once they adopted that position, they separated themselves automatically from the Church and ceased to form part of it. They did not recant their position; instead, they went on to form their own church, thereby creating a schism. A person who is responsible for the creation H of a schism cannot be heard to say he has not withdrawn membership

---

from the former Church. Even where a bishop, priest or deacon of the A Province who is charged under canon 24(1) with the offence of schism is found guilty by the Church Court, the only sentence that can be imposed is excommunication.

Held, further, that resignation of a bishop is a question of fact dependent on the evidence of the conduct of the individual. Where the evidence B shows that the individual exercised his right to terminate his relationship with the Church, the resignation takes effect immediately the conduct is committed. This is so unless there is a special provision by virtue of which it takes effect upon acceptance by the person who is given the right to receive written notice and decide whether to accept the resignation or not. The law is clear. Resignation is a unilateral act. Its validity does not C depend upon acceptance by the person to whom it is directed. Acceptance determines when the resignation takes effect. In the final analysis, it is for the court and not the individual concerned to decide whether his conduct amounts to resignation or not. Once Dr Kunonga left the Church, and *ipso facto* vacated his office of Bishop of the Province, he was beyond D the reach of the Church's disciplinary procedures, which would only be applicable to a "Bishop of the Province". Dr Kunonga was no longer a bishop of the Province.

Held, further, that in the absence of express provision in the constitution of a voluntary association, property held in trust must be applied for the benefit of those who adhere to the fundamental principles of the E association. Related to this is the principle that a member of a voluntary association who leaves the organization, whilst others remain, must leave the property with those who have not resigned membership. When one leaves a club one does not take its property with one. It is well established that when one or more people secede from an existing church they have no right to claim church property, even if those who remain members F of the congregation are in the minority.

Held, further, that once Dr Kunonga and his followers left the appellant Church, they disentitled themselves from continuing as members of the Board of Trustees of the Church. They could only hold the positions of trustees for the purposes of delivering services and protecting the property G on behalf of the Province which is the owner of the property. When they left the Church, Dr Kunonga and his followers used the property and continued to control it without the approval of or authority from the Provincial Synod. They could no longer have been acting according to the mandatory tenets of the trust. The conditions under which they had held the property had changed. They could not separate the question of H

A control of the property of the Church from the obligation to uphold and adhere to the fundamental principles on which the Church is founded and for the purposes of the maintenance of which it continues to exist. They used the property of the Church to further the interests of their new church. The property could not be applied to purposes which are alien to the purposes of the Trust and for the benefit of persons who had no title B to call themselves members and

office bearers of the Church. It would be unreasonable to think that the trust with which they would have been expected to act authorized Dr Kunonga and others to use the property for the achievement of the interests of their new church.

Held, further, that from all the circumstances of the dispute between the C Church and Dr Kunonga and his adherents, it was clear that they constituted the seceding party. They broke away from the Church, citing irreconcilable differences on the question of tolerance of homosexuality. The principle that the property must fall under the control and use of those who adhere to the fundamental principles of the Church must be enforced. The property in question belonged to the Church. The Church D had a right to an order for vindication of its property from possessors who had no right to have it. Dr Kunonga and his followers had no right to continue in possession of the congregational buildings when they had departed from the fundamental principles and standards on which the Church was founded. They left the Church, putting themselves beyond E its ecclesiastical jurisdiction.

Cases cited

Chong v Lee (1981) 29 BCLR 13

Craigdaile v Aikman (1813) 1 Dow 1

Ethiopian Church Trustees v Sonjica 1926 EDL 107

Fawcett Security Operations (Pvt) Ltd v Director of Customs & Excise & Ors 1993 (2) ZLR 121 (S) F

Free Church of Scotland v Lord Overtoun [1904] AC 515

Independent African Church v Maheya 1998 (1) ZLR 552 (H)

Macfoy v United Africa Co Ltd [1961] 3 All ER 1169

Nederduitse Hervormde Congregation of Rustenburg v Nederduitse Hervormde of Gereformeerde Congregation of Rusternburg (1895) 12 CLJ 140 G

Sick & Funeral Soc of St John's Sunday School v Golcar [1973] 1 Ch 51

Zambezi Conference of Seventh Day Adventists v General Conference of Seventh Day Adventists & Anor 2001 (1) ZLR 160 (S)

Malaba DCJ

Case information

A P de Bourbon SC, with him *T Mpofu,* for the appellant A

T M Kanengoni, with him *C Nyika,* for the respondent

Judgment

Malaba DCJ: There are two appeals against judgments of the High Court. The first decision appealed against is in case No. HC 4327/08 * whilst the second appeal is against the judgment in case No. HC 6544/07. Both decisions B were made by the same judge. At the centre of the dispute in each case is the question whether those people who had been members of the Board of Trustees for the Diocese of Harare relinquished the right to control the appellant's property on 21 September 2007. Put differently, but directly, the question raised by both appeals is: did those people who had been members of the Board of Trustees for the Diocese of Harare withdraw their membership C from the appellant and *ipso facto* resign their offices, thereby losing the right to control its property such as church buildings, houses, schools, motor vehicles and funds in banks? The appellant shall hereinafter be referred to as "the Church", or "the Province" or "the Church" as the context permits.

Who are the parties involved in the dispute over the right of control and D occupation of the property? The Church is a voluntary association of members whose main objective is to hold the faith of Jesus Christ and act in accordance with the doctrines in which it is embodied. The Church was formed on 8 May 1955, out of four dioceses of Northern Rhodesia, Nyasaland, Mashonaland and Matabeleland, under the terms and provisions of the Constitution contained in what is known as the "Green Book". The first two dioceses had previously E fallen under the administrative jurisdiction of the Church of the Province of Cape Town, headed by the Archbishop of Cape Town. The other two

had formed the administrative area of the Church of the Province of Canterbury, under the Archbishop of Canterbury. The preamble to the Constitution of the Church ("the Constitution") recites that it was established to cover the F dioceses to strengthen it in the work of "witnessing in Central Africa the redemption wrought for all men in Christ". Today "the Church" has as its administrative area the whole of the four countries of Botswana, Malawi, Zambia and Zimbabwe, under the control of an ecclesiastical authority headed by an Archbishop.

The terms and provisions of the Constitution and the Canons under the G authority of which they are made show the following. The Church is made up of clerical as well as lay members who are voluntarily associated together. They all hold the faith of Christ as taught in the Holy Scriptures, preached

---

2012 (2) ZLR p399

Malaba DCJ

A by the Apostles and expressed in the doctrines, sacrament and discipline in the public worship of God according to the principles set forth in the Book of Common Prayer. It is by the Constitution, which constitutes an agreement between members, that the faith by which all those people who choose to take up membership of the Church and the standards in accordance with which they undertake to act is revealed. The standards and principles B which govern specific matters of worship, government and discipline in the Church all relate to and find ultimate justification in conformity with the faith and the doctrines by which it is expressed. It goes without saying that membership of the Church is a public confession of the faith of Christ. It is a declaration of commitment to act at all times and places in accordance C with the doctrines and the mutual rules of the Constitution. That is the contract in terms of which each person binds himself or herself to others as a member and office-bearer in the Church. It is by reference to adherence to the unity of the doctrines and the rules as the standard of behaviour that any religious group of people can lay claim to being described or identified as part of the Church.

D In terms of Article 2 of the Constitution, the Church is under the general authority of the Archbishop who sits in the Provincial Synod. This is the legislative body of the Church dealing with the making of rules for the order, good governance, worship and discipline in the Province. The Provincial Synod is made up of bishops of the Province, clergy and laity E who are communicants. The Archbishop also sits in the Episcopal Synod. This is a body dealing with matters of faith such as the preservation of the truth of the Church's doctrine, the purity of its life and the worthiness of its worship. The Episcopal Synod is made up of bishops of the Province only. The Archbishop, who presides over the two bodies, administers all the functions of the Church to members in the dioceses through bishops, who F are the heads of the dioceses. A diocesan bishop is elected or chosen from among the male communicants of any diocese who are over 21 years of age. He is a member of and presides over the proceedings of the Diocesan Synod. He also administers property rights owned by the Church through a board of trustees which he heads. Under the supervision of the Archbishop, a diocesan bishop is "chief in superintendency" in matters ecclesiastical within G the diocese. Members of the Diocesan Board of Trustees are appointed by the Diocesan Synod.

The Archbishop is also a bishop of a diocese. He is elected to the office in accordance with the Canons of the Church. In terms of the Constitution, every member, including bishops, is bound to obey the lawful directions H and instructions of the Archbishop and give to him due obedience. The

---

2012 (2) ZLR p400

Malaba DCJ

powers exercised by the Archbishop through the two organs of the Church A are limited to ecclesiastical matters, as distinguished from temporal affairs. There is obviously a condition implied that the powers shall be used bona fide for the purposes for which they are conferred.

It is declared as one of the fundamental principles of the Church, and therefore binding on individual members, that: B

> "In conformity with Christian doctrine, the Church of this Province proclaims the equal value of all men before the righteous Love of God, and while careful to provide for the special needs of different peoples committed to its charge, allows no discrimination on grounds of racial difference only, in the membership and government of the Church". (Fundamental Declaration III).

As at 4 August 2007, the Diocesan Bishop of Harare was the Rt Reverend Dr C Nolbert Kunonga. He was a member of the board of nine trustees responsible for holding, managing and using Church

property in trust and on behalf of the Province. Article 20, as read with Article 23 of the Constitution, requires that all movable or immovable property of the Church be held, managed or used by the trustees in trust for and on behalf of the Province. That applies even to D Diocesan boards of trustees appointed by diocesan synods. The management of Church property held by a diocesan board of trustees is required to be in accordance with rules made by the Provincial Synod. Under Article 18 of the Constitution the Provincial Synod has the full power and authority to determine in what manner and upon what conditions such property shall be used or occupied. E

Under Article 24 no-one is allowed to be admitted to any office in the Province or be entitled to receive any income, emolument or benefit from or out of any property held under the authority of the Provincial Synod unless he or she has signed a declaration of submission to the Canons or Rules of the Province relating to such office. F

The respondent is made up of Dr Kunonga, who was the Diocesan Bishop of Harare, and those people with whom he constituted the Board of Trustees for the Diocese of Harare before 21 September 2007. They claimed that they remained in those positions after that date with the right to hold Church property. G

What then brought about the situation in which the dispute over the right of control and occupation of Church property arose? A debate which had started in the Church sometime back on the question whether homosexuality was being tolerated by the ecclesiastical authorities reached crisis point in Zimbabwe on 4 August 2007. This was an emotional subject over which different opinions were bound to be held by different members of the Church H

Malaba DCJ

A who engaged in the debate. Dr Kunonga and his followers held very strong views on the question of tolerance of homosexuality.

They approached the debate on the assumption that homosexuality as a practice was being tolerated by the authorities in the Church. Whilst not conceding that homosexuality as a practice was tolerated in the Church, the B other side argued that all men and women are God's children. The effect of the argument was that, even if some men are homosexuals, they remain human beings entitled to be treated with dignity, as long as they do not practice homosexuality in Church or in violation of the law of the land. The debate took place in the context of the Constitution which contains Fundamental Declaration III and the note to Canon 22. The note to Canon 22 provides that:

> C "The Church of this Province believes that marriage, by divine institution, is a lifelong and exclusive union and partnership between one man and one woman. Its law and regulation are based on this belief."

Dr Kunonga and his followers elevated the anti-homosexuality argument to the level of proposing it as a policy of the Church that there should be no association by members with homosexuals or anyone who supported D or sympathised with them. According to them, it had to be a policy of the Church that people of such sexual orientation must not even be allowed to worship God in the Church. Similarly, those who supported or sympathised with homosexuals had to be denied freedom of worship. They upgraded the proposition to a fundamental principle of faith, to the extent that they attempted to have the whole Church dissolved on account of the differences E over it. The importance of the principle they formulated arises from the place they sought to assign to it in the Church.

At a meeting of the Diocesan Synod held on 4 August 2007 Dr Kunonga and his adherents resolved to secede from the Church over the issue of homosexuality. As a result, at the Provincial Synod meeting held at Mangochi F in Malawi on 5-10 September 2007, a representative of the Diocesan Bishop of Harare seconded a motion moved by the Diocesan Bishop of Manicaland to the effect that the Church of the Province of Central Africa be dissolved. After debate, the Provincial Synod rejected the motion. The ground was that, although the issue of homosexuality was being raised, the Diocesan Bishops of Harare and Manicaland wanted the dissolution of the Province. G The effect of the decision was that Dr Kunonga and his followers were interested in creating their own centre of ecclesiastical power with Zimbabwe as the Province. It was not necessary to dissolve the Province to solve the anti-homosexuality problem.

Having failed to achieve their objective through the dissolution of the Province, H Dr Kunonga and his followers fell back on what they conceived was within

---

Malaba DCJ

their power as the Board of Trustees of the Diocese of Harare. Dr Kunonga A wrote a letter to the outgoing Archbishop on 21 September 2007. It was a notification of withdrawal of the Diocese of Harare from the Province with effect from 4 August 2007. It is clear from the letter that the object was the creation of Zimbabwe as a Province. The letter reads:

> "RE: FORMAL WITHDRAWAL OF THE DIOCESE OF HARARE FROM THE B CHURCH OF THE PROVINCE OF CENTRAL AFRICA.
>
> The above refers, from the Bishop of the Diocese of Harare, Diocesan Synod, Standing Committee, Diocesan Trustees and the whole body of the Church in the Diocese.
>
> By copy of this letter, the Diocese of Harare would like to formalise its exclusion from the Church of the Province of Central Africa as minuted in the records C of the Provincial Synod of 2007 September the 8th, which we trust you hold.
>
> You will appreciate our relationship with the Province has been indeed a lifelong one full with genuine authentic Christian sharing. This Province has been a source from which we have drawn our livelihood in terms of Christian virtue in as much as it is from us. Our communion has been guided by nothing else than the moral doctrine of Christ, which was one based on the premise that we D hold primary, the fundamental canons of faith which are indeed in the Sacred Scriptures. It is our fear and reverence of these that made us to seriously weigh our susceptibility when faced with a threat of compromise and breach of the said in the face of what our Province was and is facing now *viz.* homosexuality.
>
> We take it on good grounds that this has become an issue in our church in the Province and unlike what the members of Synod and the Episcopal bench wanted E us to believe, this is not a matter of desktop contemplation, it is to us a matter of faith and conscience. We refer you to the following as cause for our withdrawal from the Church of the Province of Central Africa.
>
> OUR ROOTS IN THE SACRED SCRIPTURES
>
> The Diocese of Harare has always believed and upheld the Primacy and Precedence of the Sacred Scriptures over any act of reason or tradition. The Old Testament F is very explicit about its abomination and ultimate condemnation to the practice. (Gen. 19, Lev. 18:22 and Deut. 23:17). The New Testament is equally vehement against the sin of homosexuality. Paul says this is being directly opposed to nature and hence the plan of God and in fact warrants exclusion from the Kingdom of God (Rom. 1:18-22, 1 Cor. 6:9-10). We strongly believe and rightly so that the Church is indeed the shadow of the eternal Kingdom and must strive to G demonstrate congruence in this regard. For us then it is not an option to exclude from our fold such people or elements that have embraced out of their own free will, support or sympathy towards homosexuals. It is mission, it is the mandate upon which we must launch our mission as the Church. If this Province is being made part of or accommodative to people of this nature, we as a Diocese are withdrawing and we are doing this with a very clear conscience as for us this is matter of life or death in matters of faith. H

2012 (2) ZLR p403

Malaba DCJ

> A No amount of reason, persuasion or position for us can supersede the teaching of God as found in the Sacred Scriptures. For the Diocese of Harare the rejection of Homosexuality is based on nothing else except this fundamental doctrine upon which canon, act or utterance by the Church or anyone representing it must be based. We reject any compromise or tolerance when it comes to this. As a Diocese we are saying at the slightest sight of compromise, tolerance or B indulgence from our midst in the Province, we would rather exclude ourselves than be part of a conscience wrecking process where room to homosexuality is being granted.
>
> Knowing very well your own position against homosexuality, it is frightening to us, the level of advances this scourge has reached and its fast coming as you are retiring. This had urged us to pull out as a Diocese.
>
> C Consistent, therefore, with our 61st Session Diocesan Synod on the 4th of August 2007, in accordance with the Scriptures and the will of God, we were mandated by our Synod to disassociate and sever ties, with any individual, group of people, organization, institution, diocese, province which sympathizes or compromises with homosexuality. We, the Diocese of Harare, would like it to be put on record that with effect from the 4th of August 2007 and as confirmed by the Provincial Synod, we are withdrawing from the Church of the Province of Central Africa. D We have no hard feeling about our departure from the Province."

In a letter written on its behalf by the Rt Reverend Albert Chama, Dean of the Province of Central Africa & Bishop of Northern Zambia, on 16October 2007, the Church responded. The letter reads:

> "RE: ACCEPTANCE OF THE WITHDRAWAL OF THE BISHOP OF HARARE E FROM THE CHURCH OF THE PROVINCE OF CENTRAL AFRICA
>
> Dear Bishop Kunonga,

I am in receipt of your letter dated 21st September 2007, addressed to the former Archbishop of the Province, the Most Reverend Dr BA Malango advising him of the formal withdrawal of the Diocese of Harare from the Church of the Province of Central Africa.

F I would first like to advise you that it is constitutionally and canonically impossible to withdraw the Diocese of Harare from the Church of the Province of Central Africa because a diocese, in accordance with the constitution of the Church of the Province of Central Africa, forms an integral part of the said Province. Any act that purports to withdraw a diocese is unconstitutional and uncanonical as this action is tantamount to altering the very structure and essence of the Province. G The Constitution and Canons of the Church of the Province of Central Africa specifically stipulate that any alteration of the Province would require the approval of the Provincial Synod after the Synod of each Diocese in the Province has also approved and confirmed by the Provincial Synod by a two-thirds majority of those present and has subsequently been endorsed by the Archbishop of Canterbury as not affecting the terms of Communion between the Church of H this Province, the Church of England, and the rest of the Anglican Communion.

2012 (2) ZLR p404

Malaba DCJ

Consequently the heading of your letter stating the 'Formal Withdrawal of the A Diocese of Harare from the Province of Central Africa' is unacceptable and misleading. We, however, as the Dean of the Province of Central Africa accept and acknowledge that you, and some of your supporters have by notice of your letter severed relationship with the Province of Central Africa.

Therefore I declare that the See of Harare is with immediate effect vacant and, in accordance with Canon 14(1), I shall be appointing a Vicar General to hold B office whilst the necessary steps are taken for the holding of an elective assembly to elect the next Bishop for the Diocese of Harare.

Given your leaving the Church of the Province of C Central Africa we direct that all properties and assets belonging to the Province should be surrendered immediately to the Vicar General whose name we shall give you in a few days' time.

It is most unfortunate that your relationship with the Church of the Province of Central Africa has come to an end. We commend you to God's gracious keeping.

Yours in Christ,"

How did the parties treat each other thereafter? One of the members of the Board of Trustees at the time, Phillip Baki Mutasa, strongly opposed the decision taken by the Board of Trustees of the Diocese of Harare to secede D from the Church. He was the Vice Chairman of the Board of Trustees for the Diocese of Harare. He disassociated himself from the decision to withdraw membership from the Church. He sued some of the people for defamation damages arising from false allegations made in a letter dated 20 October 2007. The allegations were to the effect that he had acted out of self-interest in challenging Dr Kunonga's right to take possession of Church property on E the ground that he had withdrawn membership from the Church.

On 28 October 2007, sixty-nine clergy wrote to wardens and laity members of the Church in the Diocese of Harare making it clear that Dr Kunonga and themselves had moved out of the Church. They pledged support for Dr Kunonga. Referring to the letter of 16 October 2007 from the Rt Reverend F Albert Chama they said:

"It is a myth to us why they want to force us to go back to a scenario where we will be brushing shoulders with perpetrators of homosexuality. We refuse to accept that. In fact we are now forced to make inference that maybe they have been hard hit because they share the same values. For them what is at stake is confusion and not order in the Church. They are causing untold anxiety among G all our members and we want you to know that as your clergy we stand for orderliness in the Church. We urge you to be careful of their false teachings as Paul warns in 2 Tim. 4:3:5. They are trying hard to use the rules of a "game" we have abandoned, it does not work. We have withdrawn from the Province of Central Africa period. Trying to use the rules of our former province over us is only tantamount to mischief and lack of integrity. ... We affirm that it is very clear we are joining another province that maintains the same discipline over H

2012 (2) ZLR p405

Malaba DCJ

A the homosexuals as ourselves and the formalities for that are being finalised and every stage will be shared with you."

It is clear from the sentiments expressed that the intention of Dr Kunonga and his followers was not just to withdraw the Diocese of Harare from the Province. Those involved also intended to withdraw, and regarded themselves as having withdrawn, their individual membership from the Church. They B had decided to join another Church which was about to be formed. On 7 November 2007 the Dean of

the Province declared the office of the Diocesan Bishop of Harare vacant with effect from 16 October. He appointed Bishop Sebastan Bakare to act as Diocesan Bishop of Harare until the election of a substantive incumbent. On 20December 2007 an extraordinary meeting of C the Episcopal Synod of the Church decided, in terms of Canon (6)(6), that Dr Kunonga and his followers had left the Church. The meeting decided that Dr Kunonga had, as a result of his behaviour, resigned as a Bishop of the Province. They revoked his pastoral licence. Notwithstanding these events, which were based on the acceptance as a fact that Dr Kunonga and his followers had voluntarily left the Church over the issue of homosexuality, D they did not immediately deny that they had done so.

Dr Kunonga and his followers responded, on 12 January 2008, by forming a new ministry which they called the Anglican Church of the Province of Zimbabwe. Dr Kunonga was consecrated and enthroned by one of the Bishops of the new Church as their Archbishop. He took up office, from which he E consecrated and enthroned some of his followers as diocesan bishops of the new Church. Those who took part in the inauguration ceremony were clear in their minds that they had pulled out of the Church to form their own. They formed a Province with five dioceses, each headed by a Bishop consecrated and enthroned by Dr Kunonga. The support for the secession was passionate. There is no doubt that it was an association based on the F agreement of the individuals involved. Dr Kunonga and his followers did not surrender possession of the property of the Church upon secession. On 12 May 2008 Dr Kunonga was excommunicated from the Church, together with his supporters. The parties took the dispute to the High Court. Litigation commenced by the Church was for orders directing Dr Kunonga and his followers, to vacate or surrender possession of its property. Dr Kunonga and G his followers instituted proceedings seeking orders declaring that they were still members of the Board of Trustees for the Diocese of Harare entitled to the control of Church property in the diocese.

On 20 November 2007, in case HC 6544/2007, the Church issued summons against Dr Kunonga and six others who claimed to be members of the Board H of Trustees of the Diocese of Harare. It claimed orders interdicting them from

---

holding themselves out as its office bearers and directing them to surrender A movable and immovable assets in their possession. Dr Kunonga and others opposed the claim. They alleged that the property in their possession was owned by the Diocese of Harare. They admitted that they had left the Church. The contention was that they were holding the property on behalf of the Diocese of Harare. In case HC 4327/08, the subject of this appeal, B Dr Kunonga sought, by application to the High Court, an order that he and his followers were the Board of Trustees for the Diocese of Harare. He also made an application for an order declaring that he was the incumbent Diocesan Bishop of Harare, and interdicting the Church from consecrating and enthroning any other person as such office-bearer.

Hlatshwayo J took the view that the issues raised before him in case C HC 4327/08 were the same as those pending before the court in case HC 6544/07. He decided to determine all the issues, thereby pre-empting the commencement of the trial in the later case. The learned judge held that a diocese is an administrative area of a church. It is not a legal entity, capable of removal from a church. He concluded that the withdrawal of the Diocese D of Harare from the Province of which Dr Kunonga and his followers had given notice in the letter of 21 September 2007 was a nullity. The learned judge held that Dr Kunonga and his adherents had not withdrawn their membership from the Church. He said:

> "The applicants might have expressed their desire to sever ties between the diocese and the province in very strong terms as noted by the respondent but nowhere E in their letter do they evince a desire to withdraw as individuals."

The learned judge held that Dr Kunonga and supporters were entitled to the control of the property of the Church. He was of the view that, if they had committed acts of misconduct, disciplinary proceedings should have been instituted against them as provided by the Constitution and Canons of the F Church. He said at p 78:

> "Now, if what the applicants did constituted an offence in terms of the canons of the Church, then they should have been charged, tried and punished accordingly. Excommunication is a form of punishment following a trial. It has not been shown that any such trial took place.

