Document 1 of 73

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2013/Volume 1

Volume 1

Friendship v Cargo Carriers Ltd & Anor	2013 (1) ZLR 1 (S)
Attorney-General v Gwisai & Ors	2013 (1) ZLR 7 (H)
S v Madeyi	2013 (1) ZLR 14 (H)
Mohadi v Standard Press (Pvt) Ltd	2013 (1) ZLR 31 (H)
Mills v Tanganda Tea Company Ltd	2013 (1) ZLR 38 (H)
Sigudu v Min Of Lands & Anor	2013 (1) ZLR 48 (H)
S v Zhakata	2013 (1) ZLR 58 (H)
Zinwa v Kadoma Municipality	2013 (1) ZLR 64 (H)
Muchini v Adams	2013 (1) ZLR 67 (S)
Bravo (Pvt) Ltd v Wordhouse Multimedia Services (Pvt) Ltd & Anor	2013 (1) ZLR 74 (H)
Muneka & Ors v Manica Bus Co	2013 (1) ZLR 81 (H)
S v Murisi	2013 (1) ZLR 89 (H)
Washmate Motors Centre (Pvt) Ltd v City Of Harare	2013 (1) ZLR 97 (H)
In Re Moyo	2013 (1) ZLR 107 (H)
Ndlovu v Ndlovu & Anor	2013 (1) ZLR 110 (H)
Peta v Buwu & Anor	2013 (1) ZLR 113 (H)
S v M (A Juvenile)	2013 (1) ZLR 121 (H)
Altem Enterprises (Pvt) Ltd v John Sisk & Son (Pvt) Ltd	2013 (1) ZLR 125 (S)
Speciss College v Chiriseri & Ors	2013 (1) ZLR 134 (S)
S v Makumbe	2013 (1) ZLR 141 (H)
Estate Hedley v Angwa City Investments Three (Pvt) Ltd & Ors	2013 (1) ZLR 147 (H)

Mandala v Glens Removals And Storage Zimbabwe (Pvt) Ltd	2013 (1) ZLR 156 (H)
Sumbureru v Chinamora & Ors	2013 (1) ZLR 165 (H)
Gold Driven Investments (Pvt) Ltd v Tel·One (Pvt) Ltd & Anor	2013 (1) ZLR 172 (S)
Mabvuramiti v Altfin Insurance Company	2013 (1) ZLR 182 (H)
Zimbabwe Educational, Scientific, Social And Cultural Workers' Union v Welfare Educational Institutions' Employers' Association	2013 (1) ZLR 187 (S)
Khan v Muchenje & Anor	2013 (1) ZLR 195 (H)
S v Chikandiwa & Ors	2013 (1) ZLR 206 (H)
National Constitutional Assembly & Anor v The President & Anor	2013 (1) ZLR 212 (H)
S v Nongerai & Ors	2013 (1) ZLR 218 (H)
S v Matsetu	2013 (1) ZLR 223 (H)
S v S (a juvenile)	2013 (1) ZLR 237 (H)
Magaya v Magaya	2013 (1) ZLR 242 (H)
Commissioner General Of Police v Nyapokoto	2013 (1) ZLR 251 (H)
Chidawu & Ors v Shah & Ors	2013 (1) ZLR 260 (S)
S v Tshuma	2013 (1) ZLR 270 (H)
S v Ndlovu	2013 (1) ZLR 275 (H)
Zhung v Miao	2013 (1) ZLR 283 (H)
The President v Bhebe & Ors and related cases	2013 (1) ZLR 288 (H)
S v Mpofu	2013 (1) ZLR 297 (H)
Efrolou (Pvt) Ltd v Muringani (1)	2013 (1) ZLR 300 (H)
Efrolou (Pvt) Ltd v Muringani (2)	2013 (1) ZLR 309 (H)
Boka Investments (Pvt) Ltd v Thirdline Trading (Pvt) & Ors	2013 (1) ZLR 321 (H)
Ellingbarn Trading (Pvt) Ltd v Assistant Master	2013 (1) ZLR 332 (H)
Forestry Commission v Cell Insurance Co (Pvt) Ltd & Anor	2013 (1) ZLR 341 (H)
Nyamangunda v Mashonaland Turf Club	2013 (1) ZLR 351 (H)