> The formation of a new province may be an act in violation of the canons of the G Church and the Church would be within its rights to punish such an act in terms of its own procedures. The courts will not interfere, for example, as regards whether or not certain acts are punishable by excommunication or not, as these issues are within the ecclesiastical competency of the respondent. However, no such trials in terms of the canons of the Church have taken place".

On the question of their positions as trustees, the learned judge said at 79G: H

2012 (2) ZLR p407

Malaba DCJ

> A "The analysis pertaining to the issue of *locus standi* has already led to the conclusion that the applicants do have *locus standi* to bring this application that they have not been lawfully removed from their positions as trustees and until they are so removed they continue to hold those positions and the property of the Church in trust".

The learned judge then gave orders declaring Dr Kunonga and six others B to be the Trustees of the Diocese of Harare. He ordered that "the property of the Diocese of Harare", whether movable or immovable, owned by the Church within the Diocese be vested in them. The Church was ordered to give Dr Kunonga and others vacant possession and/or control of the property. The Deputy Sheriff, with the assistance of the police, was authorised at the direction of Dr Kunonga and others to ensure that they took vacant possession C or occupation of the property. The learned judge went on to dismiss with costs the Church's claim in case HC 6544/07.

The appeals against the judgments in the two cases were then lodged with the Supreme Court. The grounds of appeal allege misdirection on the part of the court *a quo* in holding that: Dr Kunonga and his followers did not withdraw D their membership from the Church; Dr Kunonga did not resign the office of Diocesan Bishop of Harare; he and the others remained members of the Board of Trustees for the Diocese of Harare, entitling them to the possession or occupation and control of the property of the Church.

In so far as the legal status of the diocese of Harare is concerned, the conclusion by the learned judge that it is not a legal entity that can be withdrawn from E the Province is undoubtedly correct. The holding is in accordance with the principle derived from the ancient laws and usages of the Catholic Church that dioceses should be associated in provinces. The preamble to the Constitution confirms that the Church was formed on the basis of the principle that a diocese is an administrative area or legal division of a Province under the F episcopical jurisdiction of a bishop. The word "diocese" is derived from a Greek term meaning administration.

At p 236 of *Collier's Encyclopaedia Vol. 8* by W D Halsey & L Shores (eds) the origin and development of the concept of diocese are traced and articulated in the following words:

> G "Diocese: a word derived from the Greek … It originally referred to an area or sphere of administration, financial or other. From about A.D. 300 it meant part of the Roman Empire, comprising several provinces. Under Constantine (A.D. 306-337), the system was reformed and a number of dioceses were joined into provinces. With the recognition of Christianity (AD 312-313) the diocese was generally recognized as the ecclesiastical area of a bishop's jurisdiction and as a province of an archbishop's administration, whereas earlier the bishop had H been more closely associated with the city, the capital of the province, where

---

2012 (2) ZLR p408

Malaba DCJ

his throne, or *cathedra*, was situated in the most ancient or largest church, or A 'cathedral'. Under Constantine, too, certain functions of diocesan administration were handed over to the bishop, the emancipation of slaves, for example. In the Church, *the term still denotes the area of a bishop's administration and authority*. In the Middle Ages, as a result of the tendency seen in the False Decretals, the boundaries of ecclesiastical dioceses came to be regarded as sacrosanct, and the ecclesiastical use of the word was applied to smaller areas of tribal or other B significance. The only significant departure from the traditional boundaries occurred in France in 1790, when, under the Civil Constitution of the Clergy, the dioceses of bishops were identified with the departments."

The jurisdiction of the Archbishop of the Province covers all members of the clergy and laity in the whole area of the four countries. Procedurally compliant removal of a diocese can only take place when the diocese is being C placed under the jurisdiction of another Archbishop. Removal can only be achieved after structural adjustment of the government of the Province. It has to be with the agreement of all dioceses in the four countries accompanied by approval of the Provincial Synod and endorsement by the Archbishop of Canterbury that the removal does not affect the terms of

Communion between the Church of the Province, the Church of England and the rest of D the Anglican Communion.(Fundamental Declaration VII). Under Canon 34, the formation of a new diocese or the uniting of any diocese or the alteration of the boundaries of any diocese can only be done by the Provincial Synod. If a diocese was a legal person that power would not exist because external power cannot alter the internal governance of a corporate body. E

The first question to be determined is whether Hlatshwayo J correctly found as proved that Dr Kunonga and his followers did not withdraw their membership from the Church on 21 September 2007. In the face of the documents and evidence of the words and actions of Dr Kunonga and his adherents, this court is unable to uphold the learned judge's finding. The reasons for the decision are these. F

The learned judge directed his mind to the letter of 21 September 2007, particularly the absence of an express statement that Dr Kunonga and his followers had withdrawn their membership from the Church. As a result, he shut his mind to other evidence which had a direct bearing on the matter. It was his duty to decide the question of withdrawal of membership upon G consideration of all the relevant evidence placed before him. Had the learned judge carried out his duty, he would have appreciated that the anti-homosexuality stance adopted by Dr Kunonga and his followers was no longer consistent with their remaining members of the Church. The belief of a Christian Church must be founded in general upon Holy Scriptures. What differentiates one Church from another is the accepted and crystallized H

Malaba DCJ

A definition of what they hold those Scriptures to contain – in other words, their creed. If an association of Christians adopts any one creed as the basis of their association, no one can cut and carve upon it without altering the foundation upon which that body has been associated: *Free Church of Scotland v Lord Overtoun* [1904] AC 515 at 577.

B Dr Kunonga and his followers reached a stage where they regarded it a matter of faith that homosexuals and members of the Church who supported or sympathised with them should not be associated with. To them, these people (if they regarded them as such) had no right to worship God in the Church. It did not matter whether there was any practice of homosexuality or not. Their faith in Jesus Christ did not entitle them to membership of the C Church. Needless to say that the view by Dr Kunonga and his followers of the doctrine on homosexuality as taught in the Holy Scriptures was different from that held by the other members of the Church. It was contrary to the fundamental principle of the "redemption wrought for all men in Christ" for the purpose of the witnessing of which the Church was established. It was a D distinct principle from the fundamental principle of "equal value of all men before the righteous Love of God" proclaimed by the Church.

Great light is in fact thrown on what are the essential doctrines of a church by reference to the declarations made by those who founded it as to what in their view was fundamental. The principle of "equal value of all men E before the righteous Love of God" requires that members of the Church be tolerant and accept that God loves all men equally regardless of their spiritual, physical and moral state. The acceptance of this fundamental principle is laid upon every minister, office bearer and member who subscribes to the Constitution. It is a principle which obliges the Church to keep doors open to all who wish to come in and worship God provided they adhere to the faith F of Jesus Christ as expressed in the doctrines taught by the Holy Scriptures and preached by the Apostles.

It is in that context of openness and tolerance that the Church can talk of a free offer of redemption and salvation of Jesus Christ. There would be no point in adhering to the principles of redemption and salvation of G Christ when there is no opportunity given to people to be redeemed. By advocating the principle of exclusion of homosexuals and their supporters or sympathisers from public worship of God, Dr Kunonga and his followers adopted a distinct principle. It was opposed to the fundamental principles of the free offer of redemption and salvation of Christ on the basis of which H the Church is founded.

Malaba DCJ

By definition, a church is a voluntary and unincorporated association of A individuals united on the basis of an agreement to be bound in their relation to each other by certain religious tenets and principles of worship, government and discipline. The existence of a Constitution is testimony to the

fact that those who are members of the Church agree to be bound and guided in their behaviour as individuals or office-bearers on ecclesiastical matters by the B provisions of the Constitution and the Canons made under its authority. It is the words and actions of the individuals as members and office bearers that indicate whether there is conformity with the articles of faith.

When Dr Kunonga wrote in the letter of 21 September 2007 about the withdrawal of the Diocese of Harare from the Province, he could not exclude C himself and his followers from the withdrawal. The words and actions belonged to them as individual members of the association. It is always up to the individual in a voluntary association to conduct himself or herself in accordance with the mutual standards of behaviour he or she freely undertook to observe in terms of the definite contract he or she would have entered into with others. The words and actions cannot be imputed to some D legal person as would be the case with a corporate body created by law as a positive and definite entity.

Just as a person would have exercised the right to freedom of choice in becoming a member of a church, he or she has the right to leave it at his or her free will. The Constitution recognises the right of any member to leave E the association once he or she believes that it no longer serves the purposes for which he or she joined it. A church has no right to compel a person to remain its member. Compulsion would be contrary to s 21 of the Constitution of Zimbabwe which guarantees to any person the right to associate with others for the specific purpose of public worship of God in accordance with F one's religious faith or belief. In other words, the State recognises the right of all to follow the dictates of their consciences in the religious opinion which they hold. No man or woman in this country has been punished for erroneous opinion concerning rites or modes of worship of God. The basic idea is that there should be good happiness amongst those who are united to worship God. G

When looked at in the light of the distinctive principles on homosexuality which the parties adopted in relation to the requirements of faith under the Constitution, the only reasonable inference to be drawn from the contents of the letter of 21 September 2007 is that Dr Kunonga and his followers gave notice of having withdrawn their membership from the Church. H

2012 (2) ZLR p411

Malaba DCJ

A It is important to bear in mind, when carrying out the analysis of the evidence, that it is not what the court might think of the importance of the difference between Dr Kunonga and his followers on the one hand and the others on the other, on the question of homosexuality, which matters. The court is interested in what the parties thought about the matter. Equally, it is not for the court to say whether the principles adhered to by either party on B the question of homosexuality are bad or good. The court does not discuss the truth or reasonableness of any of the doctrines of the religious group. It does not decide whether any of the doctrines are or are not based on a just interpretation of the language of the Holy Scriptures. Whilst the court does not take notice of religious opinions with the view to deciding whether C they are right or wrong, it might notice them as facts pointing to whether a person has withdrawn his or her membership from the church and who should possess and control church property.

It is the duty of the court to decide the question raised by the appeals on the basis of whether the distinctive principle adopted by Dr Kunonga and his followers on homosexuality is consistent with the fundamental principles on D which the Church is founded as contained in the Constitution and the Canons enacted under its authority. The court accepts as a correct statement of law the ruling made in *Independent African Church v Maheya* 1998 (1) ZLR 552 (H) at 556E, relied upon by the same judge (Devittie J) in the second decision of the case between the same parties reported in 2000 (1) ZLR 39 (H) E at 47B-C. It is that disputes over ownership or possession and control of church property should be resolved on the basis of the interpretation and application of the law of voluntary associations. That law requires consideration and application of the terms and provisions of the Constitution of the body concerned as well as the rules made under its authority.

The court does not, however, accept as correct the statement of law in the two F decisions to the effect that in the determination of questions of ownership or possession of church property courts should not consider the "merits of doctrinal matters". It is said that courts ought to apply what is called "neutral principles of law". These principles seem to relate to the interpretation and application of the law of voluntary associations. To support his view Devittie J rejects as incorrect the statement of principle by the learned authors of G Bamford *The Law of Partnerships and Voluntary Associations in South Africa* 3 ed where they state at p 849 that:

> "In the case of religious associations it is submitted that a court, in order to resolve questions of property, is entitled to resolve questions of ecclesiastical doctrine."

It is not clear what the learned judge meant by the words "merits of doctrinal H matters". If one group of people claims that the property belongs to it whilst

---

2012 (2) ZLR p412

Malaba DCJ

the other group also lays claim to the property, they are each of them treating A the question of ownership of the property or of its possession and control as one of religious belief and obligation. They are not treating the question as one from which religious duties are excluded. In the absence of an express provision in the constitution of a Church on how a dispute over ownership or possession and control of church property should be resolved when B members divide, how can a court decide which of the groups is made up of secessionists. The court is of the view that "neutral principles of law" do not include the proposition that such factors as allegiance to a particular leader or which group is in the majority should determine entitlement to ownership or possession and control of church property when members divide, unless there is an express provision in the constitution requiring that such factors C be decisive of the issue.

Adherence to the fundamental principles on which the church is founded must be the factor on which disputes of ownership or possession and control of church property are determined. Almost all constitutions of churches have as their subject-matters the faith, worship, government and discipline. The D constitution would invariably make provision for matters of faith as expressed in ecclesiastical doctrines and embodied in all the rules governing matters of worship, government and discipline by incorporation. It cannot be correct to say that whilst the church considers the Word of God to be embodied as the primary command in the doctrines which are incorporated in the constitution E by reference, they should not constitute the standard to be considered and applied by the court in determining the rights and obligations of the parties over the property in dispute. When rejecting the use of the factors of majority and allegiance to a leader in *Free Church of Scotland supra* Lord Robertson observed that "since the days of Cyrus it has been held that justice is done by giving people not what fits them but what belongs to them". F

In *Free Church of Scotland supra* their Lordships were of the unanimous view that the question of adherence to the fundamental principles on the basis of which a church is founded is the critical factor to be considered in the determination of a dispute over church property. They were agreed that the principle stated by Lord Eldon in *Craigdalie v Aikman* (1813) 1 Dow 1 G at 16 is the correct principle to apply. Lord Davey at 643-644 quotes Lord Eldon as having said:

> "When this matter was formerly before the House we acted upon this principle, that if we could find out what were the religious principles of those who originally attended the chapel we should hold the building appropriated to the use of persons who adhere to the same religious principles". H

2012 (2) ZLR p413

Malaba DCJ

A And after stating the result of the inquiries directed by the former judgment Lord Eldon said:

> "Supposing that there is a division of religious opinions in the persons at present wishing to enjoy this building the question then would be which of them adhered to the opinions of those who had built the place of worship and which of them differed from those opinions? Those who still adhered to those religious principles B being more properly to be considered as the *cestuis que* trust of those who held this place of worship in trust than those who have departed altogether from the religious principles of those who founded this place, if I may so express it."

At pp 612–613 the Earl of Halsbury LC said of the importance of the fundamental principles:

> "Speaking generally one would say that the identity of a religious community C described as a church must consist in the unity of its doctrines. Its creeds, confessions, formularies, tests and so forth are apparently intended to ensure the unity of the faith which its adherents profess, and certainly among all Christian churches the essential idea of a creed or confession of faith appears to be the public acknowledgement of such and such religious views as a bond of union which binds them together as one Christian community."

D The application of the principle of adherence to the fundamental principles of a church supports the proposition that those who have departed from the standards and principles on which the church is founded are more likely to leave it. For the purposes of establishing the fundamental principles of a church, it is not only the accepted interpretation of the Scriptures that counts. An accepted

interpretation of, or inference from, subordinate standards may E just as well be an article of faith as any other opinion. There is no tenable distinction for the purpose between one religious principle or opinion and another: see *Free Church of Scotland supra* at 651.

The rationale for the rejection of the application of the factor of majority lies in the concept of a church as a voluntary association of individuals united by F an agreement on the religious principles by which their affairs as individuals and association should be conducted. On the principle of majority, it would mean that where one person remains holding the original principles of the church there is no organised association of people. The issue is not that the person is alone at the time of secession from or division in the church. It is that the one person adheres to the fundamental principles which define G the church. As long as there is no provision in the constitution (on the basis of which he or she subscribed the principles and undertook to be bound by them) as to what should happen when he or she is not in the majority, his or her adherence to the fundamental principles is the decisive factor.

In this case, the exclusionary and distinctive principle to the effect that it is H unlawful to associate with homosexuals and their supporters or sympathisers

---

2012 (2) ZLR p414

Malaba DCJ

was put forward as a fundamental principle adopted by Dr Kunonga and A his followers. It was later to be the original principle on which the Church of the Province of Zimbabwe would be founded. It became the creed or doctrine in terms of which their religious belief was expressed and on the basis of which they associated in the new Church. Their Church was to be identified by that doctrine. B

The other factors, which show that Dr Kunonga and his followers no longer adhered to the fundamental principles of the Church on homosexuality and left it, but were not considered by the learned judge, are these. When Dr Kunonga communicated to the Archbishop on 21 September 2007 that they had withdrawn the Diocese of Harare from the Church, he did not say they were still members of the Church. It is unreasonable to think that C they could have withdrawn the Diocese of Harare from the Church whilst remaining members. This is particularly so when regard is had to the fact that the matter over which they differed with others in the Church touched them personally. The issue of associating with homosexuals and supporters or sympathizers of them which they had raised was about personal religion. D They had agreed to associate with others on the terms and conditions contained in the Constitution. They were in effect saying that they did not want to be associated with the other members with whom they disagreed because they tolerated homosexuality. They could only avoid contact by withdrawing themselves from the Church. It is not unusual for people to value separation from a church as a safeguard for doctrines which they hold intensely and as E to which they know that the surrounding world is indifferent or hostile: see *Free Church of Scotland supra* at 676.

When it was brought to their attention on 16 October 2007 that they had seceded from the Church, Dr Kunonga and his followers did not recant. They instead declared their resolve not to be intimidated into consorting with those who tolerated homosexuality. In the letter of 28 October the clergymen make F it clear that they had left the Church. They indicate that they were now in a position of freedom to join a new church which was about to be formed. One cannot interpret their statement that the Dean of the Province was trying to coerce them by letter of 16 October to go back to the Church to mean that they were still members of the Church. By their own words and conduct G they made it clear to all who did not share their attitude on the subject that it would be an article of faith of a separate church that homosexuals would not be tolerated.

Respect for human dignity is a fundamental principle of faith. It must have been clear to Dr Kunonga and his followers that the position they had taken contradicted the basis of this material particular of the accepted expression H

2012 (2) ZLR p415

Malaba DCJ

A of the doctrine of the Church which requires that every person be treated with respect and dignity. Once they adopted that position they separated themselves automatically from the Church and ceased to form part of it.

After the decision at the extraordinary meeting of the Episcopal Synod, dated 20 December 2007, Dr Kunonga and his followers did not recant their position. They went on to form their own church, thereby creating a schism. According B to *The Concise Oxford Dictionary* (1990) a schism is "the separation of a Church into two Churches or the secession of a group owing to doctrinal, disciplinary differences". The court agrees with Mr *de Bourbon* that the evidence proved that Dr Kunonga and his followers created the schism. The schism in the circumstances of this case is clear evidence of withdrawal of C membership by Dr Kunonga and his followers from the Church. They left the appelant Church and then formed the new church.

A person who is responsible for the creation of a schism cannot be heard to say that he or she has not withdrawn membership from the former Church. Even where a bishop, priest or deacon of the Province who is charged under Canon 24(1) with the offence of schism is found guilty by the Church Court, D the only sentence that can be imposed is excommunication. That other church, the Anglican Church of the Province of Zimbabwe, could only have been formed after a secession from the Church by Dr Kunonga and members of the clergy and laity who supported him. Evidence which the learned judge did not consider shows that they separated from the Church on a question E of doctrine, in that they considered it a rule of faith that homosexuals and those who support or sympathise with them should not be associated with in the public worship of God.

The argument that Dr Kunonga was acting in a representative or official capacity when he wrote the letter of 21 September 2007 proves nothing. No law authorized him and others to represent anyone in trying to do the F impossible concerning the withdrawal of the Diocese of Harare from the Province. Withdrawal of membership from the Church was something exclusively within their power as individuals. The minutes of the meeting of 4 August 2007 show that they discussed the question of withdrawal and agreed as individuals to withdraw from the Church. If they were acting G in their official capacities they could only have been representing the Archbishop and the Province. That would be impossible because they were fighting these institutions. Individual withdrawal of membership from the Church was the natural consequence of the letter of 21 September. Whilst they represented no-one, Dr Kunonga and his followers did act in common purpose. Dr Kunonga's appointment as an archbishop of his own church H clearly shows that he and his followers considered themselves no longer

---

members of the Church. There could not be more than one Archbishop in A a Province. Common sense indicates that Dr Kunonga could not have been doing what members agreed that office-bearers in his position would do for and on behalf of the Church. There never was agreement by the members that a diocesan bishop could write a letter to the Archbishop notifying him of a unilateral withdrawal of his diocese from the Province. Dr Kunonga was obviously advancing the secessionists' agenda. B

A careful examination of the evidence shows that the learned judge overlooked admissions by Dr Kunonga and his followers that they withdrew their membership from the Church. The Church made the allegation in case HC. 6544/07. They did not deny the allegation in their plea. They said that they left the Province but remained in the Diocese of Harare. The same allegation C was made by the Church in the opposing affidavit filed in case HC 4327/08. No answering affidavit was filed denying the allegation. The reason is that the case in the founding affidavit was that what had been done in attempting to withdraw the Diocese of Harare from the Province was lawful. The simple rule of law is that what is not denied in affidavits must be taken to D be admitted: *Fawcett Security Operations (Pvt) Ltd v Director of Customs and Excise & Ors* 1993 (2) ZLR 121 (S) at 127F.

It was only in the heads of argument filed on 9 December 2007 in case HC 4327/08 that it was contended that, as the attempted withdrawal of the Diocese of Harare from the Province was a nullity, all other acts done by Dr E Kunonga and his followers were null and void. It was expressly admitted in para. 13 of the heads of argument that Dr Kunonga and his followers withdrew their membership from the Church. What was specifically accepted was the allegation made by the Church in para 44(C) of the opposing affidavit that "Dr Kunonga and his handful of followers left the Church".

Not only did the learned judge overlook the admissions by Dr Kunonga and F his followers on the question of withdrawal of their membership from the Church, but he made no mention of the

argument on the effect of nullity. It is clear from a reading of the reasons for the judgment that his decision was not based on the point.

When Mr *Kanengoni* advanced the same argument on appeal he unwittingly G was on the side of the Church. He could not rely on the point of the effect of nullity without admitting that the learned judge was wrong in holding that the letter of 21 September 2007 did not constitute a notice of withdrawal of membership by Dr Kunonga and his followers from the Church. In any event, the court is of the view that the principle of the effect of a nullity based on the *obiter dictum* of Lord Denning in *Macfoy v United Africa Co Ltd* [1961] H

2012 (2) ZLR p417

Malaba DCJ

A 3 All ER 1169 cannot be used to nullify acts which are permitted and given effect by a separate law from that which created the nullity. In this case, the act of withdrawal of membership from the Church was an exercise of the right to freedom of choice, whilst the nullity arose from a breach of the rule on the status of a diocese in a Province. Nullification of an act by one rule, because it is in breach of its requirements, cannot be applied to nullify B an act permitted and given effect by another rule. The principle that there should be harmony between rules of the same legal order prevents such an internal contradiction arising in the legal order.

The second question is whether these facts show that Dr Kunonga resigned his office as Diocesan Bishop of Harare in the Church. The court holds that C they do. The reasons for the decision are these. According to Article 4 of the Constitution and Canons of the Church, a vacancy in the office of a Bishop of any Diocese of the Province may be created by death, resignation or removal for any cause of the Bishop. Canon 13(1) gives a diocesan bishop who desires to do so, a right to resign from the office before the completion of his sixty-fifth year by giving written notice of the resignation to the D Archbishop (or to the Dean of the Province if the Bishop is the Archbishop). The resignation would take effect upon acceptance of it by the Archbishop (or the Dean of the Province if the Bishop is the Archbishop). It was argued in the court *a quo* that since Dr Kunonga did not give notice to the Archbishop of any resignation as Diocesan Bishop of Harare, he remained in office. E The contention was that there cannot be a resignation of a diocesan bishop other than in terms of Canon 13(1). The argument overlooked the effect of Article 4. That means that the Constitution recognizes that there can be resignations which do not have to be contained in written notices to the Archbishop (or Dean of the Province if the Bishop is the Archbishop). In other words, it does not have to be a resignation subject to the acceptance of F the Archbishop. Article 4 applies to a resignation of any bishop of a diocese, including a diocesan bishop, whilst Canon 13(1) applies to a diocesan bishop only. Article 4 is consistent with the principle that a person will be deemed to have resigned from an office if evidence of his or her conduct shows that he or she exercised the right to resign notwithstanding absence of notice to the appropriate authority of an intention to resign.

G There must be many people who leave offices in voluntary associations without giving notice. If the contention by Dr Kunonga was to be accepted, it would mean that a person could leave office and return to an organization when benefits arise as long as he or she can claim that he or she had not resigned office because no written notice was given. Canon 12(4) gives H the Archbishop the power to *declare*, with the consent of the majority of

---

2012 (2) ZLR p418

Malaba DCJ

Bishops of the Province, the office of a diocesan bishop vacant in the event A of him being absent from his diocese for more than six months without good cause. The bishop concerned would have resigned office within the meaning of Article 4. It must be accepted that there can be resignation by conduct in addition to resignation by words: *Sick and Funeral Society of St John's Sunday School v Golcar* [1973] 1 Ch 51 at 62C-E. B

Canon 13(1) is concerned with a person who at the time he desires to resign is willing to act in accordance with the procedure prescribed thereunder and recognizes the authority of the Archbishop (or Dean of the Province if he is the Archbishop). The person intends to remain a member of the Church. A person in the position of Dr Kunonga would find no moral justification for subjecting his resignation from the office of diocesan bishop to the procedure C prescribed by Canon 13(1). By his own words and conduct he had placed himself in a position in which he felt no obligation to give due

obedience to the Archbishop. He occupied an equivalent position of authority and reverence in another church.

Resignation of a bishop is a question of fact dependent on the evidence of D the conduct of the individual. Where the evidence shows that the individual exercised his/her right to terminate the relationship with the church the resignation takes effect immediately the conduct is committed. This is so unless there is a special provision by virtue of which it takes effect upon acceptance by the person who is given the right to receive written notice and decide whether to accept the resignation or not. The law is clear. Whether it E is under article 4 or 13, resignation is a unilateral act. Its validity does not depend upon acceptance by the person to whom it is directed. Acceptance determines when the resignation take effect. In the final analysis it is for the court and not the individual concerned to decide whether his conduct amounts to resignation or not.

The facts show that Dr Kunonga was no longer a diocesan bishop in the F Church. He took part in the formation of the new church which he named the Anglican Church of the Province of Zimbabwe. He could not have accepted the post of Archbishop of the new church whilst retaining the position of Bishop of the Church. He must have known that there could not be two Archbishops in the Province. He could not be both Diocesan Bishop of G Harare and Archbishop of the Church of the Province of Zimbabwe, which was a separate church. He accepted the position in which the decision of the Episcopal Synod declared him to be. From that position he was able to accept the consecration and enthronement as Archbishop of the Anglican Church of the Province of Zimbabwe. He was also able to use the authority of the new office to consecrate and enthrone a number of people as diocesan H

Malaba DCJ

A bishops of the new Church. It must go without saying that Dr Kunonga was able to act in the manner he did without attracting disciplinary charges from the Archbishop of the Church because he had withdrawn his membership from the Church and, *ipso facto,* resigned the office of Diocesan Bishop. It would be unreasonable in a case such as this which requires proof on a pre-ponderance of probabilities to expect, the Church to produce evidence B of greater probative value than it placed before the court *a quo* in order to establish that Dr Kunonga resigned from the office of Diocesan Bishop.

The holding by the learned judge that the Church ought to have instituted disciplinary proceedings against Dr Kunonga with a view to passing the sentence of excommunication ignores a number of factors. The procedure C for the implementation of disciplinary proceedings shows that they can only be invoked against people who are still members and office-bearers of the Church. Once it is accepted, as it should be, that Dr Kunonga left the Church, and, *ipso facto,* vacated his office of Bishop of the Province, then it should be accepted that he was beyond the reach of the procedure referred to by the learned judge. Canon 24(1), which the learned judge relied on, states D quite clearly that it is applicable to a "Bishop of the Province". Dr Kunonga was no longer a bishop of the Province. The purpose of the proceedings would be to discipline the member. Disciplinary action, which is the object of the proceedings provided for under Canon 24, is completely different from resignation. A person who has resigned from the office of "Bishop of the Province" effectively puts himself beyond the reach of the disciplinary E proceedings. A church cannot institute disciplinary proceedings against a person who is no longer its member or office bearer. The court holds that Dr Kunonga resigned as a bishop of the Province of Central Africa and could not have been dealt with in terms of the disciplinary procedure prescribed by Canon 24.

F The final question is whether Dr Kunonga and others remained members of the Board of Trustees of the Diocese of Harare, entitled to the control of the property of the Church. The court holds that they did not. The reasons for the decision are these. It is clear from the evidence that, once Dr Kunonga and his followers left the Church, they disentitled themselves from continuing as members of the Board of Trustees of the Church. They could only hold the G positions of trustees for the purposes of delivering services and protecting the property on behalf of the Province, which is the owner of the property, if they were members of the Church.

Article 20 of the Constitution, as read with Articles 21 and 23, establishes the Trusts upon which property belonging to the Church is held. Article 21 makes H it clear that the duty of trustees is to hold movable or immovable property in

---

Malaba DCJ

trust for and on behalf of the Provincial Synod. Article 23 provides that the A Diocesan Trusts' Board is obliged to exercise over the property only those powers which are prescribed for it by the Provincial Synod. Under Article 18 the Provincial Synod is the only body with the power to frame such rules as may be necessary from time to time for the management of property held in trust for the Church. It has full power and authority to determine in what B manner and upon what conditions such property shall be used or occupied.

When they left the Church Dr Kunonga and his followers used the property and continued to control it without the approval of, or authority from, the Provincial Synod. They could no longer have been acting according to the mandatory tenets of the Trust. The conditions under which they had held C the property had changed. They could not separate the question of control of the property of the Church from the obligation to uphold and adhere to the fundamental principles on which the Church is founded and for the purposes of the maintenance of which it continues to exist. They used the property of the Church to further the interests of their new Church of the Province of Zimbabwe. D

There can be no doubt that the original purpose of the property trust was for the maintenance and support of the Church. It is clear from the provisions of the Constitution that the property belonged to the Church, as named in the Constitution, and was to be held for and on behalf of the Provincial Synod of that particular Church. The Church is one known to hold the faith E described by the Constitution. The import of the Trust would be that the buildings, for example, should be enjoyed as places of religious worship by congregations of the said body of Christians called the Church of the Province of Central Africa. The property could not be applied to purposes which are alien to the purposes of the trust and for the benefit of persons who F have no title to call themselves members and office-bearers of the Church. It would be unreasonable to think that the trust with which they would have been expected to act authorized Dr Kunonga and others to use the property for the achievement of the interests of their new church.

In *Chong v Lee* (1981) 29 BCLR 13 at 17, Hinds J stated:

> "Where a number of people group together to establish a Christian church and G it is formed for the purpose of promoting certain defined doctrines of religious faith then expressed, property which the church acquires is impressed with a trust to carry out that purpose, and a majority of the congregation cannot divert the property to uses inconsistent with such defined religious doctrines, against the opposition of a minority of the congregation, however small such minority may be". H

2012 (2) ZLR p421

Malaba DCJ

A The principle is that, in the absence of express provision in the constitution of a voluntary association such as a church, property held in trust must be applied for the benefit of those who adhere to the fundamental principles of the association. Related to this is the principle that a member of a voluntary association who leaves the organization whilst others remain must leave the property with those who have not resigned membership. When one B leaves a club one does not take its property with him or her. It has long been established as a salutary principle of law in this area of property ownership that when one or more people secede from an existing church they have no right to claim church property, even if those who remain members of the congregation are in the minority.

C From all the circumstances of the dispute between the Church and Dr Kunonga and his adherents, it is clear that they constituted the seceding party. They broke away from the Church citing irreconcilable differences on the question of tolerance of homosexuality. In the absence of evidence of a contract in terms of which the Provincial Synod directed that Dr Kunonga and his followers should continue holding tenaciously to Church property D after they had withdrawn from membership of the Church, the principle that the property must fall under the control and use of those who adhere to the fundamental principles of the Church must be enforced*: Ethiopian Church Trustees v Sonjica* 1926 EDL 107 at 115–116.

In *Nederduitsch Hervormde Congregation of Rustenburg v The Nederduitsch* E *Hervormde of Gereformeerde Congregation of Rustenburg* (1895) 12 CLJ 140, Kotzé CJ said at 142:

> "Those, however, who, as members of the congregation of the former Hervomde Church of Rustenburg, however small their number might be, have not joined the union, still remain the Hervomde Congregation of Rustenburg, and are as such entitled to all the property and things belonging to, or standing registered F in the name of, the Hervomde Church of the Congregation of Rustenburg.

In *Zambezi Conference of Seventh Day Adventists v General Conference of Seventh Day Adventists & Anor* 2001 (1) ZLR 160 (S) after a dispute with the SDA, delegates to a local conference decided on 20 December 1992 to secede from the Mother Church to form the Seventh Day Adventists. The G new body claimed ownership of the properties of its predecessor. The claim was dismissed on the same principle that those who have left a Church have no claim to its property. McNally JA at 162D-F said:

> "These individual members, who seceded from the Church, even if they be a majority of the members of a particular congregation, have seceded as individuals. They cannot have a claim to property of the SDA. They have formed a *universitas,* H a new association of individuals. They cannot have a claim to property of

the SDA. It may be that, as individuals, they subscribed towards the funds of the A Church. But they did so as members. Having now founded a new *universitas,* they cannot in law claim ownership of Church property."

There has been no dispute as to the ownership of the movable and immovable property the possession of which was claimed by the Church from Dr Kunonga and the others named in case HC 6544/07. It is common cause that the property B belongs to the Church. It has a right to an order for vindication of its property from possessors who have no right to have it. The learned judge was wrong in giving Dr Kunonga and his followers the right to possess and control the property of the Church without its consent. They had no right to continue in possession of the congregational buildings when they had departed from the fundamental principles and standards on which the Church is founded. C They left it, putting themselves beyond its ecclesiastical jurisdiction.

The suggestion made by Mr *Kanengoni* in argument that Dr Kunonga and his followers have disbanded the new church has no basis in the papers. The court agrees with Mr *de Bourbon* that had that happened, the court would not be hearing these appeals. In any case they would have to be formally "received" back in the Church. That has not happened. D

For all these reasons, the judgment of the court *a quo* cannot stand. It is therefore ordered as follows:

1. The appeal in the case of The Church of the Province of Central Africa *v* The Diocesan Trustees for the Diocese of Harare SC 180/09 succeeds with costs. E
2. The judgment of the court *a quo* in case HC 4327/08 is set aside and substituted with the following:

   "The application is dismissed with costs".
3. The appeal in the case of *The Church of the Province of Central Africa v Kunonga & Ors* SC 130/10 be and is hereby allowed with costs. F
4. The judgment of the court *a quo* in case HC 6544/07 is set aside and substituted with the following order:

   "The claim is granted with costs".

ZIYAMBI JA and OMERJEE AJA concurred. G

Gill, Godlonton & Gerrans, appellant's legal practitioners

Chikumbirike & Associates, respondent's legal practitioners

* See *Diocesan Trustees, Diocese of Harare v Church of the Province of Central Africa* 2009 (2) ZLR 57 (H), a judgment of Hlatshwayo J. – *Editor*.

© 2015 Juta and Company (Pty) Ltd.

Document 52 of 60

Source:

MUGADZAWETA v CO-MINS OF HOME AFFAIRS & ORS 2012 (2) ZLR 423 (H)

Citation	2012 (2) ZLR 423 (H)
Case No	Judgment No. HH-439-12
Court	High Court, Harare
Judge	Zhou J
Heard	1 August 2012; *CAV*
Judgment	20 November 2012
Counsel	*H Mandevere* for the plaintiff No appearance for the defendants
Case Type	Civil application
Annotations	No case annotations to date

Flynote

Damages – *delictual – assessment – damages arising out of bodily injury – pain and suffering – meaning of – pain and suffering actually suffered by plaintiff relevant to assessment of damages – shock closely associated* D *to pain and suffering – disfigurement and loss of amenities – meaning of*

Delict – damages – *assessment – bodily injury – pain and suffering – meaning of – pain and suffering actually suffered by plaintiff relevant to the assessment of damages – shock closely associated to pain and* E *suffering – disfigurement and loss of amenities – meaning of*

Headnote

In assessing general damages arising out of bodily injury, it "… must be recognized that translating personal injuries into money is equating the incommensurable; money cannot replace a physical frame that has been permanently injured. The task therefore of assessing damages for F personal injury is one of the most perplexing a court has to discharge." (*per dicta* Gubbay JA in *Minister of Defence & Anor v Jackson* 1990 (2) ZLR 1 (S) at 7, followed.)

In assessing general damages, pain and suffering covers all pain, physical and mental suffering and discomfort caused by bodily injury, emotional shock or the medical treatment to be given to the injured person. The G pain which is relevant is that actually suffered by the plaintiff and not what would be experienced by a reasonable person. The fact that the plaintiff is more or less sensitive than the *diligens paterfamilias* is of no relevance in the assessment of the pain suffered. Shock, particularly emotional shock, is closely associated with pain and suffering, albeit it H may sometimes account for other forms of loss such as insomnia, anxiety

Zhou J

neuroses, hysteria, depression or other mental or physical conditions A which the law recognizes as non-patrimonial loss.

Disfigurement, which is also referred to as deformity, refers to any defacing or mutilation of the plaintiff's body or any part thereof. It includes scars, loss of limb, a limp caused by an injury to the leg(s), and distortions of the body. The loss involves the aesthetic value of the body or a B part thereof and not its functional performance. The extent of the loss under this head depends

upon a number of factors, which include the plaintiff's sex, age, the visibility of the disfigurement, its influence on the plaintiff's life, and the plaintiff's appearance before the injuries. Whether the disfigurement is temporary or permanent is also a factor to be considered. C

Loss of amenities of life is experienced when a person loses the ability and/or will to take part in certain activities in life and fails to enjoy life as he used to do prior to the injuries being sustained. This damage is not confined to the loss already sustained but also includes loss which will probably be suffered in future. Loss of amenities has also been D described as "a diminution in the full pleasure of living", a loss of those satisfactions in one's everyday existence which flow from the blessings of an unclouded mind, a healthy body, and sound limbs. The amenities of life derive from such simple but vital functions and faculties as the ability to walk and run; the ability to sit and stand unaided; the ability to read and write unaided; the ability to bath, dress and feed oneself E unaided; and the ability to exercise control over one's bladder and bowels. Upon all such powers individual human self-sufficiency, happiness and dignity are undoubtedly highly dependent.

Cases cited

Admin-General, SWA v Kriel 1988 (3) SA 275 (A) F

Gwiriri v Highfield Bag (Pvt) Ltd 2010 (1) ZLR 160 (H)

Hoffa NO v SA Mutual Fire & General Insurance Co Ltd 1965 (2) SA 944 (C)

Min of Defence & Anor v Jackson 1990 (2) ZLR 1 (S)

Nyandoro v Min of Home Affairs & Anor 2010 (2) ZLR 332 (H)

Sandler v Wholesale Coal Suppliers Ltd 1941 AD 194 G

H West & Son Ltd & Anor v Shephard [1963] 2 All ER 625 (HL)

Case information

H Mandevere for the plaintiff

No appearance for the defendants H

Zhou J

Judgment

A **Zhou J:** This is an unopposed claim for general damages for an assault perpetrated upon the plaintiff at about midnight on 13 October 2009, by fourth, fifth and sixth defendants who are police officers. The plaintiff's declaration merely narrates the event,s which or evidence of what occurred on the day in question rather than pleading the facts which constitute the cause of action. The declaration contains material which should be found in B an affidavit rather than in a pleading. No wonder then that the affidavit of evidence filed in support of the *quantum* largely reproduces the contents of the declaration. Also, the summons and declaration limit the cause of action to "unlawful assault, pain, shock and suffering, disfigurement and loss of amenities of life", even though the evidence pleaded reveals other causes C such as unlawful arrest and detention. The time has come for the profession to seriously consider mandatory continuing professional development or legal education in order to complement the efforts of universities which are primarily centres for research. It is necessary for the profession to continue to refresh its knowledge on matters such as drafting pleadings and other court documents.

D The facts upon which the claim is founded are as follows: On 13 October 2009 the plaintiff was at a hotel in Kadoma known as the Grant Hotel. He was on his way to Carax Mine where he had been contracted to provide security services. He woke up as a result of noise on the door to his hotel room. The fourth, fifth and sixth defendants, together with other police officers, E entered the room and assaulted the plaintiff all over his body. They used open hands, booted feet, baton sticks and other blunt objects in the assault. They then handcuffed him using his handcuffs. The assaults continued even after he had been handcuffed. He was subsequently detained at Kadoma police station. Even as he was in the police station the police officers continued to assault the plaintiff. During the assaults he was tortured by being forced to F lie prostrate while the officers took turns to

assault him. The plaintiff states that the police officers falsely accused him of illegal possession of a firearm.

As a consequence of the assault the plaintiff suffered some injuries, as detailed in the medical report prepared by a doctor who examined him at Parirenyatwa Hospital on 17 October 2009. The injuries are described G as multiple petechial hemorhages on the buttocks and blisters, as well as chronic subdural hematoma. The plaintiff suffered partial disfigurement of the right buttock. The degree of shock, pain and suffering experienced by the plaintiff at the time of his hospitalisation is described as severe. The medical report reveals that there will be permanent scars on the plaintiff's body as a result of the assault. The doctor stated that at the time of the examination H the plaintiff suffered from memory lapses, and that the problem of loss of

memory was likely to continue. In his affidavit of evidence the plaintiff A states that he suffers loss of memory as well as persistent headaches and loss of sleep. The loss of memory, according to the medical evidence, will limit the plaintiff's participation in recreational activities. The plaintiff requires specialist monitoring by a neurosurgeon. The doctor stated that he was treated using analgesics. B

The plaintiff initially claimed a sum of US$100 000. In his heads of argument, he reduced the amount to $70 000. In the supplementary affidavit of evidence he proposed a lower figure of $30 000.

Assessing general damages arising out of bodily injury is by no means an easy task. This onerous task is not at all mitigated by the fact that the claim C is unopposed, as the court still has to be satisfied that the amount awarded is fair and reasonable in the circumstances. That point is remarkably articulated by the Supreme Court in the celebrated case of *Minister of Defence & Anor v Jackson* 1990 (2) ZLR 1 (S) at 7, in the following terms:

> "It must be recognised that translating personal injuries into money is equating the incommensurable; money cannot replace a physical frame that has been D permanently injured. The task therefore of assessing damages for personal injury is one of the most perplexing a court has to discharge."

In that case the court set out eight general principles which the courts will take into account in assessing general damages. Those principles have stood the test of time. See *Gwiriri v Highfield Bag (Pvt) Ltd* 2010 (1) ZLR 160 (H) at 172A-G. They will guide the approach in the instant case. E

The plaintiff claimed a global figure of US$175 000, which was subsequently reduced to US$70 000 and, eventually, to US$30 000, in respect of what are essentially four heads. These are pain and suffering, shock, disfigurement, and loss of amenities of life. It is preferable to itemise the claims under the individual heads in order to assist the court, as they are distinct forms of loss. F Visser & Potgieter *Law of Damages* 2 ed p 99-102. The plaintiff referred to *Nyandoro v Minister of Home Affairs & Anor* 2010 (2) ZLR 332 (H), in which an amount of US$5 000 was awarded for general damages.

Pain and suffering covers all pain, physical and mental suffering and discomfort occasioned by bodily injury, emotional shock, or the medical treatment to G be given to the injured person: *Sandler v Wholesale Coal Suppliers Ltd* 1941 AD 194 at 199; *Hoffa v SA Mutual Fire & General Insurance Co of SA Ltd* 1965 (2) SA 944 (C). The pain which is relevant is that actually suffered by the plaintiff and not what would be experienced by a reasonable person. The fact that the plaintiff is more or less sensitive than the *diligens paterfamilias* is of no relevance in the assessment of the pain suffered. In H

A *Gwiriri v Highfield Bag (Pvt) Ltd supra* at 174B, the court awarded damages for pain and suffering in the sum of US$3 000, where the plaintiff's hand had been trapped between machine rollers and was crushed by the rollers. The plaintiff in that case was hospitalised for more than three months. Unlike in that case, the injuries in this case were deliberately inflicted and included inflicting torture on the plaintiff. The injuries were inflicted all over the B body, including in the head and buttocks. The doctor who treated the plaintiff describes the pain and suffering as severe. The plaintiff still experiences severe headaches as a result of the injuries. Having regard to the principles in the case

of *Minister of Defence & Anor v Jackson supra*, it seems to me that a sum of US$5 000 would represent reasonable compensation for the C excruciating pain and suffering which the plaintiff experienced.

Shock, particularly emotional shock, is closely associated with pain and suffering, albeit it may sometimes account for other forms of loss such as insomnia, anxiety neuroses, hysteria, depression or other mental or physical conditions which the law recognises as non-patrimonial loss. Visser & Potgieter *op cit* at p100 describe emotional shock as "a sudden, painful D emotion or fright resulting from the realisation or perception of an unwelcome or disturbing event which involves an unpleasant mental condition such as fear, anxiety or grief". The attack on the plaintiff involved instilling fear in him. The assailants forcibly entered into the hotel room and started to assault him without introducing themselves. The assaults were indiscriminate. The medical evidence tendered shows that the plaintiff suffers memory loss as a E result of the injuries sustained in the attack. The realisation that the assaults were being perpetrated by police officers and, subsequently, at a police statio, must have traumatised the plaintiff, who would expect the law enforcement agents to protect him from that kind of behaviour. As pointed out above, the injuries have affected the plaintiff psychologically, as he suffers loss of sleep F and often has nightmares as he relives the assault in his sleep. The plaintiff states that during the assaults he suffered "great pain, indignity, discomfort, distress, fear and anxiety". A sum of US$4 000 would reasonably compensate him for the shock.

In *Gwiriri v Highfield Bag (Pvt) Ltd supra* the court awarded a total sum of US$6 000 for disfigurement and loss of amenities.

G Disfigurement, which is also referred to as deformity, refers to any defacing or mutilation of the plaintiff's body or any part thereof. It includes scars, loss of limb, a limp caused by an injury to the leg(s), and distortions of the body. The loss involves the aesthetic value of the body or a part thereof and not its functional performance. Visser & Potgieter *op cit* at 101 state that H the extent of the loss under this head depends upon a number of factors,

---

which include the plaintiff's sex, age, the visibility of the disfigurement, A its influence on the plaintiff's life, and the plaintiff's appearance before the injuries. Whether the disfigurement is temporary or permanent is also a factor to be considered. *In casu* there is partial disfigurement of the right buttock. The medical evidence revealed, too, that the injuries will leave permanent scars on the plaintiff. Although disfigurement of a buttock is not a readily B visible deformity, the plaintiff's body remains physically impaired by it. I would therefore award a sum of US$3 000 for the disfigurement.

Loss of amenities of life is experienced when a person loses the ability and/or will to take part in certain activities in life and fails to enjoy life as he used to do prior to the injuries being sustained. This damage is not confined to the loss already sustained but also includes loss which will probably be C suffered in future. In *H West and Son Ltd v Shephard* [1963] 2 All ER 625 (HL) at 636G-H, loss of amenities is described as "a dimunition in the full pleasure of living". See also *Gwiriri v Highfield Bag (Pvt) Ltd supra* at 174D. In *Administrator-General, SWA v Kriel* 1988 (3) SA 275 (A) at 288D-G, amenities of life are described as:

> "those satisfactions in one's everyday existence which flow from the blessings D of an unclouded mind, a healthy body, and sound limbs. The amenities of life derive from such simple but vital functions and faculties as the ability to walk and run; the ability to sit and stand unaided; the ability to read and write unaided; the ability to bath, dress and feed oneself unaided; and the ability to exercise control over one's bladder and bowels. Upon all such powers individual human self-sufficiency, happiness and dignity are undoubtedly highly dependent." E

The medical evidence shows that the plaintiff's participation in recreational activities will be impeded by memory lapses. There is no doubt, too, that the persistent headache which he complains of will affect his enjoyment of amenities of life. An award of a sum of US$3 000 will meet the justice of the case. F

Accordingly, judgment is hereby given in favour of the plaintiff against all the defendants, jointly and severally, the one paying the others to be absolved, in the sum of US$15 000, together with interest thereon at the prescribed rate from the date of service of summons to the date of payment in full, and costs of suit. G

Mbidzo Muchadehama & Makoni, plaintiff's legal practitioners

© 2015 Juta and Company (Pty) Ltd.