S v Maripfonde & Anor	2013 (1) ZLR 361 (H)
Air Zimbabwe (Pvt) Ltd & Anor v Nhuta & Ors	2013 (1) ZLR 366 (H)
African Banking Corporation of Zimbabwe Ltd v Pwc Motors (Pvt) Ltd & Ors	2013 (1) ZLR 376 (H)
Cristal Motor Spares (Pvt) Ltd v South African Airways	2013 (1) ZLR 382 (H)
S v African Consolidated Resources (Pvt) Ltd	2013 (1) ZLR 392 (H)
Econet Wireless (Pvt) Ltd & Ors v Sanangura	2013 (1) ZLR 401 (S)
S v Matutu	2013 (1) ZLR 412 (S)
Tapvice Enterprises (Pvt) Ltd v Sino Zimbabwe Cotton Holdings (Pvt) Ltd	2013 (1) ZLR 417 (H)
Chombo v Parliament of Zimbabwe & Ors	2013 (1) ZLR 426 (S)
African Banking Corporation of Zimbabwe Ltd v Paul Edwards Shipping (Pvt) Ltd & Ors	2013 (1) ZLR 437 (H)
Trojan Nickel Mine Ltd v Reserve Bank of Zimbabwe	2013 (1) ZLR 444 (H)
Marange Resources (Pvt) Ltd v Core Mining & Minerals (Pvt) Ltd (In Liquidation) & Ors	2013 (1) ZLR 454 (H)
Mawarire v Mugabe No & Ors	2013 (1) ZLR 469 (CC)
Freda Rebecca Gold Mine Holdings Ltd v Nhliziyo & Ors	2013 (1) ZLR 503 (S)
Zimbabwe Electricity Transmission & Distribution Co v Ruvinga	2013 (1) ZLR 510 (S)
Granary Investments (Pvt) Ltd v Pianim	2013 (1) ZLR 518 (H)
Musemburi & Anor v Tshuma	2013 (1) ZLR 526 (S)
Ordeco (Pvt) Ltd v Govere & Anor	2013 (1) ZLR 532 (H)
Mubaiwa v Mubaiwa And Anor	2013 (1) ZLR 540 (H)
Constitutional Court of Zimbabwe Practice Directive No. 2 of 2013	2013 (1) ZLR 552 (CC)
Hwange Colliery Co v Savanhu	2013 (1) ZLR 555 (H)
Manwere v Matahwa No & Ors	2013 (1) ZLR 561 (H)
Ngazimbi v Murowa Diamonds (Pvt) Ltd	2013 (1) ZLR 569 (S)

S v Mataruse 2013 (1) ZLR 574 (H)

Mawere v Registrar-General & Ors 2013 (1) ZLR 578 (C)

S v Nkomo & Ors 2013 (1) ZLR 589 (H)

© 2015 Juta and Company (Pty) Ltd.

Document 2 of 73

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2013/Volume 1/FRIENDSHIP v CARGO CARRIERS LTD & ANOR 2013 (1) ZLR 1 (S)

FRIENDSHIP v CARGO CARRIERS LTD & ANOR 2013 (1) ZLR 1 (S)

Citation	2013 (1) ZLR (S)
Case No	Judgment No. S-01-13
Court	Supreme Court, Harare
Judge	Ziyambi JA
Heard	30 August 2012; *CAV*
Judgment	10 January 2013
Counsel	*L Uriri,* for the applicant *R M Fitches,* for the respondent
Case Type	Chamber application
Annotations	No case annotations to date

Flynote

Practice and procedure – *condonation – application – condonation an indulgence granted at discretion of court – need for applicant to be candid and honest – criteria to be observed by court in exercise of its discretion*

Headnote

D Condonation of failure to apply timeously for rescission of judgment is an indulgence which may be granted at the discretion of the court. It is not a right obtainable on demand. The applicant must satisfy the court or judge that there are compelling circumstances which would justify a finding in his favour. To that end, it is imperative that an applicant for condonation be candid and honest with the court. Certain criteria have E been laid down for consideration by a court or judge in order to assist in the exercise of that discretion. Among these are: the extent of the delay and the reasonableness of the explanation therefor; the prospects of success on appeal; the interest of the court in the finality of judgments; and the prejudice to the party who is unable to execute his judgment. The list is not exhaustive. An appellate court will not interfere with the exercise F of

its discretionary power by a lower court unless it is shown that the lower court committed such an irregularity or misdirection or exercised its discretion so unreasonably or improperly as to vitiate its decision.