Document 53 of 60

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2012/Volume 2/S v CHIGOGO 2012 (2) ZLR 429 (S)

S v CHIGOGO 2012 (2) ZLR 429 (S)

Citation	2012 (2) ZLR 429 (S)
Case No	Judgment No. S-38-12
Court	Supreme Court, Harare
Judge	Malaba DCJ, Ziyambi JA & Gowora JA
Heard	5 June 2012; *CAV*
Judgment	20 November 2012
Counsel	*P Makurumure*, for the appellant *R Chikosha*, for the respondent
Case Type	Details not supplied
Annotations	No case annotations to date

Flynote

Criminal procedure – *trial – when commences – trial commencing with* C *arraignment – arraignment – what constitutes*

Military law – *court martial – arraignment – what constitutes – convening order for court martial not part of arraignment*

Headnote

D The term "trial" can be regarded as including "arraignment" and the trial of an accused person commences when he is arraigned. The calling upon an accused person to appear, the informing him of the crime charged against him, the demanding of him whether he be guilty or not guilty, and the entering of his plea, comprise the arraignment of the accused. E His plea having been entered, he is said to stand arraigned. However, a convening order for a court martial cannot be classed as an arraignment. It is no more than an internal document meant for the guidance of those involved in setting up, and conducting a prosecution before, a court martial.

Cases cited

F *S v Ndhlovu* HB-82-02

R v Sibanda 1968 (2) RLR 167 (G); 1968 (3) SA 559 (R)

Legislation considered

Defence Act [*Chapter 11:02*], s 46(4)

Case information

G *P Makurumure*, for the appellant

R Chikosha, for the respondent

Judgment

Ziyambi JA: The appellant was on 5 November 2009 convicted by a general court martial of contravening para 19(4) of the First Schedule of the H Defence Act [*Chapter 11:02*] ("the Act") in that, being responsible for State

---

Malaba DCJ

property, he negligently performed his duties, resulting in a deficiency in A the said property. He was sentenced to 22 months' imprisonment, reduced in rank from master sergeant to aircraftman and discharged with ignominy from the Defence Forces. He now appeals to this court against his conviction.

Five grounds of appeal were advanced by the appellant. It was our view that the first ground, being a point *in limine,* would, if determined in favour B of the appellant, be dispositive of this appeal. Accordingly, after hearing argument on the point *in limine* we adjourned to consider the merits thereof.

The point raised *in limine* was that the court *a quo*

> "erred in arraigning the appellant for trial and subsequently finding him guilty in contravention of the provisions of s 46(4) of the Defence Act as the matter had prescribed". C

I digress here in order to set out the background of the appeal. On 25 September 2006, the appellant, who was employed by the Air Force of Zimbabwe as a master sergeant, was instructed to be the captain of the team which was to represent the Chegutu Military Base at shooting competitions hosted by Thornhill Air Base. He received, and duly signed for, 2000 rounds of D ammunition for AK rifles and 200 rounds of 9 mm ball ammunition which was to be used for practice with pistols before the competition. After the competitions, the appellant returned 153 rounds of 9 mm ball ammunition to Chegutu Air Base.

Nothing further was heard about the matter until nearly three years later. On E 19 April 2009, around 2 am, a window at the appellant's house was broken as a result of a brick thrown thereat by an unknown person. The appellant reported the matter to the camp policemen who attended the scene, made their observations and left.

At 6am the same morning, the appellant discovered several rounds of 9 mm ball ammunition in his flower bed. He reported the matter this time to F the military policemen who attended the scene and collected a total of 22 rounds of 9 mm ammunition from the flower bed. Investigations were carried out, as a result of which the appellant was summoned to appear before the court martial to answer charges of theft, in contravention of s 18(a)of the First Schedule; alternatively, contravention of s 19(4) of the First Schedule of the Act. G

On 21 October 2009, the appellant appeared before the court *a quo*. His plea, *in limine,* that the court had no jurisdiction to entertain the matter since it had prescribed in terms of s 46(4) of the Act, was rejected by the court *a quo* on the basis that the date of issue of the convening order was the date of commencement of the trial. The holding was that since the convening H

Malaba DCJ

A order was issued within three years of the commission of the offence, the trial had commenced within the statutory period.

Section 46(4) of the Defence Act provides:

> "Subject to subsection (2), no member shall be tried by a military court for an offence in terms of this Act, other than an offence – B
>
> (a) which, on conviction, renders the accused liable to be sentenced to death, or
>
> (b) in terms of subparagraph (1) of paragraph 15 of the First Schedule; or

(c) in terms of subsubparagraph (a) of subparagraph (2) of paragraph 15 of the First Schedule;

unless the trial is commenced within three years after the date of the commission C of theoffence".

It was common cause that the date of commission of the alleged offence was on 26 September 2006 and that the appellant was brought before the court *a quo* to plead to the charges on 21 October 2009.

In rejecting the contention that the prosecution was in contravention of s D 46(4), the court *a quo* relied on the judgment in *Ndhlovu & Anor v Minister of Defence &* Ors 2002 (2) ZLR 118 (H). In that case the applicants brought on review the proceedings before the court martial which had convicted and sentenced them to custodial sentences. One of the grounds of review was that the respondents had acted in a manner that was grossly irregular in issuing E or causing to be issued a convening order on 7 May 2002, ordering the trial of the applicants to commence on 27 May 2002 when in terms of s 46(4) of the Defence Act a military court had ceased to have jurisdiction over the matter as the alleged offence was committed on 11 May 1999. Kamocha J dismissed the applicants' submissions in this regard on the basis that "the applicants were arraigned by the issue of the convening order on 7 May F 2002". In so finding Kamocha J relied on the interpretation of the word "trial" by Young J in *R v Sibanda* 1968 (2) RLR 167 (G); 1968 (3) SA 559 (R) at 559H where he said:

"In my view the expression 'trial'…ought, because of the history of the provision, to be interpreted as including 'arraignment'".

G He then went on to find that "the applicants were arraigned by issuing convening order number 01/2002 on 7 May 2002".

The word "trial" has been defined as:

"an investigation of a case in front of a judge to decide whether a person is innocent or guilty of a crime by questioning him or her and considering the evidence".

H See *Collins Dictionary, New Edition* (Harper Collins Publishers).

Malaba DCJ

I would respectfully agree that the term "trial" can be regarded as including A "arraignment" and that the trial of an accused person commences when he is arraigned. However, by no stretch of imagination can a convening order – if the one on record is a typical example – be classed as an arraignment. In *Gardiner and Lansdown South African Criminal Law and Procedure* 6 ed at p 350, the following is said: B

"the calling upon an accused person to appear, the informing him of the crime charged against him, the demanding of him whether he be guilty or not guilty, and the entering of his plea, comprise the arraignment of the accused. His plea having been entered, he is said to stand arraigned."

The convening order *in casu*, was issued on 23 September 2009. It read, in part, as follows: C

"GENERAL COURT MARTIAL 2 PRESIDENTIAL GUARDS SESSION

By the order of the Commander of the Air Force of Zimbabwe, the details set below are additional nom for GCM that is currently running at 2 Presidential Guards in Dzivaresekwa.

a. 71027 MS Chigogo R". D

It went on to set out certain instructions as to how the court should be constituted, as well as the personnel who would officiate at the court martial. Clause 11(ii) of the order provided that Staff Officer Personnel was to ensure that a copy of the "SOE" was passed to the accused or his defending officer. The order was signed by P Shiri GCZM Air Marshal, Commander AFZ. It contained a distribution list, which did not include the accused. There is E nothing on the face of the order which would indicate that the accused person was made aware of it. Indeed, the order appeared to me to be nothing but an internal document meant for the guidance of those involved in setting up, and conducting the prosecution before, the court martial.

It would appear that the appellant made an initial appearance before the court F martial, apparently differently constituted, on 28 September 2009 and that he was not asked to plead because that court took the view that the matter had prescribed. The appellant was, however, brought before the court *a quo* on 21 October 2009, in an apparent change of mind, to answer the same charges. It was on that date that the charges were put to the appellant and G he was asked to plead to them. Once his plea was recorded the arraignment was complete. His trial had commenced.

Thus the trial of the appellant commenced on 21 October 2009, well after the three year period specified in s 46(4) of the Act had elapsed. It follows that the court *a quo* had no jurisdiction to entertain the matter and the trial was, therefore, a nullity. H

2012 (2) ZLR p433

Malaba DCJ

A In the result the appeal succeeds and it is ordered as follows:

1. The appeal is allowed.
2. The conviction of the appellant and the sentence imposed by the court *a quo* are hereby set aside.

B MALABA DCJ and GOWORA JA concurred

Warara & Associates, appellant's legal practitioners

Attorney-General's Office, respondent's legal practitioners

© 2015 Juta and Company (Pty) Ltd.

Document 54 of 60

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2012/Volume 2/MUTARISI v UNITED FAMILY INTERNATIONAL CHURCH 2012 (2) ZLR 434 (H)

MUTARISI v UNITED FAMILY INTERNATIONAL CHURCH 2012 (2) ZLR 434 (H)

2012 (2) ZLR p434

Citation	2012 (2) ZLR 434 (H)
Case No	Judgment No. HH-445-12
Court	High Court, Harare
Judge	Zhou J
Heard	13 November 2012; *CAV*
Judgment	22 November 2012
Counsel	Ms *O T Sanyika*, for the applicant *T Govere*, for the first respondent *C Muchesa* (Director of Urban Planning Services), for the second respondent
Case Type	Urgent chamber application
Annotations	No case annotations to date

Flynote

Practice and procedure – *application – urgent – when a matter may be treated as urgent – principles*

Practice and procedure – *interdict – interim interdict – draft order – need to base draft on case pleaded* D

Practice and procedure – *interdict – interim interdict – requirements – what right must be established – when necessary to show that irreparable harm will occur if interdict not granted – court's general power to reject application for interdict*

Practice and procedure – *order – draft order – should be written so as to* E *properly assist court as to relief being sought*

Headnote

A chamber application is urgent where it cannot wait to be resolved through a court application. The urgency may arise where, if the matter is not determined urgently, there is a risk of irreparable harm to an applicant F or there is a risk of perverse conduct on the part of the respondent or its agents which would defeat or render hollow any order which may subsequently be obtained by the applicant in connection with the dispute. The court must be satisfied that if the matter is not heard urgently substantial injustice would result to the applicant. G

The requirements for an interim or temporary interdict are:

(1) that the right which is the subject matter of the main action and which applicant seeks to protect by means of interim relief is clear or, if not clear, is *prima facie* established, though open to some doubt;

(2) that, if the right is only *prima facie* established, there is a well-grounded apprehension of irreparable harm to the applicant if the H

Zhou J

A interim relief is not granted and he ultimately succeeds in establishing his right;

(3) the balance of convenience favours the granting of interim relief; and

(4) that the applicant has no other satisfactory remedy.

Where a clear right is established, an applicant for an interim interdict need B 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 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 alleged. Whether or C not an applicant has a right is a matter of substantive law; whether that right is clearly or only *prima facie* established is a question of evidence.

The court has a general discretion to grant or reject a request for an interdict, even in circumstances where the applicant has established the requirements for interim relief discussed above. The discretion must, of course, be exercised judicially, having regard to all the facts and D circumstances of the case.

While a draft order is only a draft and does not bind the court, it must be based on the case pleaded. It is not a mere formality for applicants to file draft orders in application proceedings. The draft order must properly assist the court as to the relief being sought by an applicant.

Cases referred to E

Cambridge Plan AG v Moor 1987 (4) SA 821 (D)

Dilwin Invstms (Pvt) Ltd v Jopa Eng Co (Pvt) Ltd HH-116-98

Document Support Centre (Pvt) Ltd v Mapuvire 2006 (2) ZLR 240 (H)

Econet (Pvt) Ltd v Min of Information 1997 (1) ZLR 342 (H)

F *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)

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

Nyika Investments (Pvt) Ltd v Zimasco Holdings (Pvt) Ltd & Ors 2001 (1) ZLR 212 (H)

Olympic Passenger Service (Pty) Ltd v Ramlagan 1957 (2) SA 382 (D)

Pickering v Zimbabwe Newspapers (1980) Ltd 1991 (1) ZLR 71 (H)

H *Watson v Gilson Entprs & Ors* 1997 (2) ZLR 318 (H)

Zhou J

Case information

Ms *O T Sanyika*, for the applicant A

T Govere, for the first respondent

C Muchesa (Director of Urban Planning Services), for the second respondent

Judgment

Zhou J: This is an urgent chamber application for an interdict restraining the first respondent from encroaching onto the applicant's immovable properties B described as Stands 19774 and 19775 Town Centre, Seke South, Chitungwiza. The application is opposed by both the first and second respondents. The second respondent only filed its opposing papers after I had asked that it places the correct facts on record, given that the evidence tendered by both the applicant and first respondent suggested that the dispute had arisen as a result of the conduct of the second respondent in relation to those two C parties. The background to the dispute is as follows.

The applicant acquired by way of cession rights in immovable properties described as Stand 19774 Town Centre, Seke South, Chitungwiza and Stand 19775 Town Centre, Seke South, Chitungwiza. Rights in the said properties were ceded to the applicant by one Chenjerayi Tarcisius Madamombe who D had acquired rights in the properties from the second respondent in terms of a deed of settlement entered into in Case Number HC 6575/10. The cession of the rights was duly accepted by the respondent and recorded in writing. Following the cession of rights, the applicant and the second respondent entered into two lease agreements in respect of the two properties. The terms of the agreements are contained in two memoranda of agreement which E contain identical terms except for the description of the stand numbers. The lease agreements are for a period of two years commencing on the first day of September 2011. In terms of the agreements, the applicant is obliged to construct buildings in accordance with plans and specifications approved in writing by the second respondent's town engineer. Clause 19 of the agreements provides that in the event that the lessee completes the F buildings on any of the properties leased during the period of the lease or any extension of that period granted by the second respondent, then he shall have the option of purchasing the property let at a price to be determined by the lessor. Clause 17 of the agreements provides that notwithstanding the provisions of Clause 19 the applicant may be permitted to purchase the G properties let and to receive title thereto before completion of the buildings required in Clause 3, if he satisfies the requirements set out under paras (a) to (d) of Clause 17. In other words, the applicant is entitled to purchase the leased properties subject to the conditions set out in the agreements.

On 27 October 2012 the applicant noticed that construction workers employed by the first respondent were clearing his land without his authority. He had H

Zhou J

A until then assumed that the first respondent was the holder of rights over an adjoining property. When he discovered the interference with the properties belonging to him, the applicant made enquiries with representatives of the first respondent. Upon getting no assistance, he approached the second respondent's employees, who advised him that the first respondent had purchased a piece of land which included the two properties which are the B subject of the lease agreements referred to above. On 1 November 2012 the applicant instituted the instant urgent chamber application seeking an interdict to restrain the first respondent from encroaching onto the property which was subject to his lease agreement with the second respondent. The first respondent opposed the application. The first ground of opposition is C an objection *in limine* to the application on the ground that the matter is not urgent. In support of its objection, the first respondent contends that it has been building on the piece of land for over two years. On the merits, the first respondent states that it has purchased the property, including the two properties belonging to the applicant. The first respondent questions the agreements between the applicant and the second respondent which it D describes as "dubious".

The matter was initially set down for argument on 6 November 2012. It was postponed to 8 November 2012 at the request of the first respondent's legal practitioners who asked for time to file opposing papers. On 8 November 2012 the matter was again postponed to give the applicant's legal practitioners the E opportunity to read the first respondent's opposing papers which had been filed on that day, and to file an answering affidavit. On that date I asked Mr *Govere*, who represented the first respondent, to notify the second respondent that the court was giving it an opportunity to place its position on the matter before the court. I made that suggestion after preliminary discussion on the matter suggested that the second respondent had alienated the disputed land F in favour of the applicant and the first respondent. At the resumption of the matter on 13 November 2012, the second respondent filed an opposing affidavit deposed to by one Conrad Muchesa, its Director of Urban Planning Services. Muchesa also represented the second respondent at the hearing. No legal practitioner was in attendance for the second respondent. In the G opposing affidavit, the second respondent argued that the land allocated to the applicant was "fictitious" and "non-existent". It contended that a verification exercise undertaken had shown that the properties in question did not exist. The second respondent also incorporated the averments which were made on its behalf in Case No. HC 4868/12, in which it seeks to set aside the deed of settlement entered into in HC 6575/10, which has already been referred H to above. I will address these issues in due course. I need mention, though,

---

that in his submissions Conrad Muchesa admitted the agreements with the A applicant and that the agreements have not been cancelled.

The first issue to be determined is whether the matter should be dealt with on an urgent basis. A chamber application is urgent where it "cannot wait to be resolved through a court application". See *Dilwin Investments (Pvt) Ltd v Jopa Engineering Company (Pvt) Ltd* HH-116-98 at p 1; *Kuvarega* B *v Registrar General & Anor* 1998 (1) ZLR 188 (H); *Document Support Centre (Pvt) Ltd v Mapuvire* 2006 (2) ZLR 232 (H). The urgency may arise where, if the matter is not determined urgently, there is a risk of irreparable harm to an applicant or there is a risk of perverse conduct on the part of the respondent or its agents which would defeat or render hollow any order C which may subsequently be obtained by the applicant in connection with the dispute. The court must be satisfied that if the matter is not heard urgently substantial injustice would result to the applicant: *Pickering v Zimbabwe Newspapers* (1980) Ltd 1991 (1) ZLR 71 (H) at 93E.

The first respondent's contention is that the matter is not urgent because it D has been building on the land for over two years. But the urgency arises from encroachment onto the property which is the subject of the applicant's rights, a fact which only arose when the applicant noticed the interference on 27 October 2012. The applicant has stated that he knew that the first respondent was building on an adjacent piece of land, and did not realise that it was also claiming the land belonging to him. The first respondent has E not denied the encroachment. Neither has it undertaken not to proceed with any developments on the disputed land pending resolution of the dispute relating to the properties. If anything, Mr *Govere*, who represented the first respondent brazenly insisted that the land belongs to the first respondent and that it will not stop any developments on it. Thus, if the matter was to F proceed as an ordinary court application and the first respondent continues with whatever developments it contemplates on the property, the ultimate relief would be rendered hollow if the applicant succeeds. As will be shown below, the transaction between the two respondents bears all the hallmarks of a questionable deal which may have been concluded to frustrate any G claim by the applicant to the property. For the above reasons, I hold that the matter is urgent.

As regards the merits of the matter, what is being sought is an interim or temporary interdict pending the return date on which there will be a full enquiry into the issue of title to the property in dispute. The requirements for such an interdict are settled. These are: H

(a) that A the right which is the subject matter of the main action and which applicant seeks to protect by means of interim relief is clear or, if not clear, is *prima facie* established, though open to some doubt;

(b) that, if the right is only *prima facie* established, there is a well-grounded apprehension of irreparable harm to the applicant if the interim relief is B not granted and he ultimately succeeds in establishing his right;

(c) the balance of convenience favours the granting of interim relief; and

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

See *Econet (Pvt) Ltd v Minister of Information* 1997 (1) ZLR 342 (H) at 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) C at 213G-214B.

Where a clear right is established an 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 D *Nyika Investments (Pvt) Ltd v Zimasco Holdings (Pvt) Ltd supra* at 214B-D.

The words "clear" and "*prima facie*" in the context of interdicts relate to the degree of proof required to establish the right alleged. Whether or not an applicant has a right is a matter of substantive law; whether that right is clearly or only *prima facie* established is a question of evidence. See C B E Prest *Interlocutory Interdict* p 47; Erasmus *Superior Court Practice* p E8-6A. In the instant case the applicant's right to the two properties was admitted by the second respondent's representative, Conrad Muchesa, albeit in his affidavit he states something different. In any event, the two copies of the memorandum of agreements entered into between the applicant and the second respondent show that the applicant has rights arising out of those F agreements. Thus, the applicants have clearly established their rights over the properties in dispute. In any case, even if the right is not clearly established, it is at least *prima facie* established by the documents referred to above.

The first respondent has repeatedly referred to the applicant's agreements as dubious. There is nothing on the papers to suggest any wrongdoing on G the part of the applicant. On the other hand, the facts suggest collusion between the first and second respondent to defeat the applicant's claims. In its opposing affidavit, the first respondent states that it has been building on the land in question for more than two years. The first respondent does not explain the basis upon which it has been building on the land in question for over two years. The documents annexed to the first respondent's opposing H affidavit tell a different story. The minutes which it relies upon as proof of

---

the authority to build on the land relate to a meeting of 8 October, 2012. The A agreement of sale in terms of which the first respondent alleges it acquired rights in the property was signed on 30 October 2012, some two days before the instant application was filed. The copy of the electronic money transfer form attached to the opposing papers shows that payment of what is stated as the purchase price in the sum of US$730 000 was made on 2 November B O2012, a day after the urgent application was filed. The further evidence of collusion between the two respondents is revealed by the submissions which were made by Conrad Muchesa for the second respondent. He stated that it was not possible for the applicant to be given leases in respect of the two properties as they were on land meant for recreation, a stadium and an "open space". He stated that, before any such lease could be concluded, C there should be an application for change of use which should be approved by the responsible authorities in accordance with the law. However, when he was asked to explain if there had been an application for or approval of the change of use before the property was sold to the first respondent, he readily admitted that no such approval had been applied for or granted. Also, D Muchesa stated that the first respondent had been granted permission to construct its structures on Stand Number 19722, but had gone on to construct on Stand Number 19770. The second respondent condoned that conduct on the part of the first respondent. No explanation is given other than, it appears, that the first respondent was prepared to pay a sum of US$730 000. It is not clear what reliance is being placed upon Case No. HC 4868/12 in E which the second respondent is seeking to set aside the deed of settlement it concluded with one Chenjerai Tarcisius Madamombe. The applicant is not cited in those proceedings. Further, the second respondent knows that it now has an agreement of lease in respect of the disputed properties with the applicant and not with Madamombe. F

The first respondent advanced the mistaken argument that its agreement of sale created real rights which, so goes the argument, "supersedes an agreement of lease". It is trite that an ordinary

agreement of sale merely creates personal rights as between the seller and the purchaser. The first respondent has no real rights over the property by the mere fact of having paid the purchase price. G

The applicant has a well-grounded apprehension of irreparable prejudice if the interim relief is not granted. The first respondent has already indicated that it will not stop its developments on the property. Also, the second respondent through its representative indicated that it would like to give the applicant alternative land, but that it presently has no land available for such an alternative arrangement. H

2012 (2) ZLR p441

Zhou J

A In considering whether the balance of convenience favours the granting of or refusal to grant interim relief the court weighs 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. *In casu* the respondents suffer no irreparable prejudice if the temporary B interdict is granted. On the other hand, if the interdict is not granted and the first respondent erects structures on the disputed land which, going by previous events, the second respondent will approve, the applicant would have no remedy to reverse such a state of affairs. The applicant intended to develop the properties which are the subject of the lease agreement with C the second respondent but was notified that all developments were to be held in abeyance pending some investigations. It will not be able to build such structures if the first respondent is permitted to undertake its own developments on the properties.

The court has a general discretion to grant or reject a request for an interdict even in circumstances where the applicant has established the requirements D for interim relief discussed above. See *Francis v Roberts* 1972 (2) RLR 238 (A) at 248F; *Watson v Gilson Enterprises 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, having regard to all the facts and 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 that there is no alternative satisfactory remedy available to the applicant, the balance of convenience, and the fact that the first respondent has evinced an intention not to halt its developments on the property, it is appropriate that an interim interdict be granted. I have considered, too, the submissions by Conrad Muchesa, that F presently the second respondent has no alternative land which it would give to the applicant if he completely loses the properties in dispute.

The applicant filed an amended draft provisional order to substitute the one filed with the urgent chamber application. However, the amended draft order is not elegantly drafted as well, and does not show that the legal practitioner who drafted it applied her mind to its contents. Litigants are reminded that G while the draft order is only a draft and does not bind the court, it must be based on the case pleaded. It is not a mere formality for applicants to file draft orders in application proceedings. The draft order must properly assist the court as to the relief being sought by an applicant. In this case the relief being sought in the first paragraph of the terms of the final order H sought is the same as that being sought under the interim relief. The second

---

2012 (2) ZLR p442

Zhou J

relief being sought under the terms of the final order sought is that "the A applicant be and is hereby declared (to be) the owner of Stands 19774 and 19775 Chitungwiza Town Centre, Seke South". Apart from the inconsistent descriptions of the properties in dispute, the applicant knows that his claim is based upon lease agreements. Nowhere in the papers has he alleged, let alone proved, an entitlement to ownership. The lack of attention to accuracy B is also reflected in the notice of the chamber application where it is alleged that "the applicant is the legal and registered owner of a certain piece of land …" I have accordingly amended the provisional order as shown below.