Cases cited

G *Halwick Invstms v Nyamwanza* 2009 (2) ZLR 400 (S)

Sedco v Chimhere 2002 (1) ZLR 424 (S);

ZFC Ltd v Geza 1998 (1) ZLR 137 (S)

Legislation considered

H High Court Rules 1971 (RGN 1047 of 1971), r 63

Ziyambi JA

Case information

L Uriri, for the applicant A

R M Fitches, for the respondent

Judgment

Ziyambi JA: This is an application for condonation of the failure to note an appeal timeously as well as an extension of time within which to appeal against a judgment of the High Court dated 12 July 2012. The *dies induciae* B for noting the appeal expired on 2 August 2012. This application was filed on 15 August 2012.

The background of the matter is as follows. On 12 October 2011, the High Court granted a default judgment against the second respondent (of which company the applicant is a director) ordering it to pay, *inter alia,* the sum of US$101 381.32 to the first respondent. Liability of the applicant to pay C the second respondent's debt was founded on s 318 of the Companies Act [*Chapter 24:03*].

In terms of r 63 of the High Court Rules 1971:

> "(1) A party against whom judgment has been given in default, whether under these rules or under any other law, may make a court application, not later D than one month after he has had knowledge of the judgment, for the judgment to be set aside.
>
> (2) If the court is satisfied on an application in terms of subrule (1) that there is good and sufficient cause to do so, the court may set aside the judgment concerned and give leave to the defendant to defend or to the plaintiff to prosecute his action, on such terms as to costs and otherwise as the court considers just. E
>
> (3) Unless an applicant for the setting aside of a judgment in terms of this rule proves to the contrary, he shall be presumed to have had knowledge of the judgment within two days after the date thereof."

The applicant was therefore presumed to have had knowledge of the judgment on 14 October 2011 unless he proved to the High Court to the contrary.

On 15 December 2011, the applicant filed two applications in the High Court. F One was for condonation of failure by the applicant to file an application for rescission of the above- mentioned judgment within the period provided for in r 63. The other was an application for rescission of the said judgment. Both matters were argued before the court *a quo* on 10 July 2012. The learned judge dismissed the application for condonation. The application G for rescission of the judgment, dependent as it was on the success of the application for condonation, was also dismissed. It is against this judgment refusing condonation that the applicant seeks to appeal.

In its founding affidavit, the applicant alleges that following the issuance of the judgment on 12 July 2012, he received an email from his legal practitioners on 17 July 2012 advising him to seek an opinion from counsel as to whether H

Ziyambi JA

A or not an appeal should be noted against the judgment. On 24 July 2012, he advised his legal practitioners to obtain an opinion from Advocate Morris. Instructions were immediately despatched to Mr Morris to draft heads of argument, but regrettably he was "ill disposed" (*sic*) and the notice of appeal could not be drawn within the peremptory time limits. The opinion has now been obtained from counsel who has drafted the notice of appeal which is B attached to the application.

The reference to heads of argument confuses the issue but I will assume in favour of the applicant that the instructions were to give an opinion and to draft a notice of appeal if necessary. The use of the expression "ill disposed" is also confusing, as it gives the impression that counsel was averse to the C idea of noting an appeal against the judgment. But here again the applicant could have meant that counsel was "indisposed", which would mean that counsel by reason of sickness or otherwise was unable to attend to the matter timeously. The confusion is not resolved on the papers as nothing more is said on the issue.

The application is opposed by the first respondent, who avers that the D application is an abuse of court process and it ought to be dismissed with costs on a punitive scale as a mark of the court's disapproval of the contemptuous conduct of the applicant for the following reasons. The applicant has sought indulgences at various stages of the proceedings between the parties. The main application, in which default judgment was granted against the applicant E and the second respondent, was filed on 19 April 2011. The applicant did not file a notice of opposition in the time provided and was time barred on 10 May 2011. The matter was set down for default judgment on the unopposed roll on 18 May 2011. On 17 May 2011, a day before the set down date, the applicant sought the consent of the first respondent to a withdrawal of the matter from the unopposed roll in order to enable him to make an application F for the upliftment of the bar obtaining against him and to "remedy his default". The first respondent grudgingly consented to the withdrawal of the matter from the unopposed motion roll. Thereafter, it took the applicant 13 days to file and serve the application for upliftment of the bar on the first respondent. Notwithstanding the fact that the respondent did not oppose the application, the applicant failed to prosecute it and in order to make some G progress in the matter, the respondent filed a 'consent to the upliftment of the bar' on 12 September 2011, on condition the applicant filed its notice of opposition within ten days of 13 September 2011, on which date the consent to the upliftment of the bar was filed. The ten-day deadline was far more than the 48 hours indulgence that the applicant had requested. However, H once again, the applicant failed to file its notice of opposition and default

---

judgment was entered. On November 2011, the first respondent served a copy A of the default judgment on the applicant. In any event, so it was argued, the applicant had not shown that there were any prospects of success on appeal because the applicant had made a personal undertaking to repay the debt, which undertaking he had not honoured.

Condonation is an indulgence which may be granted at the discretion of the B court. It is not a right obtainable on demand. The applicant must satisfy the court/judge that there are compelling circumstances which would justify a finding in his favour. To that end, it is imperative that an applicant for condonation be candid and honest with the court. Certain criteria have been laid down for consideration by a court/judge in order to assist it in the exercise of its discretion. Among these are, the extent of the delay and C the reasonableness of the explanation therefor, the prospects of success on appeal, the interest of the court in the finality of judgments and the prejudice to the party who is unable to execute his judgment. The list is not exhaustive.

The application was filed on 15 August 2012. The judgment was handed down on 12 July 2012. There are no affidavits from the applicant's legal D practitioners and Mr Morris supporting the allegations made concerning them by the applicant, neither does the applicant disclose the reason why it took him seven days to respond to the email from his legal practitioners, or the date on which instructions were despatched to Mr Morris. The *dies induciae* expired on 2 August 2012. The explanation for the delay is itself confusing as I have already mentioned above. I do not, in the circumstances, E consider that the applicant has given a reasonable explanation for the delay.

As far as the prospects of success are concerned, the applications before the court *a quo* were two-fold. Since his application for rescission of the default judgment was way out of time, the applicant had to pass the hurdle of condonation of his failure to file that application on time. In his application F for condonation before the court *a quo* he stated that he was making the application "out of an

abundance of caution", as he only became aware of the judgment against him on 13 December 2011. However, the court *a quo* found this averment to be untrue because a copy of the order in question was delivered to the applicant's legal practitioners by the legal practitioners of the first respondent on 9 November 2011. The court *a quo* appears to have G proceeded on the basis that the applicant first had knowledge of the judgment on that date and found that the application for rescission of the judgment was out of time by six days. In view of the dishonest averment that he had first seen the judgment on 13 December, that was a generous finding on the part of the court *a quo*. The attitude that the application was being made out of an abundance of caution smacked of arrogance, bearing in mind the H

2013 (1) ZLR p5

Ziyambi JA

A lateness of the application, and ignored the fact that the applicant was seeking an indulgence from the court. The following excerpt from the judgment of the court *a quo* is instructive as to the view which it took of the applicant's explanation for the delay in filing the application for rescission of judgment:

> "The applicant did not attach any affidavit from his erstwhile legal practitioners to explain the default. Apart from his mere allegation, there is nothing to demonstrate B that the applicant sought an explanation for the default from his former legal practitioners. In a case such as the present where there is a history of consistent default on the part of a litigant and the legal practitioners are blamed for that default, it is necessary for the litigant to avail proof, preferably in writing, that it has demanded an explanation from the legal practitioners concerned . . . on his part the applicant has not shown what steps he took to *protect* his interests.
>
> C . . .
>
> The fact that the delay was of just below one week does not, on its own, assist the applicant. See *Viking Woodwork (Pvt) Ltd v Blue Bells Enterprises (Pvt) Ltd* 1998 (2) ZLR 249 (S) at 253F-H".

The learned judge then went on to consider the prospects of success.

> "The onus is on the applicant to show that he has a defence which has prospects D of success. The applicant seems to suggest that because the requirements of s 318 of the Companies Act have to be established for him to be personally liable then he has a defence which has prospects of success. That is not so. The applicant must set forth facts upon which the prospects of success of its defence may be assessed. The documents in the record show that the applicant personally admitted to being liable to pay the second respondent's debt owed E to the first respondent.
>
> In any event, it has been held that in cases of 'flagrant breaches of the Rules, especially where there is no acceptable explanation therefore, the indulgence of condonation may be refused whatever the merits of the appeal are. This applies even where the blame lies solely with the attorney': *Viking Woodwork (Pvt) Ltd v Blue Bells Enterprises (Pvt) Ltd supra* at 254D-E, *Tshivhase Royal Council* F *& Anor v Tshivhase & Anor* 1992 (4) SA 852 (A) at 859E-F".

It is now settled that an appellate court will not interfere with the exercise of its discretionary power by a lower court unless it is shown that the lower court committed such an irregularity or misdirection or exercised its discretion so unreasonably or improperly as to vitiate its decision: *Halwick Investments v Nyamwanza* 2009 (2) ZLR 400 (S); *Sedco v Chimhere* 2002 (1) ZLR 424 (S); G *ZFC Ltd v Geza* 1998 (1) ZLR 137 (S).