In the premises, relief is granted in favour of the applicant against the respondents in terms of the draft provisional order as amended to read as follows: C

TERMS OF FINAL ORDER SOUGHT

That you show cause to this Honourable Court why a final order should not be made in the following terms:

1. That the agreement of sale between the first respondent and the second respondent be and is hereby set aside to the extent that it relates to or D includes Stand Number 19774 Town Centre, Seke South, Chitungwiza and Stand Number 19775 Town Centre, Seke South, Chitungwiza.
2. The lease agreement between the applicant and second respondent in respect of Stand Number 19774 Town Centre, Seke South, Chitungwiza and Stand Number 19775 Town Centre, Seke South, Chitungwiza, be E and is hereby declared to be legally binding unless it is set aside by an order of court.
3. The costs of this application shall be paid by the first and second respondents jointly and severally, the one paying the other to be absolved.

INTERIM RELIEF GRANTED F

Pending determination of this matter the applicant is granted the following relief:

1. The first respondent be and is hereby interdicted from carrying on any developments which encroach on or otherwise interfere with the applicant's rights in relation to Stand Number 19774 Town Centre, Seke South, Chitungwiza and Stand Number 19775 Town Centre, Seke South, G Chitungwiza.

SERVICE OF PROVISIONAL ORDER

The applicant's legal practitioners are hereby granted leave to serve a copy of this provisional order upon the respondents. H

2012 (2) ZLR p443

Zhou J

A *Matipano & Matimba*, applicant's legal practitioners

Govere Law Chambers, first respondent's legal practitioners

© 2015 Juta and Company (Pty) Ltd.

Document 55 of 60

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2012/Volume 2/S v MAZAMBANI 2012 (2) ZLR 444 (H)

S v MAZAMBANI 2012 (2) ZLR 444 (H)

2012 (2) ZLR p444

Citation	2012 (2) ZLR 444 (H)
Case No	Judgment No. HH-449-12
Court	High Court, Harare
Judge	Uchena J
Heard	28 November 2012
Judgment	28 November 2012
Counsel	Details not supplied
Case Type	Criminal review

Annotations No case annotations to date

Flynote

Criminal procedure – *record – status of – need for full record to be made during trial – unreliability of subsequent and belated explanation from magistrate in answer to query from scrutinising regional magistrate or reviewing judge*

Headnote

The magistrates court is a court of record. A trial court is therefore duty D bound to keep an accurate record of the proceedings and of the scrutiny cover. The record of proceedings must be considered by the scrutinizing regional magistrate and reviewing judge as it appears, and not as the trial magistrate interprets it on inquiry being made. Members of the public who have access to the record of proceedings will understand E the proceedings as per the record. It is therefore important that judicial officers presiding over courts of record keep an accurate record of the proceedings. A court record should tell the whole story of what happened during the trial. It cannot be supplemented by an explanation from the trial magistrate on details which should be in it. The rationale for the rules prohibiting review and appellate tribunals from having recourse F to matters extraneous to the actual record is clear, as is the prohibition against the correction and reconstruction of records except in accordance with defined rules, and in only exceptional cases. It is inconceivable that a magistrate who hears several cases per day can recall what happened in a particular case months later on being questioned by a scrutinizing regional magistrate. A scrutinizing G regional magistrate or reviewing judge cannot rely on such a belated and unprocedural reconstruction or correction of the record.

The duty of judicial officers who find themselves presiding at a trial in which the facility of a mechanical recorder is not available is to write down completely, clearly and accurately, everything that is said and happens H

2012 (2) ZLR p445

Uchena J

A before them, which can be of any relevance to the merits of the case. They must ensure that they do not record the evidence in a way which is meaningless or confusing or does not give the real sense of what the witness says. They must remove obscurities of language or meaning whenever possible by asking questions. This is because the record kept by them is the only reliable source of ascertaining what took place and B what was said, and from which it can be determined whether justice was done. 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.

C Failure to ask the accused whether he wishes to give evidence is an irregularity necessitating the setting aside of a conviction, though in proper cases an appeal court may remit the matter for the correct questions to be put. The failure to explain to an accused who has misunderstood his right to give evidence or the other courses open to him, and what his rights really are, is also an irregularity justifying an appeal court in setting aside the D conviction. The fact that the accused has been informed of these matters should be recorded; it is a fatal irregularity not to record this fact.

Cases cited

In re *E T & Ors* 1992 (1) ZLR 300 (H)

E In re *Eight Juveniles* 1998 (1) ZLR 362 (H)

Nyikadzino v A-G 1964 RLR 543 (A)

R v Barnard 1951 SR 215

S v Davy 1988 (1) ZLR 386 (S)

S v M & Ors 1975 (2) RLR 270 (A)

R v McDonald 1964 RLR 270 (A)

F *S v Manera* 1989 (3) ZLR 92 (S)

S v Ndebele 1988 (2) ZLR 249 (H)

R v Rushinga & Ors 1947 SR 1

Legislation considered

Criminal Procedure & Evidence Act [*Chapter 9:07*], ss 198 & 199

G Magistrates Court Act [*Chapter 7:10*], ss 5 & 58

Judgment

Uchena J: The convicted person pleaded not guilty but was convicted on a charge of theft as defined in s 113(1)(a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. He was jointly charged with two others H who were acquitted at the end of the trial. The record of proceedings was

---

Uchena J

forwarded to a regional magistrate for scrutiny. It was placed before the A senior regional magistrate, Harare, who raised issues of record keeping and compliance with the provisions of s 198(6) and s 199(1) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] (the CP&E Act) with the trial magistrate.

The issue of record keeping was on the review cover, indicating that the B convicted person's co-accused had been convicted and sentenced as was the convicted person. The issue of compliance with the provisions of s 198(6) and s 199(1) of the CP&E Act was raised because there is no record in the record of proceedings that these provisions had been explained to the accused persons. In his response to the issues raised by the Senior Regional Magistrate the trial magistrate said; C

> "I indeed explained the accused's rights in respect of s 198 and 199, however, I erred in that I did not endorse this on the record of proceedings. I overlooked that the other accused persons had been included on the scrutiny cover. Next time I will check my scrutiny cover before submitting my work."

The senior regional magistrate was not satisfied with the trial magistrate's D response. He forwarded the record of proceedings to this court for guidance, with the following comments;

> "I queried whether the trial magistrate complied with the provisions of s 198 (6) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] and checked with the accused person whether "it was intended to adduce evidence for the defence and whether he intended himself to give evidence". E
>
> The relevant information is not part of the record and worse still there is no mention of the court's compliance with the peremptory provisions of s 198 (6) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] on p 15 of the trial notes.
>
> While the trial magistrate claimed not to have endorsed the explanation to the accused person only, it is noticeable that the court did not ask the accused the F relevant questions. None of the accused persons told the court that they had no witnesses to call before they closed their respective cases."
>
> I am not persuaded to accept that the accused could have been convicted before he was given the chance to call defence witnesses (if any).
>
> I seek your guidance:"

Record keeping. G

This review raises two issues on record keeping. Failure to submit a correct record for review and failure to maintain an accurate record of the trial, if the magistrate's claim that he complied with s 198(6) is to be believed. The latter is more critical as it has an effect on whether or not real and substantial justice has been done. H

Uchena J

A The magistrates court is a court of record. Section 5(1) and (2) of the Magistrates Court Act [*Chapter 7:10*] provides as follows;

> "(1) Every court shall be a court of record.
>
> (2) Subject to this Act and except as provided in any other law –
>
> (a) … B
>
> (b) the records of the proceedings of the court shall be kept in the English language and shall be accessible to the public under the supervision of the clerk of the court at all convenient times and upon payment of such fees as may be prescribed in rules;"

The trial court was therefore duty bound to keep an accurate record of the proceedings and of the scrutiny cover. The record of proceedings must be C considered by the scrutinizing regional magistrate and reviewing judge as it appears, and not as the trial magistrate interprets it on inquiry being made. In this case, the proceedings were initially sent for scrutiny as the magistrate's manuscript notes, without any remarks from the trial magistrate, as per the proviso to s 58(1) of the Magistrates Court Act.

D Members of the public who have access to the record of proceedings will understand the proceedings as per the record. It is therefore important that judicial officers presiding over courts of record keep an accurate record of the proceedings.

A court record should tell the whole story of what happened during the trial. E It cannot be supplemented by an explanation from the trial magistrate, on details which should be in it. Muchechetere J, as he then was, commenting on record keeping in *S v Ndebele* 1988 (2) ZLR 249 (H) at 254C–G said:

> "All courts are courts of record and are required to keep a full and comprehensive record of all proceedings. The proposition is self-evident and accords with reason and justice. In *S v Besser* 1968 (1) SA 377 (SWA), the court held that a failure F to keep a proper record of any proceedings or any part thereof amounted to a gross irregularity cognizable under the court's powers of review as envisaged in provisions such as s 27(1)(c) of the High Court Act No. 29 of 1981. In addition s 163(4), 190 and 255(3) of the Code compel him to record those matters mentioned in them.
>
> See also *S v K* 1974 (3) SA 857 (C); *R v Khumalo* 1947 (4) SA 156 (N); *R v* G *Sikumba* 1955 (3) SA 125 (E) at 128; *S v Maxaku* 1973 (4) SA 248 (C); *Pheiffer v Landdros*, *Warrenton* 1977 (4) SA 127; *R v Parmanand* 1954 (3) SA 833 (A); and *R v Neto* 1965 RLR 656.
>
> The need to do so is quite obvious. In the absence of such a record how is a review or appellate tribunal to assess the correctness and validity of any proceedings placed before it for adjudication? The instant case is an eloquent expression of H the importance of such a rule and the necessity for strict compliance therewith.

2012 (2) ZLR p448

Uchena J

> The rationale for the rules prohibiting review and appellate tribunals from A having recourse to matters extraneous to the actual record becomes clear, as does the prohibition against the correction, and reconstruction of records except in accordance with defined rules and only in exceptional cases. See *S v Mavuma* 1964 (1) SA 369 (N); *S v Brandt* 1972 (4) SA 70 (NC); *S v Booi G* 1972 (4) SA 68 (NC); *S v Mtetwa & Ors* 1964 (4) SA 29 (N); *S v K supra*; *S v Mkize* 1962 (2) SA 457 (N); Ex p *Magade*: in re *R v Magade* 1948 (1) SA 109 (E)." B

In *S v Davy* 1988 (1) ZLR 386 (S) at 393C–E Gubbay JA (as he then was) said:

> "Before concluding on this aspect, I wish to sound a note of warning to judicial officers who find themselves, presiding at a trial in which the facility of a mechanical recorder is not available. *It is their 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. They must ensure that they do* C *not record the evidence in a way which is meaningless or confusing or does not give the real sense of what the witness says. They must remove obscurities of language or meaning whenever possible by asking questions. This is because the record kept by them is the only reliable source of ascertaining what took place and what was said and from which it can be determined whether justice was done.* See *R v Sikumba* 1955 (3) SA 125 (E) at 128E–F; *S v K* 1974 (3) SA 857 (C) at D 858H. 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" (my italics).

See also In Re *E T & Ors* 1992 (1) ZLR 300 (H) at 302G–303C, In Re *Eight Juveniles* 1998 (1) ZLR 362 at 363B–E and *S v Manera* 1989 (3) ZLR 92 at 94F. E

In view of these authorities it is apparent that the trial magistrate erred by failing to maintain an accurate record of the proceedings and of the review cover. As already said the inclusion of the convicted person's co accused who were acquitted at the end of the trial on the review cover was not proper, as their case was not subject to scrutiny. This however is not fatal as is does not F affect the convicted person's conviction. Only cases referred to in s 58(1) of the Magistrates Court Act, are subject to scrutiny.

Effect of not recording what happened as required by s 198(6) of the CP&E Act

In his response the trial magistrate conceded that he did not record his G explanation of the provisions of ss 198(6) and 199(1) of the CP&E Act to the convicted person. He also did not record the convicted person's responses to such explanations and questions related to them if they were given or asked. The record is therefore silent about this crucial part of the convicted person's trial.

Section 198(6), (8) and (9) and s 199(1) provide as follows: H

2012 (2) ZLR p449

Uchena J

"(6) Subject A to subsection (3), at the close of the case for the prosecution the court shall –

(a) ask the accused or, if he is legally represented, his legal representative whether it is intended to adduce evidence for the defence and whether the accused intends himself to give evidence; and

(b) if the accused is not legally represented, inform him of the provisions of B the proviso to subsection (8) and of subsection (9) and of subsection (1) of section *one hundred and ninety-nine*.

(7) …

(8) Subject to Part XIVA, any witnesses called for the defence shall be examined by the accused or his legal representative and the accused, if he gives evidence himself, shall be examined by C his legal representative, if any, and the accused or his legal representative shall put in and read any documentary evidence which may be admissible:

Provided that no evidence shall be adduced for the defence before the accused is called to give evidence or is, in terms of subsection (9), questioned by the prosecutor or the court, unless the court in its discretion otherwise allows.

(9) If the accused declines to give evidence, the prosecutor and the court may D nevertheless question him and, if the accused is legally represented, his legal representative may thereafter question him subject to the rules applicable to a party re-examining his own witness.

199 (1) If an accused who gives evidence or is questioned in terms of subsection (7), (8) or (9), as the case may be, of section *one hundred and ninety-eight* refuses to answer any question, he shall be asked to give his reasons for so E refusing and, if he persists in his refusal, the court, in determining whether the accused is guilty of the offence charged or any other offence of which he may be convicted on that charge, may, unless satisfied that he had just cause for so persisting, draw such inferences from the refusal as appear proper and the refusal may, on the basis of such inferences, be treated as evidence corroborating any other evidence given against theaccused."

F The convicted person in this case was not legally represented. The record of proceedings on p 1 indicates that he was acting in person. He should therefore have been asked if he intended to adduce evidence for the defence and if he himself intended to give evidence. As an unrepresented accused he should have been asked these questions in digestible portions. Two questions should have been asked and answered on this aspect. The provisions of ss 198(8), (9) G and 199(1) should have been explained to the convicted person. The fact that such explanations had been given should have been recorded. The convicted person should then have been asked if he understood the explanations. His answer to that question should have been recorded.

The record of proceedings indicates that when the state closed its case the H convicted person was sworn and asked the following questions:

2012 (2) ZLR p450

Uchena J

"Q Do you remember what you said in your defence outline A

A Yes

Q Do you abide by it

A Yes

Q Any variations

A No B

Defence outline adopted as evidence in chief Cross exam"

This means the explanations and the questions referred to above were not given or asked as the court started the defence case by administering the oath and asking the convicted person questions about his defence outline and its adoption as his evidence in chief. C

There is no indication that he was informed of the provisions of s 198(8) and (9) and s 199(1). The absence of such explanations and warnings from the record are indicative of how the trial proceeded.

I am aware of the trial magistrate's attempt to place them on record through his response to the regional magistrate's inquiry. That in my view is not a D permissible way of reconstructing or correcting a record. It also boggles the mind how a magistrate who hears several cases per day can recall what happened in a particular case two months later on being questioned by a scrutinizing regional magistrate. A scrutinizing regional magistrate or reviewing judge can not rely on such a belated and unprocedural reconstruction or correction of the record. In *S v Ndebele* s*upra* at 254E–255A Muchechetere E J (as he then was) dealt with the prohibition against; review and appellate tribunals from having recourse to matters extraneous to the actual record and the prohibition against the correction, and reconstruction of records except in accordance with defined rules and only in exceptional cases.

The failure to explain the provisions of s 198(6) to the convicted person is F apparent. I do not accept the magistrate's explanation. There were therefore gross irregularities in these proceedings. The convicted person gave his defence case without the statutory explanations and warnings he was entitled to be given. He can not in those circumstances be said to have properly defended himself.

John Reid Rowland in his book *Criminal Procedure in Zimbabwe* at p 16-34, commented G on the court's duties in terms of the provisions of s 198(6) of the CP&E Act as follows:

> "This procedure is mandatory. The failure to ask the accused whether he wishes to give evidence is an irregularity necessitating the setting aside of a conviction, though in proper cases an appeal court may remit the matter for the correct questions to be put. The failure to explain to an accused who has misunderstood H

A his right to give evidence or the other courses open to him, what his rights really are is also an irregularity justifying an appeal court in setting aside the conviction. The fact that the accused has been informed of these matters should be recorded; it has been held a fatal irregularity not to record this fact."

See also *R v McDonald* 1964 RLR 124 (A). *Nyikadzino v A-G* 1964 RLR 543 (A); *R v Simon* 1948 SR 7; *S v M & Ors* 1975 (2) RLR 270 (A); *R v* B *Rushinga & Ors* 1947 SR 1; and *R v Barnard* 1951 SR 215, which were referred to in the above quoted passage.

It is therefore apparent that the trial court committed several fatal irregularities. The convicted person's conviction and sentence must be set aside. The failure of this trial is attributable to the trial magistrate's failure to comply with the trial procedures laid down by statute. The case must therefore be remitted C back to the magistrate's court for trial *de novo* before a different magistrate.

The convicted person's conviction and sentence are set aside. The case is referred back to the magistrate's court for trial *de novo* before a different magistrate. Should the convicted person be convicted at the subsequent trial the portion of the sentence he has already served should be taken into D consideration in passing sentence.

Chitakunye J concurs.

© 2015 Juta and Company (Pty) Ltd.

Document 56 of 60

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2012/Volume 2/PRIZE COMMERCIAL HOLDINGS (PVT) LTD v GOLDBERG & ORS 2012 (2) ZLR 452 (H)

PRIZE COMMERCIAL HOLDINGS (PVT) LTD v GOLDBERG & ORS 2012 (2) ZLR 452 (H)

Citation	2012 (2) ZLR 452 (H)
Case No	Judgment No. HH-446-12
Court	High Court, Harare
Judge	Mathonsi J
Heard	30 October 2012; 31 October 2012; 1 November 2012; *CAV*
Judgment	5 December 2012
Counsel	*E Chizikani*, for the plaintiff. *L Mhundirwa*, for the first, second and third defendants *D Halimani*, for the fourth defendant
Case Type	Civil trial
Annotations	No case annotations to date

Flynote

Contract – *sale – option – right of first refusal (pre-emption) – creation of – can only be created by contract or agreement between grantor and grantee – cannot arise in terms of a custom, convention or practice* D *– nature of the right – undertaking by a grantor to offer the property at a price equal to that offered by another – sitting tenant of leased property – no custom or convention whereby such tenant has right of pre-emption*

Headnote

"A right of pre-emption can only be created by a contract or agreement between the grantor and the grantee. Where breach of the right is alleged E as a cause of action and its existence is denied, the onus is on the plaintiff to show that there was an agreement between the parties in terms of which the defendant undertook to offer him the property at a price equal to that offered by another." (*dicta per* Malaba JA in *Eastview Gardens Residents Assn v Zimbabwe Reinsurance Corp Ltd & Ors* 2002 (2) ZLR 543 (S) at 548G-H, followed). F

A right of pre-emption or first refusal differs from an option by giving the holder the right to buy in priority to other prospective buyers if and when the seller decides to sell. The grantor of such a right cannot be compelled to sell the property concerned, but if he does sell, he is obliged to give the grantee the preference of purchasing and consequently he is prevented G from selling to a third person without giving the first refusal. A right of pre-emption thus involves a negative contract not to sell the property to a third party without giving the grantee the first refusal; and the grantee has the correlative legal right against the grantor that he should not sell. This is a right which is enforceable by appropriate remedies. The right of pre-emption can only be created by contract or agreement between H

Mathonsi J

A the grantor and the grantee. Where breach of the right is alleged as a cause of action and its existence is denied, the onus is on the plaintiff to show that there was an agreement between the

parties in terms of which the defendant undertook to offer to him the property at a price equal to that offered by another.

B In the case of a leased property, a right of pre-emption can only be granted by the property owner and by agreement of the parties. In Zimbabwe there is no custom, convention or practice under which a plaintiff can claim the right of first refusal (or pre-emption) as a sitting tenant on a property to be sold.

Cases cited C

Central African Processed Exports (Pvt) Ltd & Ors v Macdonald & Ors 2002 (1) ZLR 399 (S)

Eastview Gardens Residents Assn v Zimbabwe Reinsurance Corp Ltd & Ors 2002 (2) ZLR 543 (S)

Manchester Ship Canal Co v Manchester Racecourse Co [1900] 2 Ch 352

D *Nerger Properties (Pvt) Ltd v R Chitrin and Ors (Pvt) Ltd* 2006 (2) ZLR 287 (S)

Soteriou v Retco Poyntons (Pty) Ltd 1985 (2) SA 922 (A)

Case information

E Chizikani, for the plaintiff.

E *L Mhundirwa*, for the first, second and third defendants

D Halimani, for the fourth defendant

Judgment

Mathonsi J: In downtown Harare are located four adjoining pieces of land known as subdivision A of stand 1499 Salisbury Township measuring 299 m2, the remainder of stand 1499 Salisbury Township measuring 297 m2, F stand 1500 Salisbury Township measuring 595 m2 and stand 1498 Salisbury Township measuring 595 m2. Those properties are currently held by M Peters Agencies (Pvt) Ltd, the fourth defendant in this matter, by Deed of Transfer No. 239/11. Physically, they are stands 129 to 135 Mbuya Nehanda Street, Harare.

Historically the properties were owned by the estate of the late Aubrey G Urback, the gentleman himself having died on 26 February 1993, which estate leased out the four units to different tenants including the plaintiff, who leased No. 129 Mbuya Nehanda Street. The fourth defendant was later to come into one of the units, No. 135, in 2008.

In the process of the winding up of the estate of the late Mr Urback, the H properties were inherited jointly by Ruth Goldberg and Esther Hiram (the first

---

and second defendants), who held title by Deeds of Transfer numbers 7581/06 A and 7582/06. The respective lease agreements of the tenants, including that of the plaintiff, continued after transfer to the first and second defendants. In due course, the first and second defendants sold the properties to the fourth defendant for US$200 000 by agreement of sale signed on 25 June 2010. The fourth defendant took transfer on 28 January 2011. B

This did not impress the plaintiff, who instituted proceedings against the first, second and third defendants (being the estate agent mandated to manage the properties and to sell them), and the fourth and fifth defendants, the latter being the registrar of deeds. In its declaration, the plaintiff averred that about January 1997 it had, through the agency of the third defendant, entered into a written lease agreement with the estate of the late Mr Urback, in terms C of which it leased number 129 Mbuya Nehanda Street, Harare. It went on to aver that in 2003 it had offered to purchase the leased property which offer was accepted by the landlord, duly represented by the third defendant, thereby conferring upon the plaintiff the right of first refusal in the event of the property being sold. D

In addition, the plaintiff alleged the existence in Zimbabwe of a binding convention and practice requiring owners of immovable property tenanted to first offer such property to sitting tenants should they elect to sell the property. The plaintiff averred that when the first and second

defendants inherited the property, they assumed the rights and obligations attached to the property as successors in title, including the right of first refusal that it enjoyed. E

When it learnt that the property was being sold, it rushed to register an XN Caveat on the title deed but this did not stop the fourth defendant taking transfer from the first and second defendants. The plaintiff averred that, to the extent that the property was sold and transferred without regard to its right of first refusal, the sale to the fourth defendant was invalid and should F be annulled, with deed of transfer No. 239/11 cancelled. The property should be put back on the market according it the opportunity to exercise its first option to purchase it.

All the defendants, except for the fifth defendant, opposed the claim. The first, second and third defendants denied the existence of a right of first refusal G available to the plaintiff, either by virtue of the written lease agreement or by convention or practice. They averred that the written lease agreement specifically excluded such right. The third defendant specifically took issue with being cited in the proceedings when at all material times it acted as an agent of a named principal and as such could not be held liable out of a contract in which it was not a party. While conceding that they assumed the H

Mathonsi J

A rights and obligations of the lessor upon taking over the property, the first and second defendants maintained that such rights and obligations were limited to the terms set out in the written lease agreement and nothing more.

In its plea, the fourth defendant denied any knowledge of the existence of a right of first refusal enjoyed by the plaintiff. It insisted that it bought the B property in good faith, took transfer lawfully after complying with, not only the terms of the sale agreement, but also with the requirements of the law relating to transfer, as it satisfied the requirements of the Zimbabwe Revenue Authority and the Registrar of Deeds. For those reasons, it averred that it is an innocent purchaser which should be protected by the law. It added that C if the plaintiff really had a right to protect, it should have taken measures to stop the sale and transfer, which it did not do. Having failed to protect whatever interest it had, the plaintiff cannot now seek to impugn the fourth defendant's title.

The fourth defendant also made a counter-claim, averring that from the time D that it took transfer of No. 129 Mbuya Nehanda Street, the plaintiff was obliged to pay rent, rates, electricity and water bills to the fourth defendant which had inherited the tenancy. In breach of the agreement, the plaintiff has failed to pay anything up to now and is therefore in arrears. The fourth defendant therefore seeks an order evicting the plaintiff from the property and directing it to pay the arrears set out in the counter-claim.

E In response to the counter claim, the plaintiff denied being under any obligation to make any payments to the fourth defendant.

At the pre-trial conference of the parties, trial issues were identified and set out as follows:

"(1) Did F plaintiff have a right of first refusal bestowed on it by contract?

(2) Is there in Zimbabwe, [a] custom, convention and practice under which plaintiff can claim right of first refusal as a sitting tenant on property to be sold?

(3) Was the sale of the property, regular or illegal?

(4) Was the transfer of the property regular? G

(5) Whether or not the fourth defendant (plaintiff in reconvention) is a *bona fide* purchaser?

(6) Whether or not the plaintiff in reconvention is entitled to evict the first defendant in reconvention?

(7) Whether or not the first defendant in claim in reconvention is liable to pay H holding over damages, rates, water and electricity.?

Mathonsi J

(8) Whether the plaintiff as a third party can challenge the authority of first A defendant, in acting on behalf of second defendant in a contract she was not privy to?

(9) Whether or not the alleged right of first refusal between plaintiff, first defendant and second defendant is enforceable against third parties?"

The plaintiff led evidence from six witnesses, namely Miriam Denga, B Meeting Gomba, Upenyu Jaka, Christian Mgbemena, Onesmo Manenji and Kudakwashe Denga.

Miriam Denga is the managing director of the plaintiff, having taken over that position when her husband, Andrew Denga, who had been running the company, died in 2003. She acknowledged that the relationship between the parties was governed by the written lease agreement signed with the estate C in March 2006 and stated that when she took over the plaintiff company in 2003, she immediately wrote a letter to the third defendant, as agent of the landlord, offering to purchase the property when it was being sold.

That letter, which is dated 29 July 2003, reads in relevant part as follows:

> "REF: PROPOSAL FOR PURCHASING THE PROPERTY STAND 1498 D HARARE TOWNSHIP, NO. 129 MBUYA NEHANDA STREET – EASTLEA (*sic*) LATE AURBACKESR (*sic*).
>
> We wish to apply for the purchase of the above property when you consider selling it in due course.
>
> We would appreciate it if you could consider our proposal and let us know the selling of the building or whether you could consider rent to buy. E
>
> Please let us have your opinion regarding the above proposal."

In response to that letter, the third defendant wrote to the plaintiff on 31 July 2003 in the following terms:

> "RE: PROPOSAL TO PURCHASE LEASED PREMISES – 129 MBUYA NEHANDA STREET F
>
> We are in receipt of your letter dated 29 July 2003 wherein you indicated your wish to purchase the above mentioned property.
>
> We regret to inform you that the property is not for sale at present and we shall let you know when our client decides to sell."

Denga testified that the third defendant's response was an indication that G the plaintiff's interest had been acknowledged and that it was entitled to a right of first refusal. She stated that when the estate was wound up in 2006, the plaintiff was part of the estate and that the first and second defendants "inherited the plaintiff as well".

She went on to say that in April 2010 she was approached by Diana and Rudo Peters, the sisters of M Peter, who owns the fourth defendant. They advised H

Mathonsi J

A her that the third defendant was in the process of selling all the properties belonging to the first and second defendants to some Nigerian nationals and they suggested that each of the tenants should instead be allowed to purchase the property they were renting. She said that she was not worried about that as she had "applied to buy" her own rented property. After Diana and Rudo had left, she had informed her employee Onesimo Manenji and B her son Kudakwashe Denga of what the two ladies had told her.

Onesimo Manenji and Kudakwashe Denga were called by the plaintiff to confirm the visit by Diana and Rudo and the discussion they allegedly had with Miriam Denga after they had left.

Miriam Denga went on to state that after the discussion with Diana and C Rudo, she had again written to the third defendant on 10 June 2010 in the following terms:

> "RE: OFFER TO PURCHASE STAND 129 MBUYA NEHANDA STREET
>
> Developments in our operations have put us in a position in which we are able to own the premises from which we are trading. We refer to our letter of 2003 in which we informed you of our interest in the property.
>
> D We are hereby offering to purchase stand 129 Mbuya Nehanda Street, for US$150 000. Should there be any other persons interested in the property kindly enable us to exercise our right of first refusal, as we consider ourselves in a position of being able and willing to purchase this property and will not loose (*sic*) in any contest for this property.
>
> We await your response at your earliest convenient time."

E The third defendant only responded on 15 July 2010 after follow up letters had been sent, stating that:

> "RE: STAND 129 MBUYA NEHANDA STREET

> We refer to your letter of 6th July which was received by us on the 14th instant. This matter is being handled by our client's lawyers, Sinyoro and Partners and F your letter has been forwarded to them for attention."

Sinyoro and Partners then wrote to the plaintiff on 21 July 2010 and their brief letter reads:

> "RE: PROPERTY – NO. 129 MBUYA NEHANDA
>
> We refer to the above and to your letter of dated (*sic*) 07 July 2010 addressed to our client Messrs Robert Root with a proposal to purchase the above mentioned G property.
>
> Regrettably the property was disposed off (*sic*)."

That letter set in motion the dispute which has culminated in this trial. The plaintiff queried why the property had been sold when it had offered to purchase it. Miriam Denga stated that she proceeded to register a caveat on H the property as she was of the view that the plaintiff had a right of first refusal.

Mathonsi J

Notwithstanding that, the property was transferred to the fourth defendant A as the fifth defendant cancelled the caveat without notifying the plaintiff.

She made reference to the sale agreement between first and second defendants which was signed on 25 June 2010 at a time when she had been corresponding with the third defendant, suggesting that they had been doing everything behind her back when she was a sitting tenant. She had offered $150 000 B for her unit when ultimately the four units were sold to the fourth defendant for $200 000. She concluded that the third defendant was not being honest. She maintained that having been a good tenant for a long time, the plaintiff should have been given the option to purchase the property.

Denga admitted that the plaintiff had sublet part of the property, which had C brought it on a collision course with the third defendant, resulting in those subtenants being given their own leases. She admitted that she stopped paying utility bills in 2010 and that the plaintiff has not paid any rent to the fourth defendant since transfer because it does not recognise the fourth defendant as owner of the property.

She would like the sale agreement in favour of the fourth defendant cancelled D to enable the plaintiff to make an offer to purchase the property although it cannot afford to pay for it in cash. It can only pay on terms.

Miriam Denga did not make a good witness. Although admitting that the relationship between the parties was governed by the written lease agreement which specifically excluded any terms not incorporated in it, she struggled E to argue that there was an agreement according her a right of first refusal, even when such was not in the written lease. In fact clause 22(a) provides:

> "This lease constitutes the whole of the agreement between the parties; any variations or collateral agreements, unless in writing signed by both parties, shall be of no force and effect." F

Although she sought to argue that the parties had entered into a separate agreement through correspondence, in terms of which the plaintiff was given a right of first refusal, she only produced letters which she had written "applying" to purchase the property. In response to her first letter of 29 July 2003, the third defendant had made it clear that the property was not for G sale. The wording of third defendant's letter of 31 July 2003 cannot, by any stretch of the imagination, be construed as an acceptance creating a binding contract between the parties.

She referred to a visit by Rudo and Diana Peter in which they discussed the proposed sale of the properties to the exclusion of sitting tenants but the relevance of that discussion, even if it did take place, was not shown. She H

Mathonsi J

A then brought in her son and security guard to support a story which did not advance the plaintiff's case in any way.

She insinuated, without the slightest proof, that there were "underhand dealings" between the third and fourth defendants. Although accepting that the fourth defendant had purchased the property and

taken transfer, B she refused to pay any rent, water and electricity bills because she did not recognise the fourth defendant has a legitimate owner. It is strange that a tenant would want to remain in occupation of rented property for close to two years without paying anything and still insist on being taken seriously.

Meeting Gomba also testified on behalf of the plaintiff. He is a registered estate agent with 14 years experience and is currently employed by Southgate & C Bancroft (Pvt) Ltd as general manager. He testified that a right of first refusal is a clause that can be found in a lease agreement between a landlord and a tenant providing that in the event that the landlord would be contemplating selling the leased property, the tenant would be given the first option to purchase the property.

D Gomba went on to say that, in instances where there is no express clause in the lease agreement providing for a right of first refusal, the practice is that the tenant has no right of first refusal but should the property be up for sale, the tenant has to be advised that is the case so that he or she may decide to buy or vacate. All that the landlord is required to do is to disclose to the E tenant that the property is on sale.

Under cross-examination, Gomba admitted that he had previously been employed by the third defendant and that when his employment was terminated he had been accused of running a separate estate agency as a result of which he left employment. Gomba gave his evidence well and I accept it.

F Upenyu Tinoramba Jaka, another registered estate agent of seven years' experience, who currently runs his own agency, also testified for the plaintiff. According to him, in a set up where a property is tenanted, the practice is that if the landlord decides to sell that property, the sitting tenants have a right of first refusal even if no such provision is contained in the written lease agreement.

G Jaka's evidence was in sharp contrast with that of Gomba. When asked to comment on that contrast, Jaka simply said he disagreed with Gomba's evidence. As shall be seen later, Jaka's evidence regarding the right of first refusal is also in conflict with that of another experienced estate agent, Antony Robert Root, who testified on behalf of the third defendant. Perhaps it is H because he is the least experienced of the three expert witnesses.

2012 (2) ZLR p460

Mathonsi J

Christian Mgbemena told the court that he was subletting one of the units A from Hilex Technology, when he heard that the properties were being sold he was receiving information from an employee of the third defendant he refused to disclose. He made written offers to purchase them, first for $200 000 and later for $250 000 but none of his offers were accepted. Christian stated that his unnamed informant told him that the third defendant had been pressured B to sell the properties to the fourth defendant, although he is not privy to the details of that undue influence.

He said that he had spent $33 517 renovating the property that he rented and had been to court trying to stop the sale of the property to the fourth defendant but his action was dismissed because his lawyer was a tenant of the third defendant, who pressured him to compromise his case. Thereafter C the fourth defendant evicted them from the property and demolished the structures that he had put up. He has not been compensated.

The evidence of Christian is of no probative value. He came out as a bitter person following his eviction and the demolition of his structures. He is the type of witness with many underhand dealings himself. He has an informant D in the third defendant's employ whom he is unwilling to disclose. He even has no confidence in his own lawyer whom he accuses of compromising his case. His demeanour was very bad and he appears to be inherently suspicious of others. I have no hesitation in rejecting his evidence.

The first and second defendants did not give evidence and were not in E attendance, they being resident outside the country. Antony Robert Root is the managing director of the third defendant, a company established in 1958. He was registered as an estate agent in 1986 and now has 26 years' experience. The third defendant had been managing the property in dispute for close to 30 years before it was sold to the fourth defendant.

He told the court that the third defendant was mandated by the family of F the first and second defendants to sell the properties and at all times acted professionally and in the best interest of the principal. He denied any "underhand dealings" in the transaction or any "dark secrets" which the

fourth defendant exploited. He readily accepted that the letter of the plaintiff of July 2003 offering to purchase the property had been received at his office G but by a junior person who has since left employment. He stated that at the time the offer was made the property was not on the market and by the time he was mandated to sell it, he was not aware that the plaintiff had made an offer some seven years earlier.

Regarding the right of first refusal, Root denied that the plaintiff had any such right as the plaintiff's rights were governed by the written lease agreement H

Mathonsi J

A which specifically excluded it. He stated that the right only exists where, in writing, the lease would state that if the owner decided to sell the property during the course of the lease, the owner would advise the tenant, in writing, as to the conditions of the proposed sale and grant the tenant a limited period of time within which to match any offer made.

B Root denied the existence of a custom or convention giving a sitting tenant a right of pre-emption even where the lease agreement does not provide for it or specifically excludes it. His evidence in that regard resonates with that of Meeting Gomba, leaving Upenyu Jaka as the only estate agent alleging its existence.

It was Root's evidence that there were multiple tenants at the properties C but all of them were aware that the properties were for sale. He denied that the plaintiff had made an offer to purchase the property at the time that it was still available in the market. He went on to say that, although he had received the offer from Christian, he had been instructed by his clients to accept that of the fourth defendants as the client wanted to dispose of the D properties quickly.

Root gave his evidence well, readily accepting that he did not deal with the first and second defendants and that he did not have their mandate to represent them in court. Where he was not sure of the facts he did not hesitate to point that out. I accept his evidence.

Maston Peter, the director of the fourth defendant also testified. He stated E that in March 2010, the third defendant had filed an urgent chamber application against the fourth defendant seeking an order stopping it from carrying out renovations, extensions and construction work at the property the fourth defendant rented, No. 135 Mbuya Nehanda Street. The matter was withdrawn after a settlement was reached after which he approached the third F defendant with an offer to purchase the properties. Subsequent to that, a sale was concluded in terms of which he purchased the properties for $200 000.

He had not inspected the properties before the purchase because he knew them well and they were all in such dilapidated state that it was just like buying the ground only. He bought them merely to bring the structures down and start construction afresh.

G The fourth defendant paid the purchase price in instalments over four months starting with a deposit of $50 000. They then sought transfer, whereupon Zimra came and inspected the properties. Zimra demanded that they secure two valuation reports which were done by Pride Real Estate, which placed the value at $233 500 and Ebenezer Properties (Pvt) Ltd which valued them H at $285 000. Zimra settled for the latter value and assessed capital gains

---

Mathonsi J

tax of $14 250. The fourth defendant duly paid that and obtained the Zimra A clearance certificate. It also paid $11 000 to the local authority as arrear rates to pave the way for transfer which was done by deed of transfer number 239/11 on 28 January 2011.

Peter testified further that at the time that he purchased the property he was not aware that the plaintiff had an interest in it. Specifically, he was not B aware of any right of first refusal enjoyed by the plaintiff, who also did not do anything to protect such right if ever it existed.

After taking transfer, he instructed the third defendant to give all the 26 tenants sitting at the properties three months' notice to vacate. Most of the tenants vacated, except for the plaintiff, which refused not only to vacate C but also to pay any rent or water and electricity bills. Those tenants, other than the plaintiff, who remain are paying rent and other charges to the fourth defendant. When the parties went for a pre-trial conference before Bhunu J, it was agreed that the

third defendant would measure the area occupied by the plaintiff in order to ascertain the rent and other charges due by the plaintiff. This was done and the fair rent due by the plaintiff is $826.51 per D month in terms of the computation done by the third defendant (Exhibit 73). The plaintiff is therefore in arrears of $16 370. It also owes electricity charges of $1 084.04 and $3 877.58 for municipal charges.

Peter testified that the fourth defendant was an innocent purchaser which purchased the property in good faith. He denied that there were any "dark E secrets" between him and Root or that he used "underhand dealings" to purchase the property.

Maston Peter gave his evidence very well and was not shaken at all under cross examination. Although he was a bit emotional, especially when accused of impropriety which was not defined, he was consistent in his evidence. He struck me as a truthful witness. I have no reason whatsoever to disbelieve him. F

Rudo and Diana Peter, sisters of Maston Peter, were also called by the fourth defendant. They denied ever meeting Miriam Denga to discuss the pending sale of the property. Both insisted that Denga is far older than them and they are not even on talking terms. Their evidence and that of plaintiff's witnesses on that point is mutually destructive. Nothing useful comes out of it. G

I now turn to answer the questions posed for this trial at the pre-trial conference.

Did the plaintiff have a right of first refusal bestowed on it by contract?

According to R H Christe *Business law in Zimbabwe* 2 ed (Juta & Co Ltd) at p 146: H

2012 (2) ZLR p463

Mathonsi J

> A "A right of pre-emption or first refusal differs from an option by giving the holder the right to buy in priority to other prospective buyers if and when the seller decides to sell."

In *Central African Processed Exports (Pvt) Ltd & Ors v Macdonald & Ors* 2002 (1) ZLR 399 (S) at 403C–H, Malaba JA (as he then was) quoted with approval Nicholas JA in *Soteriou v Retco Poyntons (Pty) Ltd* 1985 (2) SA 922 (A) B at 932B–F where the latter said:

> "A right of first refusal is well known in our law. In the context of sale, it is usually called a right of pre-emption. The grantor of such a right cannot be compelled to sell the property concerned. But if he does sell, he is obliged to give the grantee the preference of purchasing and consequently he is prevented from selling to a third person without giving the first refusal … So, a right of C pre-emption involves a negative contract not to sell the property to a third party without giving the grantee the first refusal; and the grantee has the correlative legal right against the grantor that he should not sell. This is a right which is enforceable by appropriate remedies …
>
> 'Refusal' imports an offer. As Farwell J said in *Manchester Ship Canal Co v Manchester Racecourse Co* [1900] 2 Ch 352 at 364:
>
> > D 'Now, a refusal, to my mind, implies an offer. A thing is not in ordinary parlance refused before it is offered.'"

The learned judge of appeal went on to say at 403G and 404A;

> "The facts show that no right of first refusal was granted to Central African by the owner of the property in any of the numerous written leases the parties entered into. I am prepared, in the circumstances of this case to accept that the E letter from Roz Baker to Mr Gullan dated 6 November 1996 granted him a right of first refusal and an offer to exercise that right. Mr Gullan exercised the right by refusing to purchase the property at the price of $1,6 million which the seller was prepared to accept from a third person. The offer of first refusal could not remain open after it had been refused."

See also *Nerger Properties (Pvt) Ltd v R Chitrin & Ors (Pvt) Ltd* 2006 (2) ZLR 287 (S) F and *Eastview Gardens Residents Association v Zimbabwe Reinsurance Corporation (Ltd) & Ors* 2002 (2) ZLR 543 (S) 548G–H. In that case Malaba JA stated at 549B:

> "It is clear from all these decided cases that a right of pre-emption can only be created by contract or agreement between the grantor and the grantee. Where G breach of the right is alleged as a cause of action and its existence is denied, the onus is on the plaintiff to show that there was an agreement between the parties in terms of which the defendant undertook to offer to him the property at a price equal to that offered by another."

The foregoing is a pronouncement of the Supreme Court binding on me. For a right of first refusal to exist there must be a contract between the parties H creating it. *In casu* it is common cause that the

lease agreement between

Mathonsi J

the parties did not contain any right of first refusal. Quite to the contrary, it A specifically excluded any "variations or collateral agreements" not contained in the lease unless such were reduced to writing and signed by the parties.

The plaintiff has sought to argue that the right of pre-emption was given to it by correspondence. I have already stated that its letter of 29 July 2003 and the response from the third defendant did not create a contract between B the parties. In considering the existence or otherwise of a contract of pre-emption the basic rules of offer and acceptance apply. It cannot be said that these existed especially as the third defendant made it clear that the property was not for sale and that it would notify the plaintiff if the house was put on the market. No intention to create a right of pre-emption can be imputed on C the third defendant by virtue of the wording of its letter of 31 January 2003.

I therefore answer the first question in the negative.

Is there in Zimbabwe, a custom, convention and practice under which plaintiff can claim the right of first refusal as a sitting tenant, on a property to be sold? D

The evidence led from the three expert witnesses is divided. Meeting Gomba and Antony Robert Root, estate agents of long standing testified that no such custom exists and that such right cannot only be granted in writing in the lease agreement. Only Upenyu Taka, a relative lightweight in the profession, claimed the existence of such a right. E

The authorities I have referred to above clearly indicate that a right of pre-emption can only be granted by the property owner and by agreement of the parties: *Eastview Gardens Residents Association supra* at 548G.

I therefore conclude that no such convention exists outside the agreement of the parties. F

Was the sale of the property regular or illegal and was the transfer of the property regular?

The plaintiff tried very hard to impugn the agreement and indeed the transfer. It tried to suggest, extraneously in my view, that the first and second defendants did not authorise the sale or that transfer documents were signed G on the strength of an "expired" power of attorney. Other than the fact that the plaintiff was not privy to those transactions, I am satisfied that the sale and transfer were regular.

I therefore answer those two questions in the affirmative and find that there was nothing illegal in both the sale and the transfer. H

Mathonsi J

A **Whether or not fourth defendant is a** *bona fide* **purchaser**

I have already made a finding that Maston Peter was a truthful witness and that the sale and transfer of the property was above board. The plaintiff has failed dismally to discredit the manner in which the property was sold. The fact that the property was not offered to the plaintiff, when it did not have B a protected right to be offered the property, and that whatever offer it made was not considered, does not mean that the fourth defendant was not a *bona fide* purchaser.

Whether or not the plaintiff is liable to pay holding over damages, rates, water and electricity?

C The fourth defendant is the registered owner of the property. The plaintiff remains a tenant who is required to pay rent and other charges. Even if it had a right of pre-emption, until such time that it had exercised that right and the property transferred to it, the plaintiff would still be a tenant required to pay rent and other charges.

The arrears in rentals and other charges have been set out in evidence and D no meaningful challenge was made against the quantum of those damages. In fact, the evidence shows that the plaintiff owes more than what is prayed for. I therefore conclude that the claims have been proved. The plaintiff is liable in that regard.

It is unfortunate that the plaintiff elected not to recognise the fourth defendant E as owner and refused to pay in breach of the lease agreement. The fourth defendant is entitled to evict the plaintiff.

Whether the plaintiff as a third party can challenge the authority of the first defendant in acting on behalf of second defendant in a contract it was not privy to?

F This issue has been rendered superfluous by the findings I have already made on the other issues. Whatever challenge the plaintiff mounted in this regard has not been successful. The matter should therefore end there.

Whether or not the alleged right of first refusal between first and second defendants is enforceable against third parties?

G I have made a finding that the plaintiff has failed to prove the existence of a right of first refusal. No such right has been shown by the evidence. Accordingly the enquiry should end there.

In the result, I find against the plaintiff and make the following order, that:

1. The plaintiff's claim against all the defendants be and is hereby dismissed H with costs.

Mathonsi J

2. The plaintiff is hereby ordered to vacate stand 1498 Salisbury Township A also known as 129 Mbuya Nehanda Street, Harare.
3. The plaintiff should pay holding over damages of US$350 per month with effect from 1 April 2011 to date of eviction.
4. The plaintiff should pay arrear rates, water and electricity charges of US$4 159.48 and any such future charges until the date of eviction. B
5. The plaintiff shall bear the costs of suit on an ordinary scale

A R Chizikani, plaintiff's legal practitioners

Wintertons, fourth defendant's legal practitioners C

Sinyoro & Partners, first, second and third defendants' legal practitioners

---

© 2015 Juta and Company (Pty) Ltd.

Document 57 of 60

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2012/Volume 2/DAWSON & ANOR v NERRY INVESTMENTS (PVT) LTD 2012 (2) ZLR 467 (H)

DAWSON & ANOR v NERRY INVESTMENTS (PVT) LTD 2012 (2) ZLR 467 (H)

Citation	2012 (2) ZLR 467 (H)
Case No	Judgment No. HB-250-12
Court	High Court, Bulawayo
Judge	Kamocha J

Heard 3 October 2012; *CAV*

Judgment 6 December 2012

Counsel Mrs *H Moyo,* for the applicants
T Mpofu, for the respondent

Case Type Opposed application

Annotations No case annotations to date

Flynote

Company – *winding up – by the court – petition for winding up – may be made by court application or chamber application*

Headnote

Under s 199 of the Companies Act [*Chapter 24:03*] a company may be D wound up by the court, on any of the grounds set out in s 206. Section 207 provides that an application to the court for the winding up of a company shall be by petition presented by the company or creditor or creditors, including any contingent or prospective creditor or creditors, contributory or contributories or by all or any of those parties together E or separately. The word "court" as used in these provisions means the High Court, as being the court of jurisdiction. It does not relate to the procedure to be used in company winding up proceedings. In s 2 of the Act "court", in relation to any company, means the High Court, and in relation to any offence against the Act, includes a magistrates court having jurisdiction in respect of that offence. In terms of s 15(2) F of the Interpretation Act [*Chapter 1:01*], a "petition" to a court means an application to a court or judge. This means that an application for winding up may be by court application or by chamber application

Legislation considered

Companies Act [*Chapter 24:03*], ss 2, 199, 206 & 207

G Companies (Winding Up) Rules (RGN 841 of 1972), s 5

High Court Rules 1971 (RGN 1047 of 1971), rr 4C & 229

Interpretation Act [*Chapter 1:01*], s 15(2)

Case information

Mrs *H Moyo,* for the applicants

H *T Mpofu,* for the respondent

2012 (2) ZLR p468

Kamocha J

Judgment

Kamocha J: On 4 July 2012 this court issued a provisional order in the A following terms:

> "Interim relief granted
>
> Pending the final determination of this matter it is hereby ordered that:-
>
> 1. Nerry Investments (Pvt) Ltd (herewith called "the company') be and is hereby placed under provisional liquidation pending the grant of a final B order of liquidation or the discharge of this order as the case might be.
> 2. Barbra Lunga of Impact Trust and Executors (Pvt) Ltd be and is hereby appointed the Provisional Liquidator of the company with powers set out in section 221 (1) and (2) of the Companies Act [*Chapter 24:03*].

3. The existing directors of the company be and are hereby divested of their powers and authority in such capacities. C
4. Any interested party may appear before this honourable court sitting at Bulawayo on the ……. day of ……2012, to show cause why a final order should not be made placing the company under final liquidation and confirming the other relief granted herein and ordering that the costs of these proceedings shall be costs of the liquidation.
5. Any interested parties may inspect a copy of this application at the office D of the Deputy Registrar of the High Court of Bulawayo or at the office of the applicant legal practitioners Messrs Joel Pincus Konson & Wolhuter, 1st Floor Public Library Building, 100 Fort Street/8th Avenue."

The terms of the final order being sought are:-

"1. That the provisional order of this honourable court winding up Nerry Investments (Pvt) Ltd be and is hereby confirmed. E
2. That Barbra Lunga of Impact Trust and Executors (Pvt) Ltd is hereby appointed in her personal capacity as the liquidator of the company.
3. That the costs of this application shall be costs of the liquidation."

The return date of the provisional order was 23 August 2012. Upon receipt of the provisional order, the respondent filed an urgent chamber application F on 13 July 2012 under case number HC 2363/12 wherein it sought an order anticipating the hearing date for the provisional order. The application was filed notwithstanding the fact that the respondent had not filed any opposing papers to the confirmation of the order and that the provisional order had not yet been published in the respective publications in order to give any other G interested parties an opportunity to respond to the provisional order. That urgent application was, however, not persisted with and was abandoned.

On 18 July 2012 the respondent filed its notice of opposition and John Josias Moyo deposed to an affidavit wherein he averred that he was a director of the respondent company and was, in that position, authorized to depose to the affidavit in terms of a board resolution passed by the directors of the H

A company on 13 June 2012. He confirmed that the resolution had not lapsed. While confirming that the application was properly served on the respondent the deponent stated that having read the provisional order and the applicant's affidavits all he needed to do was to raise a point *in limine* as he saw no need to delve into the merits of the voluminous and defamatory founding affidavit filed by the applicants.

B I pause to observe that the deponent's attitude is very difficult to understand. In one breath, he says the averments in the founding affidavit are defamatory and, in the next, he says he saw no need to delve into the merits of such allegations. In fact, the allegations are very serious and detailed. Any injured party would reasonably refute them in order to defend his good name and C reputation. For instance, the other director of the respondent, Kembo Mohadi, against whom substantial allegations were also made in the founding papers, did not even file any opposing papers. As stated earlier the allegations are detailed and serious. They should have been refuted if they had been devoid of merit. It is now trite that what is not denied is taken as having been admitted.

D *In limine* the deponent submitted that the provisional order should not have been granted in the first place as the application was allegedly not properly before this court as the applicants allegedly used the wrong procedure.

It was contended that the correct procedure for winding up a company was by court application as expressly provided in ss 206 and 207 of the Companies Act [*Chapter 24:03*]. The provisions were mandatory and could E not be remedied under r 229 of the High Court Rules, so the argument went.

The relevant provisions of s 206 of the Act provide as follows:

"A company may be wound up by court –

(a) If the company had by a special resolution resolved that the company be wound up by the court. F
(b) …
(c) …
(d) …

(e) …

(f) … G

(g) if the court is of the opinion that it is just and equitable that the company should be wound up".

Section 207 provides that an application to the court for the winding up of a company shall be by petition presented by the company or creditor or creditors, including any contingent or prospective creditor or creditors, contributory H or contributories or by all or any of those parties together or separately.

2012 (2) ZLR p470

Kamocha J

The deponent of the opposing papers contended that the above provisions of A the Act were violated by the applicants when they filed a chamber application instead of a court application. The despondent through his legal practitioners submitted that it should have been by a court application. In his view failure to comply with the law would not be condoned by either r 229C or r 4C.

The deponent's other contention was that the applicants had also failed to B comply with s 5 of the Companies (Winding Up) Rules 1972 (RGN 841 of 1972) which sets out the information which ought to be included in an application for liquidation.

The deponent's allegations are without merit, as the objects and nature of the company were clearly stated in the founding affidavit. The petitioners are directors of the respondent company and went on to detail the reasons C for seeking an order for its winding up. They named Barbra Lunga of Impact Trust and Executors (Pvt) Ltd as the provisional liquidator. She was willing to take up that appointment. This court makes a specific finding that the provisions of s 5 of the Companies (Winding Up) Rules 1972 were not violated in anyway. D

I now turn to the main contention made by the deponent. The deponent's belief is that when s 199 of the Companies Act [*Chapter 24:03*] provides that the winding up of a company may be by the court, it means by court application. Similarly, when s 206 provides that a company may be wound up by the court, it means by court application. E

The deponent's submission is clearly faulty and lacks any merit. Quite clearly, the word "court" as used in these provisions is used in relation to the High Court as the court of jurisdiction. It does not relate to the procedure to be used in company winding up proceedings. In s 2 of the Act, "court", in relation to any company, means the High Court, and in relation to any offence against the Act, includes a magistrates court having jurisdiction in F respect of that offence.

So when any provisions of the Companies Act refer to a "court", other than in a criminal matter, they mean the High Court. Similarly when the Companies (Winding Up) Rules make reference to a "court", what is meant is the High Court. G

The procedure for winding up a company is laid down in s 207 quoted above. For instance, a company seeking voluntary winding up has to present an application to the High Court by way of a petition.

A petition means an application to the court. An application can be made to a court or judge. Section 15(2) of the Interpretation Act [*Chapter 1:01*] provides that: H

2012 (2) ZLR p471

Kamocha J

A "(2) Any reference in an enactment to a petition to a court shall be construed as reference to an application to the court or to a judge … made in accordance with the rules of the court."

This court has no hesitation in rejecting the deponent's fallacious contention which is devoid of any merit. The applicants were correct in instituting the application the way they did.

B As alluded to earlier in this judgment, the deponent did not see fit to address himself to the merits of the application. He is taken as having no meaningful defence to the merits.

In the result, it is ordered that the provisional order issued by this court on 4 July 2012 be and is hereby confirmed with costs.

C *Joel Pincus, Konson & Wolhuter* applicants' legal practitioners

G N Mlotshwa & Co, respondent's legal practitioners

© 2015 Juta and Company (Pty) Ltd.

Document 58 of 60

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2012/Volume 2/MAPINGURE v MINISTER OF HOME AFFAIRS & ORS 2012 (2) ZLR 472 (H)

MAPINGURE v MINISTER OF HOME AFFAIRS & ORS 2012 (2) ZLR 472 (H)

Citation	2012 (2) ZLR 472 (H)
Case No	Judgment No. HH-452-12
Court	High Court, Harare
Judge	Bere J
Heard	28 March 2012; 29 March 2012; *CAV*
Judgment	12 December 2012
Counsel	*I Murerwa*, for the applicant No appearance for the respondents
Case Type	Application for default judgment
Annotations	No case annotations to date

Flynote

Delict – *negligence – public officials – failure to assist woman made pregnant as result of unlawful intercourse – no duty imposed on such officials by relevant legislation – no actionable negligence shown*

Statutes – *Termination of Pregnancy Act [Chapter 15:10] – when a pregnancy* D *resulting from unlawful intercourse may be lawfully terminated – procedure to be followed by woman concerned – need for affidavit to be made by her before a magistrate, who may then issue certificate authorising termination – no such affidavit made – issue of certificate not lawful* E

Headnote

The applicant was raped by robbers who attacked her residence. She reported the rape to the local police immediately afterwards and requested the attending detail to arrange for her to immediately see a doctor to get sought medical intervention to prevent pregnancy and any possible transmission of sexually transmissible infections. The police were dilatory F about getting her to a doctor, keeping her waiting the whole day. When she saw a doctor, he told her that he could only terminate any pregnancy in the presence of the police and that a report was also required. She was also told by the doctor concerned that the desired termination had to be done within 72 hours of the unlawful intercourse. The doctor then invited the applicant to come back to the hospital the following day with G a police officer. The plaintiff went to the police the next day and was attended to by the investigating officer. The investigating officer advised the applicant that a particular police officer, who was not present at the station at the time, was the only officer who could take her to the doctor. In the absence of a "report" the doctor would not help on that day, nor on the next, the particular police officer still being "unavailable". Only H

Bere J

A on the third day was the officer present but by the time the applicant went to the doctor with the officer, the doctor said it was too late, more than 72 hours having passed.

The police officer then referred the applicant to a public prosecutor where again the applicant made it clear she wanted the pregnancy terminated. The applicant was told by the public prosecutor to wait until the rape B trial was over.

That the applicant was pregnant was confirmed about a month after the rape.

About three months after the rape, the applicant, again on the advice of the officer mandated to deal with rape cases, went back to the prosecutors' office where the applicant saw one of the prosecutors, who again advised C her that she needed to get a pregnancy termination order. A magistrate whom she then approached advised that he could not help because the trial had not taken place. It was not until the applicant was nearly seven months pregnant that an order was given, but the matron assigned to carry out the termination felt that it was no longer safe to do so and declined to terminate the pregnancy. A full term child was later born.

D The applicant brought an action against the Ministers of Home Affairs, Health and Justice for damages for physical and mental pain, anguish and stress suffered and for maintenance for the child until the child turned 18. The basis of the claim was that the employees of the three Ministries concerned were negligent in their failure to prevent the pregnancy or to E expedite its termination. The particulars of negligence were itemised.

Held, that the termination of pregnancy in this country is governed or regulated by the Termination of Pregnancy Act [*Chapter 15:10*]. Under s 4(c), a pregnancy may be terminated where there is reasonable possibility that the foetus is conceived as a result of unlawful intercourse. Under s 5, a pregnancy may only be terminated on the grounds referred to in s 4(c) by F a medical practitioner after a certificate has been issued by a magistrate of a court in the jurisdiction of which the pregnancy is terminated to the effect that, in the case of alleged rape or incest, the woman concerned has alleged in an affidavit submitted to the magistrate or in a statement made under oath to the magistrate that the pregnancy could be the result of that rape or incest. Liability of the cited defendants must naturally G fall within the four corners of the Act. There must be a specific finding made by the court that the defendants, or one or more of them, acted in a manner that was not consistent with the Act

Held, further, that the Act itself does not make any specific reference to the role which police officers play in the chain of events that lead to the H termination of pregnancy. However, the Act requires that "the woman

Bere J

concerned has to allege in an affidavit", which must be presented to a A magistrate, that her pregnancy could be a result of rape. No such affidavit was made. The police officers were of no assistance to the applicant in giving her the correct advice. That there was some negligence in the conduct of police in their interaction with the applicant was quite evident. However, this is the kind of negligence is sometimes referred B to as "negligence in the air". The police officers' mandate in a rape case is to ensure the culprit is brought to book in criminal proceedings. Their mandate does not extend to ensuring the successful termination of an unwanted pregnancy. The Act does not say so and its clear language must not be stretched to cover situations which even the legislature could not have contemplated. C

Held, further, that the role of a medical practitioner in the termination of the undesired pregnancy is quite simple and straightforward and is governed by s 5(4) of the Act. That section requires the medical practitioner to terminate the pregnancy once a magistrate has issued the appropriate certificate to authorise such termination. Without the certificate it would D have been unlawful to proceed. When the certificate was finally issued, termination would have been unsafe. No negligence could be imputed to the medical personnel involved.

Held, further, that a public prosecutor's mandate is to prosecute the alleged offender. He has nothing to do with the termination of the pregnancy, nor is he obliged to give legal advice to a person in the position of the E applicant. The mere fact that officials from the Ministry of Justice

may have mistakenly or wrongly advised the applicant on the process of termination of her pregnancy did not give her ground to act against them because they were not her legal representatives.

Held, further, that the applicant's situation was understandable. She was ignorant of the F procedures involved. However, just as ignorance of the law is no excuse, neither can one find refuge in such ignorance to attach liability to someone else. If the applicant was not aware of the process or procedure for terminating her pregnancy she was at liberty to seek proper legal advice in time. G

Case referred to

Mayor of the City of Harare & Anor v Magama & Anor 1992 (2) ZLR 75 (S)

Legislation considered

Termination of Pregnancy Act [*Chapter 15:10*], ss 4, 5 & 6 H

2012 (2) ZLR p475

Bere J

Case information

A *I Murerwa*, for the applicant

No appearance for the respondents

Judgment

Bere J: This is an application for the granting of default judgment against the defendants who after filing a notice of intention to defend this action through the Civil Division of the Attorney-General's Office neglected to file their B pleas, resulting in them being barred from pleading hence this application.

It is sad, in my view, that once again the dilatory approach by the Civil Division of the Attorney-General's Office comes under scrutiny. This court is naturally concerned with the casual approach adopted by the Division, given the significance of this case and the far reaching consequences of C the judgment desired by the applicant. Government departments have a legitimate expectation for quality professional assistance from the division. The limping services which were rendered by the Division in this matter do not enhance the stature of the Division.

The background

D This case is no doubt a tragedy. The facts, which are not in dispute, can be summarised as follows. On 4 April 2006 the plaintiff was raped by robbers who attacked her residence in the Chegutu area, after which she immediately lodged a report at the police at Chegutu. The report was made on the same morning of the alleged rape.

E At the police station, the applicant requested the attending detail to arrange for her to immediately see a doctor as she sought medical intervention to prevent pregnancy and any possible transmission of sexually transmissible infections. She did not get the prompt desired assistance. She was kept waiting for the whole day in order to get assistance from the officer mandated to deal with rape victims. It was not until 1600 hours on the same day that the F applicant was taken to hospital where she was attended to by a Dr Kazembe.

The applicant asked the doctor concerned to ensure that she did not fall pregnant or contract any sexually transmissible infection. The doctor advised the applicant that he could only terminate the pregnancy in the presence of the police and that a report was also required. The applicant was further told by the doctor concerned that the desired termination had to be done within G 72 hours of the unlawful intercourse. The doctor then invited the applicant to come back to the hospital on the following day with a police officer.

On 5 April 2006, around 7 o'clock in the morning, the applicant went back to Chegutu police station where she was referred to the Criminal Investigation Department (CID) and attended to by the

investigating officer. Again the H investigating officer advised the applicant that one Musarurwa, who was

Bere J

not present at the station at the time, was the only officer who could take A her to the doctor.

Conscious of the need to act within the 72 hours advised by the doctor, the applicant went back to the doctor and advised him the officer responsible was not at the station. The applicant asked the doctor to terminate the pregnancy but the doctor insisted he could only do so if a "report" was available. B

On 6 April 2006, the applicant went back to the police station where she was once again advised that the officer responsible was unavailable. Frustrated, she went back to the doctor to whom she reported that the police officers were not co-operating and emphasised her fear of falling pregnant. The doctor was adamant he could not assist her as the police had to do their investigations first. The doctor cleaned and dressed her wound and sent her away. C

It was only on 7 April 2006 that the applicant was able to find the appropriate officer at the station. When the officer escorted her to the doctor, the doctor advised that it was too late to terminate the pregnancy.

On 5 May 2006, the applicant's pregnancy was formally confirmed. D

The police officer then referred the applicant to a public prosecutor where again the applicant made it clear she wanted the pregnancy terminated. The applicant was told by the public prosecutor to wait until the "rape trial was done".

In July of the same year the applicant, on the advice of the officer mandated to deal with rape cases, went back to the prosecutors' office where the applicant E saw one of the prosecutors, whom she again advised she required to get her pregnancy terminated order.

The prosecutor concerned saw a magistrate who, according to the applicant, advised that he could not help because the trial had not been done. It was not until 30 September 2006 that the certificate was eventually given to the F applicant. The applicant's pregnancy was now around seven months old. By the time the certificate was obtained, the matron who was assigned to carry out the termination felt that it was no longer safe to do so and she declined to terminate the pregnancy.

The long and short of it is that for all her efforts to have the pregnancy G terminated, the applicant, against her will, kept the pregnancy to full term and eventually delivered a baby girl on 24 2006.

It is this unwanted birth of the child and the complications associated with the conception itself, plus the various efforts she made to have the pregnancy terminated, which prompted the applicant to issue court process against the defendants seeking the following relief: H

Bere J

(a) payment A in the sum of US$10 000 for physical and mental pain, anguish and stress suffered.;

(b) payment in the sum of US$41 904 for the maintenance of the child since her birth in December 2006 until she attains the age of 18 years or becomes self-supporting, whichever may be the sooner; B

(c) interest on the global amount of claim from date of judgment to date of full payment;

(d) costs of suit.

The basis of the applicant's claim is that the employees of the three cited defendants were negligent in their failure to prevent the pregnancy or to C expedite its termination.

In her declaration the applicant alleged that the employees of the first defendant were negligent in one or more of the following respects:

(a) they failed to attend to the plaintiff timeously for the pregnancy to be prevented; D

(b) they failed to take the plaintiff to the doctor timeously for the pregnancy to be prevented;

(c) they failed to attend at the hospital with the plaintiff within a reasonable time for the pregnancy to be terminated;

(d) the police failed to take reasonable steps to ensure that the pregnancy E was terminated.

As for the employees of the second defendant, the applicant alleged that:

(a) they failed to prevent the pregnancy when it could have been reasonably prevented;

(b) they failed to take reasonable steps to terminate the pregnancy.

F Finally, as for the employees of the third defendant, the applicant alleged they were negligent in one or more of the following respects;

(a) they failed to attend to the plaintiff's case timeously in order to issue a certificate for the pregnancy to be terminated;

(b) they failed to take reasonable steps necessary to ensure that the certificate G required in terms of the Termination of Pregnancy Act was granted, and thereby prevented the termination of the pregnancy.

It is not in dispute that at all material times the defendants' employees were acting in the course and scope of their employment.

In determining this application I will also proceed on the basis that what the H applicant alleges in her affidavit of evidence as well as her declaration is

accurate, since, by allowing themselves to be barred, the defendants deprived A themselves of the opportunity to controvert the narration of events as put across by the applicant.

The law on termination of pregnacy in Zimbabwe

The termination of pregnancy in this country is governed or regulated by the Termination of Pregnancy Act [*Chapter 15:10*] ("the Act"). B

The most relevant sections of the Act that deal with the situation that confronts me in this case are ss 4 and 5.

The relevant paragraph of s 4 is framed as follows:

> "**4 Circumstances in which pregnancy may be terminated**
>
> Subject to this Act, a pregnancy may be terminated – C
>
> (a) ...
>
> (b) ..
>
> (c) where there is reasonable possibility that the foetus is conceived as a result of unlawful intercourse".

The most relevant part of s 5 reads as follows: D

> "**5 Conditions under which pregnancy may be terminated**
>
> (4) A pregnancy may only be terminated on the grounds referred to in paragraph (c) of section *four* by a medical practitioner after a certificate has been issued by a magistrate of a court in the jurisdiction of which the pregnancy is terminated to the effect that –
>
> (a) he has satisfied himself – E
>
> (i) that a complaint relating to the alleged unlawful intercourse in question has been lodged with the authorities; and
>
> (ii) after an examination of any relevant documents submitted to him by the authorities and after such interrogation of the woman concerned or any other person as he may consider necessary, that, on a balance of probabilities, unlawful intercourse with the woman concerned has F taken place and there is a reasonable possibility that the pregnancy is the result of such intercourse; and
>
> (iii) in the case of the alleged incest, that the woman concerned is related within the prohibited degree to the person with whom she is alleged to have had incest; and
>
> (b) in the case of alleged rape or incest, the woman concerned has alleged *in an* G *affidavit submitted to the magistrate or in a statement made under oath to the magistrate that the pregnancy could be the result of that rape or incest, as the case may be"* (my emphasis)..

I find it quite instructive that s 6 of the same Act deals with appeals by "any person who is dissatisfied with the refusal of the superintendent of a designated institution". H

Bere J

A In my view, liability of the cited defendants must naturally fall within the four corners of the Act. There must be a specific finding made by the court that the defendants, one or more of them, acted in a manner that was not consistent with the act in question.

I propose to consider the alleged liability of the defendants in the order they B appear in the declaration itself.

The Minister of Home Affairs

It is true that after the alleged rape the applicant presented herself to different officers of the Ministry, who in turn shuffled her from office to office whilst time for the required termination was running out.

C The Act itself does not make any specific reference to the role which police officers play in the chain of events that lead to the termination of pregnancy. However, the same Act prescribes that "the woman concerned has to allege in an affidavit" which must be presented to a magistrate that her pregnancy could be a result of rape.

The applicant does not allege that she did this in all her affidavits that were D filed in these proceedings.

The second requirement or the other alternative requirement prescribed by s 5(4)(b) of the Act is that a woman requiring to have her pregnancy terminated must make a statement under oath to a magistrate that her pregnancy could be the result of *inter alia* rape.

E It is common cause that once again the applicant did not do this as evidenced by the conspicuous absence of this averment in all of the papers filed.

It is equally true that the police officers were not of assistance to the applicant in giving her the correct advice. Without in anyway condoning the conduct of the police in this regard, I am far from being convinced that by being a rape victim, the role of the police *vis-à-vis* the applicant should be raised F to that of legal advisers to her.

It is understandable that the applicant was ignorant of the action that she had to take and that because of this she wasted valuable time shuffling from one office to the other.

That there was some negligence in the conduct of police in their interaction G with the applicant is quite evident. However, this is the kind of negligence which some legal minds have referred to as "negligence in the air": *per* McNally JA in *Mayor of the City of Harare & Anor v Magama & Anor* 1992 (2) ZLR 75 (S) at 83.

The police officers' constitutional mandate in a rape case is to ensure the H culprit is brought to book in criminal proceedings. I do not read their mandate

Bere J

to extend to ensure the successful termination of unwanted pregnancy. The A Termination of Pregnancy Act does not say so and its clear language must not be stretched to cover situations which even the legislature could not have contemplated.

It is for this reason that I am unable to attach any delictual liability to the police officers because of their omissions. If liability cannot be traced to B the police officers, it goes without saying that the first defendant must be exonerated from any civil liability.

The Minister of Health and Child Welfare

The role of a medical practitioner in the termination of the undesired pregnancy is quite simple and straightforward and it is governed in terms of s 5(4) C of the Act. That section, as I perceive it, requires the medical practitioner to terminate the pregnancy once a magistrate has issued the appropriate certificate to authorise such termination. This position was emphasised for time without number by the doctor who was approached by the applicant on numerous occasions. The applicant could not possibly have reasonably expected the doctor to act in violation of the law. D

When the certificate was eventually obtained when the applicant's pregnancy was seven months or so old, the conviction by the matron who was supposed to terminate it was that it was no longer safe to do so. I did not hear the applicant to be arguing that at that stage it was still safe to have the pregnancy terminated nor did I hear her through her filed papers to be saying that the E doctor or matron was to blame for the delay in her obtaining the appropriate certificate. In fact, her own counsel, through supplementary heads of argument filed at the request of my brother Mutema on 3 March 2012 concedes that when the certificate was eventually issued on 30 September 2006 it was too late for the pregnancy to be terminated. F

In any event, if the applicant felt that those who attended to her at the institution had erred, she could have at that stage taken her case on appeal to the Secretary as provided for in terms of s 6 of the Act.

Again, in this regard, I do not find any negligence on the part of the second defendant's employees. If anything, they deserve to be commended for their G insistence on compliance with the statutory requirements of the Act, and their cautious approach in avoiding taking a risk with the applicant's life by attempting termination of pregnancy which was approaching maturity.

It remains as fanciful thinking for the applicant to attach any liability to the second defendant's employees and consequently no vicarious liability can be visited upon the second defendant. H

Bere J

A **The third defendant**

It occurs to me that by the time the employees of the third defendants were approached valuable time had already been lost by the applicant in barking the wrong tree.

Counsel for the applicant/plaintiff suggests in his supplementary heads of B argument that "the Act does not specifically prescribe who should initiate the process of termination of pregnancies *per se* nor does the Act clearly spell out the procedure to be followed in effecting termination …"

With respect, I have extreme difficulty in following this argument. A proper reading of the Act, in my view, clearly shows that the victim must herself C take the initiative because not all victims who conceive through rape desire termination. The onus was clearly on the victim in this case to have initiated termination of her pregnancy.

Secondly, the conditions under which a magistrate issues a certificate to authorise termination of pregnancy is clearly spelt out in s 5(4) of the Act. It D is the applicant (the woman concerned) who had the obligation to present an affidavit to a magistrate or to physically present herself before a magistrate and make a statement under oath explaining the circumstances surrounding her pregnancy.

This is all that was required of the applicant. There is no role for the public prosecutor. Again, the public prosecutor's mandate is to prosecute the alleged E rapist and he has nothing to do with the termination of the pregnancy or to give legal advice to a person in the position of the applicant.

The applicant's numerous papers as presented to me in this application for default judgment do not show that when she presented herself to a magistrate she had satisfied the conditions under which the magistrate could have issued F her with the required certificate. The applicant took it upon herself to shuffle from office to office, from one officer to the other, instead of doing simple things required by the Act.

The applicant's situation is understandable. What runs through all her efforts is that she did not know the correct procedure. She was simply ignorant of the G procedure or processes involved and she spend quite some time knocking at almost every door that presented itself to her. But we all know, and tragically so, that ignorance of the law is no excuse, neither can one find refuge in such ignorance to attach liability to someone else.

That ignorance of the law does not excuse anyone is a concept that has H survived the test of time does not trigger any debate.

Bere J

The strong view that I take is that the mere fact that officials from the third A defendant may have mistakenly or wrongly advised the applicant on the process of termination of her pregnancy does not give the applicant ammunition to turn her sword against them because they were not her legal representatives.

If the applicant was not aware of the process or procedure for terminating her pregnancy she was at liberty to seek proper legal advice in time like B what she has now done in these proceedings.

The applicant cannot and must not be allowed to derive some financial benefit from her ignorance and/or failure to do the right thing at the appropriate time.

I would have understood the applicant's case if her position was that, after she had complied with the provisions of s 5(4) of the Act, the magistrate C failed to assist her. The applicant does not say that and she cannot possibly say that because it is clear she did not herself comply with the requirements of the Act. The reason for such non-compliance is simple. The applicant was simply ignorant of the processes involved.

I am again at a loss as to why the third respondent has been dragged to D court in these proceedings. The applicant cannot vent her frustrations for her misfortune on the cited Ministers or ministries because of her own inadequacies in failing to do the right thing in time.

I according dismiss her claim against the third defendant.

In conclusion, I want to comment the extensive research done by counsel for E the applicant and I am persuaded that in a proper case courts should have no difficulties granting the relief sought. Unfortunately this is not one such a case.

I may also want to add and say that if the applicant still finds it difficult to come to terms with the misfortune of having given birth in the circumstances she was subjected to she must be advised of the various options open to her F by her legal practitioners.

I have agonised over the question of costs in this matter, conscious that I have a wide discretion in this regard. This case has once again brought to the fore the rights of women falling into the category of the applicant. These are matters of national interest and I am satisfied the applicant must be spared G the burden of costs despite her having lost.

Consequently the applicant's application for default judgment is dismissed with no order as to costs.

Scanlen & Holderness, applicant's legal practitioners H

© 2015 Juta and Company (Pty) Ltd.

Document 59 of 60

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2012/Volume 2/REDAN PETROLEUM (PVT) LTD v BIOLINE PETROLEUM (PVT) LTD & ORS 2012 (2) ZLR 483 (H)

REDAN PETROLEUM (PVT) LTD v BIOLINE PETROLEUM (PVT) LTD & ORS 2012 (2) ZLR 483 (H)

2012 (2) ZLR p483

Citation	2012 (2) ZLR 483 (H)
Case No	Judgment No. HH-463-12
Court	High Court, Harare
Judge	Mutema J
Heard	14 December 2012
Judgment	14 December 2012

Counsel *T Nyamasoka*, for the applicant
Ms *F Mahere*, with her S Gutsa, for the respondents

Case Type Urgent chamber application

Annotations No case annotations to date

Flynote

Property and real rights – *spoliation order – when may be granted – quasi-possession arising out of management agreement – breach by one party – real nature of complaint by applicant – specific performance more* D *appropriate remedy*

Headnote

The first respondent, a fuel company, owed the applicant a large sum of money. The parties concluded a compromise agreement in an endeavour to restructure the debt. The salient terms of the agreement were that the applicant would assume the management of the retail forecourt of E a service station which was being leased by the first respondent; the applicant would pay the first respondent a percentage of the sales of fuel; it would be responsible for the salaries and wages of the forecourt staff; and the balance of dealer margins, after paying all trading expenses and the first respondent's overdraft facilities, would go towards settling F the debt owed to the applicant by the first respondent. This was done with the consent of the first respondent's landlord. The applicant took over the running of the service station and invested in re-branding it and procured staff uniforms. About nine months later, the applicant received a letter from the first respondent's co-director, the second respondent, purporting to terminate the agreement. Shortly after that, the second G respondent de-branded the service station by repainting it and removing the applicant's colours and logo and instructing forecourt employees not to wear the applicant's uniform any more. The third respondent took over the running of the finances of the service station, contrary to the terms of the compromise agreement. The respondents denied the applicant H permission to make fuel deliveries at the service station, saying that no

---

Mutema J

more of the applicant's products were to be sold from the service station. A The applicant sought an urgent spoliation order.

Held, that although the respondents' conduct seemed to be imbued with some semblance of spoliation, an order of spoliation was not the proper remedy for the wrong alleged by the applicant. The applicant's real complaint was that it alleged that the respondents were in breach of the alleged B management agreement. It should have sued for specific performance of the alleged contract, together with interlocutory relief in the form of an interdict, if it believed such relief was available.

Held, further, that while the concept of possession is widely defined to include quasi-possession or juridical possession (*possessio juris*), one must be careful not to overstate the availability of spoliation proceedings in regard C to quasi-possession. If the protection given by the *mandament van spolie* were to be held to extend to the exercise of rights in the widest sense, then rights such as the right to performance of a contractual obligation would have to be included, which would be to extend the remedy beyond its legitimate field of application and usefulness. To grant spoliation, with D the respondents contending that it was the applicant who had breached the management agreement, would, in effect, amount to granting an order for specific performance of a contractual obligation in circumstances where the respondents were precluded from adducing evidence to prove a breach by the applicant of the management agreement. E

Cases cited

Kama Construction (Pvt) Ltd v Cold Comfort Farm Co-Operative & Ors 1999 (2) ZLR 19 (S)

Shoprite Checkers Ltd v Pangbourne Properties Ltd 1994 (1) SA 616 (W)

Zulu v Min of Works, Kwazulu & Ors 1992 (1) SA 181 (D) F

Case information

T Nyamasoka, for the applicant

Ms *F Mahere*, with her S Gutsa, for the respondents

Judgment

Mutema J: This is an application for a spoliation order. The bare bones of the matter are as follows: The first respondent owed the applicant US$149000. G That debt has since ballooned to US$200 000. On 31 January 2012 the applicant and first respondent concluded a compromise agreement in an endeavour to restructure the debt. The salient terms of the agreement were that, effective 1 February 2012, the applicant would assume the management of the retail forecourt of the service station at stand 96A Norton Road, Norton, which is under lease by the first respondent; the applicant would pay the H

Mutema J

A first respondent US$0.01 per litre from the site margins at the end of each month, based on the previous month's traded values; the applicant would be responsible for the salaries and wages of the forecourt staff at the service station; and the balance of dealer margins, after paying all trading expenses and the first respondent's overdraft facilities, would go towards settling the debt owed to the applicant by the first respondent. This was done with the B consent of the first respondent's landlord.

The applicant took over the running of the service station and invested in re-branding it and procured staff uniforms. On 30 November 2012 the applicant received a letter from the first respondent's co-director, the second respondent, purporting to terminate the agreement. The third respondent is C the other director. On 2 December 2012, the second respondent de-branded the service station by repainting it and removing the applicant's colours and logo and instructing forecourt employees not to wear the applicant's uniform anymore.

The applicant's then legal practitioners wrote to the respondents warning them D not to take the law into their own hands. The warning fell on deaf ears. The third respondent took over the running of the finances of the service station, contrary to the terms of the compromise agreement, and on 6 December 2012 the respondents denied the applicant permission to make fuel deliveries at the service station, arguing that no more of the applicant's products were to be sold from the service station.

E It is against the foregoing backdrop that, on 10 December 2012, the applicant filed this urgent chamber application seeking restoration of the status quo ante pending the court's determination on whether the compromise agreement between the parties is valid and still subsisting.

The respondents opposed the application. The gist of the opposition can be F summarised as follows. At the time the applicant filed this application it was not in peaceful and undisturbed possession of the service station. The first respondent remained in de facto and de jure possession of the service station during the subsistence of the agreement in terms of the lease agreement with the landlord. Also, the first respondent's employees operated the service station, with the first respondent using the offices at the service station. The G applicant's role was to manage aspects of the fuel supply and distribution in accordance with the compromise agreement. The applicant was also entitled to brand the property. The applicant's peaceful and undisturbed possession of the property was under threat as from 12 October 2012 when the first respondent wrote a letter indicating that, unless the applicant complied with H clause 3 of the agreement, Mr and Mrs Rukuni, who had provided collateral

---

Mutema J

for a debt owed by the first respondent, would take over the management and A possession of the service station. Another letter dated 19 October 2012 giving the applicant an ultimatum to comply

with clause 3 of the agreement was to the same effect, that the applicant's possession was anything but peaceful and undisturbed. On the basis that the applicant was not in peaceful and undisturbed possession of the service station alone, the application ought B to be dismissed. Further, it is argued that restoration of status quo ante is no longer possible because Petrotrade has now taken over the service station. Also, so the argument goes, the relief sought is incompetent because it is a prohibitory order which seeks to enquire into the merits which is inconsistent with a spoliation order.

In order to comprehend the peroration of respondents' argument supra C regarding the prohibitary interdict, herewith is the relief in relevant part, being sought in the draft order:

> "Terms of the Final Order Sought
>
> That you can show cause to this Honourable Court why a final order should not be made in the following terms: D
>
> 1. That it be and is hereby declared that compromise agreement between the applicant and the first respondent is valid and still subsisting.
> 2. That the applicant, its representatives, employees, invitees and assignees are entitled to remain in peaceful undisturbed possession and use of a certain immovable property, being a service station situated at stand number 96A, E Norton Road, Norton until such a time – should it become necessary – as a competent court issues an eviction order or any order having final effect against the applicant in favour of the respondents.
> 3. That the respondents and all other persons acting through them or on their instructions be and are hereby interdicted from summarily entering upon or remaining on the portion occupied by the applicants at stand number 96A, F Norton Road, Norton, or in any way threatening or interfering with the normal business and operations of the applicant, its employees, representatives, invitees and assignees without a valid court order.
> 4. That the respondents shall pay the costs of this application on a legal practitioner-client scale.
>
> **Interim Relief Granted** G
>
> Pending confirmation or discharge of the final order the applicant be and is hereby granted the following interim relief:
>
> 1. The respondents and all other persons acting through them, be and are hereby interdicted and ordered not to interfere with nor disturb the applicant's peaceful possession of a certain immovable property, being a service station situate at stand 96A, Norton Road, Norton without a valid court order. H

2012 (2) ZLR p487

Mutema J

> 2. To A that effect, the respondents shall, within 24 hours of this order, hand over to the applicant all the keys necessary for the applicant to gain access into the safe and the office for purposes of conducting its business, as well as restoring the service station to the state it was prior to 30 November 2012.
> 3. Failing clause 2 above, the Sheriff or his lawful deputy, together with his assistants, be and are hereby entitled and authorised to ensure that the B applicant retains possession of the service station forthwith.
>
> As a result, all expenses that will be incurred by the applicant in restoring the service station to its prior state shall be levied and payable by the respondents upon presentation of relevant receipts and invoices."

Although the respondents' conduct seems to be imbued with some semblance of spoliation, an order of spoliation is not the proper remedy for the wrong C alleged by the applicant. In *Kama Construction (Pvt) Ltd v Cold Comfort Farm Co-Operative & Ors* 1999 (2) ZLR 19 (S), which I find to fall on all fours with the present scenario, the appellant company had entered into an arrangement with the trustees of the respondent co-operative with a view to restoring the co-operative to financial viability. It became involved in the management of the farm run by the co-operative and in various of the D farm's activities. A dispute later arose and the arrangement was terminated by the co-operative. The appellant sought a spoliation order from the High Court, restoring it to peaceful possession of the farm. A provisional order was granted, but was not confirmed. The appellant appealed against the refusal to grant the spoliation order.

E Dismissing the appeal, McNally JA at 22 held:

> "In my view, the confirmation of the order was properly refused in the court a quo. I come to this conclusion because I consider that a spoliation order was not the proper remedy for the perceived wrong alleged by the appellant. The real complaint of *Kama Construction* is that it alleges that the respondents

> are in breach of the alleged management agreement. They should have sued for F specific performance of the alleged contract, together with interlocutory relief in the form of an interdict, if they believed such relief was available."

The learned judge of appeal cautioned that, while the concept of possession is widely defined to include quasi-possession or juridical possession (possessio juris), one must be careful not to overstate the availability of spoliation proceedings in regard to quasi-possession. He relied on what Zulman J said G in Shoprite Checkers Ltd *v* Pangbourne Properties Ltd 1994 (1) SA 616 (W) at 623B-C where it was said:

> "If the protection given by the mandament van spolie were to be held to extend to the exercise of rights in the widest sense, then rights such as the right to performance of a contractual obligation would have to be included, which would be to extend the remedy beyond its legitimate field of application and H usefulness."

Mutema J

He also relied on what Thirion J said in Zulu *v* Minister of Works, Kwazulu A & Ors 1992 (1) SA 181 (D) at 190G-H:

> "To hold otherwise would, in effect, mean that the court would grant an order for specific performance of a contractual obligation in proceedings where the respondent is precluded from adducing evidence to disprove the existence of the obligation."

So, too, in the instant case, I find that the real complaint by the applicant is B that the respondents have breached the alleged management agreement. The applicant should have sued for specific performance of the alleged contract, possibly together with interlocutory relief in the form of an interdict, if it believed that such relief was tenable. To grant spoliation in casu with the respondents contending that the applicant had breached the management C agreement by failing to adhere to the terms of clause 3 thereof would, in effect, amount to granting an order for specific performance of a contractual obligation in circumstances where the respondents are precluded from adducing evidence to prove breach, by the applicant, of the management agreement.

In view of the foregoing finding, I find it unnecessary to delve into whether D the applicant was ever in peaceful and undisturbed possession of the service station at the time the application was filed or whether, in view of the allegation that Petrotrade has replaced the applicant, restoration of the status quo ante is no longer possible.

In the result, the application is hereby dismissed with costs. E

Atherstone & Cook, applicant's legal practitioners

Chingeya-Mandizira Legal Practitioners, respondents' legal practitioners

---

© 2015 Juta and Company (Pty) Ltd.

Document 60 of 60

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2012/Volume 2/S v CHIZHANGE 2012 (2) ZLR 489 (H)

S v CHIZHANGE 2012 (2) ZLR 489 (H)

Citation	2012 (2) ZLR 489 (H)
Case No	Judgment No. HH-8-13
Court	High Court, Harare
Judge	Uchena J

Heard 28 December 2012

Judgment 28 December 2012

Counsel Details not supplied

Case Type Criminal review

Annotations No case annotations to date

Flynote

C **Court – judicial officer** – *functus officio – when judicial officer becomes functus officio – administrative duties after completion of trial – not affected by judicial officer becoming functus officio in respect of judicial duties*

Criminal procedure – *record – incomplete – duties of magistrate and clerk of court when record not complete*

D **Criminal procedure** – *review – submission of records for review – duties of magistrate and clerk of court to ensure that records are submitted in orderly fashion and properly secured*

Headnote

E Reviews are based on the documents in the review cover and the record of proceedings. Where the record or part of it goes missing and it becomes impossible to review the proceedings, the convicted person's conviction and sentence must be set aside. That, however, must only occur if the record of proceedings (if it was mechanically recorded) cannot be transcribed, or, if it was handwritten, cannot be reconstructed.

F Where a record or part of it is lost, that is not the end of the matter. The following should be done:

(1) the clerk of court, who is the custodian of court records, must be administratively required to search for the record or missing part of the record. G

(2) if it cannot be found after a diligent search, the clerk must either cause the mechanical record to be transcribed or the missing record of proceedings to be reconstructed. If a document generated by the State is missing, a copy can be obtained from the prosecutor.

(3) if the mechanically recorded proceedings are transcribed and the transcribed record is certified by the transcriber and signed by the H magistrate, it can be forwarded for review.

2012 (2) ZLR p490

Uchena J

(4) if the record is to be reconstructed, since the trial court is *functus* A *officio*, the clerk of the court must by affidavit indicate that the record is irretrievably lost and should obtain affidavits from the presiding magistrate, witnesses and others present at the trial as to the contents of the record. Thereafter he must give both parties an opportunity to peruse this, so they may give their version as well. B This reconstructed record from the best available secondary evidence must be sent for review.

While a magistrate becomes *functus officio* on sentencing the convicted person, he retains an administrative duty to ensure that the record is sent for scrutiny or review. That is why he has to sign the scrutiny or review cover. The *functus officio* principle only applies to his judicial C role. It does not extend to his administrative duties.

Many records are now being forwarded for review in a disorderly manner, with papers loosely placed in a review cover and in any order. It is the duty of the clerk and the trial magistrate to ensure that the documents and record of proceedings are properly arranged and securely stapled or bound together. If documents are simply loosely placed in the review D cover, they can easily slip out. A magistrate should not sign a review cover with loose papers in it. He should instruct the clerk of court to staple or bind them together before signing the review cover.

Cases referred to

S v Manera 1989 (3) ZLR 92 (S) E

R v Nortje 1950 (4) SA 725 (E)

S v S (a juvenile) 1991 (1) ZLR 237 (H)

R v Wolmarans & Anor 1942 TPD 279

Judgment

Uchena J: The record of the proceedings in which Cleopas Chizhanje (the F convicted person) was convicted and sentenced on his own plea was place before me for review. It is not reviewable. Most of the documents and the record of proceedings which should be in it are missing.

According to the review cover, the convicted person was charged with four counts of contravening ss 131 and 113 of the Criminal Law (Codification G and Reform) Act [*Chapter 9:23*]. The back of the charge sheet on count 4, where the magistrate recorded the pleas, indicates that he pleaded guilty to all four counts. It is however not possible to ascertain what charge was preferred under count three as the charge sheet and state outline, for that count are missing from the record. While the charge sheets for counts 1 and 2 are also missing, the charges preferred under them are revealed by the H

A outlines of the State's case. The outlines of the State's case for counts 3 and 4 are also missing from the record.

The magistrate's hand written record of proceedings is also missing except for a sheet of paper on which the accused's plea in mitigation is recorded. I caused my clerk to write to the trial magistrate seeking clarification on the B state of the record. In her response the trial magistrate said:

> "Indeed the accused person pleaded guilty to all four counts preferred against him. All the essential elements of the offences in respect of the four counts were put to the accused person and recorded.
>
> The trial magistrate has also noted that the charge sheet in respect of counts 1 to 3 is missing as well as facts for count 3 to 4. A full record of all the proceedings C was brought to me for signature before it was forwarded for review.
>
> Half a page was left blank as the court canvassed the essential elements in respect of all the counts on different pages since there were four counts. The trial magistrate also recorded the reasons for sentence on a separate page. All these are missing in the record of proceedings.
>
> The trial magistrate is not aware of what could have happed to part of the D proceedings in the record after it left her office for review."

This case is not reviewable because reviews are based on the documents in the review cover and the record of proceedings. Where the record or part of it goes missing and it becomes impossible to review the proceedings the convicted person's conviction and sentence must be set aside. That, however, E must only be if the record of proceedings, if it was mechanically recorded, cannot be transcribed, or, if it was hand written, cannot be reconstructed.

Many magistrates now simply throw their hands in the air when faced with such a situation. They – as did the trial magistrate in this case – simply say "I don't know what happened to the record of proceedings or part of it", and leave every thing to the reviewing judge. Reviewing judges do not create F records of proceedings, but merely review them. It remains the duty of trial courts to take remedial action to ensure that a record of proceedings is placed before a judge for review. It is only when the record has been irretrievably lost and cannot be transcribed or reconstructed, that a magistrate can throw his or her hands in the air and leave everything to the reviewing judge.

G My experience with incomplete review records indicates that many magistrates do not know what to do with such situations. They believe if a record or part of it is lost that is the end of the matter. It is not. The following should be done.

1. The clerk of court, who is the custodian of court records, must be administratively required to search for the record or missing part of the H record.

Uchena J

2. If it cannot be found after a diligent search, he must either cause the A mechanical record to be transcribed or the missing record of proceedings to be reconstructed.

If a document generated by the State is missing a copy can be obtained from the prosecutor.

3. If the mechanically recorded proceedings are transcribed and the B transcribed record is certified by the transcriber and signed by the magistrate it can be forwarded for review.

4. If the record is to be reconstructed, the procedure laid down in the cases of *S v S (a juvenile*) 1991 (1) ZLR 237 (H), *R v Nortje* 1950 (4) SA 725 (E) and *R v Wolmarans & Anor* 1942 TPD 279, should be followed. C

In *S v S (a juvenile*) s*upra* at 242C-D Adam J said:

> "It is clear from the foregoing that the practice has been for some considerable time well regulated in that the duty of the clerk of the court was to submit the best secondary evidence that he could obtain.
>
> To summarise, where the accused has pleaded guilty, found guilty and sentenced or has pleaded not guilty, been found guilty and sentenced and the record is D irretrievably lost prior to review by this court, since the trial court is *functus officio*, the clerk of the court must by affidavit indicate that the record is irretrievably lost and should obtain from the presiding magistrate, witnesses and others present at the trial affidavits as to the contents of the record and thereafter he must give both parties an opportunity to peruse this so they may give their version as well. This reconstructed record from the best available secondary evidence E must be sent for review."

While I fully agree with the observations of Adam J, I must add that, while a magistrate becomes *functus officio* on sentencing the convicted person, he retains an administrative duty to ensure that the record is sent for scrutiny or review. That is why he has to sign the scrutiny or review cover. The *functus officio* principle only applies to his judicial role. It does not extend to his F administrative duties. If the clerk of court does not know what to do when a record or part of it is lost, the magistrate must guide and supervise him on the procedure to be followed, to ensure that the provisions of the law on sending proceedings for scrutiny and review are complied with.

Having dealt with how to ensure that a transcribed or reconstructed record G is placed before a reviewing judge, I find it imperative to comment on the standard of record keeping. Many records are now being forwarded for review in a disorderly manner, with papers loosely placed in a review cover in any order. It is the duty of the clerk and the trial magistrate to ensure that the documents and record of proceedings are properly arranged and securely stapled or bound together. It is not difficult to imagine how some documents H

Uchena J

A end up slipping out of the review cover, if they are simply loosely placed in it. A magistrate should not sign a review cover with loose papers in it. He should administratively instruct the clerk of court to staple or bind them together before signing the review cover. In *S v Manera* 1989 (3) ZLR 92 (S) at 94 Gubbay CJ said:

> "It is, I think, necessary to impress *upon all judicial officers and clerks of court* B *that records of proceedings must be preserved with meticulous care.* Rule 24(2) of the Supreme Court (Magistrates Court) (Criminal Appeal) Rules, 1979, published in SI 504 of 1979, places upon the clerk of the court the administrative responsibility of lodging the original record with the Registrar of the Supreme Court. It is his obligation to ensure that the complete record of the proceedings is so lodged. Consequently, if there is anything remiss with the record, the fault C must be visited upon the State and not upon the appellant" (emphasis added).

A securely bound review record cannot arrive on the reviewing judge's desk, with missing parts. In the present case, the magistrate says the record was in order when she signed the review cover. However, she omits to state whether or not the record had been properly secured.

In view of what I said above, this case cannot be reviewed until an inquiry D is conducted as to whether or not the proceedings can be transcribed or reconstructed.

It is therefore remitted back to the magistrates court for such an inquiry after which it should be resubmitted for review.

In view of the administrative issues raised in this judgment, a copy should E be send to the Chief Magistrate's office for his information.

Chitakunye J agrees.

© 2015 Juta and Company (Pty) Ltd.