It has not been shown that the learned judge improperly exercised his discretion in refusing condonation and certainly no allegation to that effect is contained in the notice of appeal sought to be filed. Having regard to the history of consistent disregard of the rules, the learned judge cannot be faulted in the H exercise of his discretion against the applicant.

2013 (1) ZLR p6

Ziyambi JA

In addition, the very fact that the applicant has brought this application A for condonation without a satisfactory explanation for the delay is further evidence of his disregard of the rules of this court. The paucity of evidence explaining the reason for his default and the fact that he had placed the blame for the default on his legal practitioners but filed no affidavits from them in support of his allegations were among the reasons for the dismissal, by the B court *a quo*, of his application for condonation. Yet the applicant did not learn from that criticism but instead repeated the same mistake in the present application. The applicant's conduct displays a disdain for the rules of court and makes the inference irresistible that his desire to defend the matter is not *bona fide* but merely

a ploy to delay the evil day to the prejudice of the first respondent, who is entitled to execute his judgment bringing finality C to the proceedings.

In view of the above, the appeal has no prospects of success.

The application is therefore dismissed with costs.

Gill Godlonton & Gerrans, applicant's legal practitioners D

Scanlen & Holderness, first respondent's legal practitioners

© 2015 Juta and Company (Pty) Ltd.

Document 3 of 73

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2013/Volume 1/ATTORNEY-GENERAL v GWISAI & ORS 2013 (1) ZLR 7 (H)

ATTORNEY-GENERAL v GWISAI & ORS 2013 (1) ZLR 7 (H)

Citation	2013 (1) ZLR 7 (H)
Case No	Judgment No. HH-20-13
Court	High Court, Harare
Judge	Hungwe J
Heard	16 January 2013
Judgment	16 January 2013
Counsel	Details not supplied
Case Type	Criminal application
Annotations	No case annotations to date

Flynote

Appeal – *criminal matter – application by Attorney-General to appeal against sentence – allegation of inadequacy of sentence passed – principles to be observed by High Court when considering application for leave to appeal – grounds of appeal – what such grounds should allege*

Headnote

D The right of the Attorney-General to appeal against the inadequacy of a sentence passed in the magistrates court is an unusual one. It does not exist either in South Africa or in England and there have been few cases in this country where such a right was successfully claimed and exercised. There is therefore very little guidance to be found as to the principles to be followed when the Attorney-General invokes this right.

E Two grounds of appeal are available to the Attorney-General in a case where he wishes to exercise his right of appeal against sentence. First, he may argue that the sentence is incompetent at law. Second, he may argue that the sentence imposed by the magistrate is inadequate, either in the light of the findings of fact made by the court and the nature of F the charge, or because it was

based on findings of fact for which there was no evidence or on a view of the facts which could not reasonably entertained. Alternatively, he may raise both grounds of appeal against sentence in appropriate circumstances. Where the incompetence of the sentence is raised, this will be easy to demonstrate. Where, however, the ground of appeal raised is that of the alleged inadequacy of the G sentence, then a heavier onus exists on the Attorney-General, not only to demonstrate the inadequacy of the sentence imposed, but also to show that in imposing such a sentence, the court misdirected itself in light of its findings of fact and the nature of the charge or because it was based on findings of fact for which there was no evidence or because it was H based on a view of the facts which could not reasonably entertained.

There are three main situations where it is appropriate to increase a A sentence: (1) where the magistrate has adopted an entirely erroneous view of the law; (2) where the sentence is so inadequate as not to do justice to the community as a whole; and (3) where, because of special circumstances, such as the prevalence of a particular type of offence, a higher penalty is called for than that being applied. B

Rule 15 of the Supreme Court (Magistrate's Court) (Criminal Appeals) Rules, 1979, which deals with appeals by the Attorney-General against a sentence passed by the magistrates court and requires the leave to appeal for any such appeal to be made within ten days of sentence, is a peremptory provision. Where there has been a failure to comply with such a peremptory provision of the rules, it cannot simply be condoned C in terms of r 5, which permits a departure therefrom when it is in the interests of justice. Such a failure would require a separate application for the condonation of the late filing thereof.

In considering an application for leave to appeal by the Attorney-General against the inadequacy of a sentence, in terms of s 62(1) of the D Magistrates Court Act [*Chapter 7:10*], the test to be applied is whether the Attorney-General has a reasonable prospect of success on appeal, not merely whether the appeal is arguable. The sentence must be found to be manifestly inadequate and it must be remembered that a court will be more reluctant to increase a sentence than to reduce one because of the hardship to the convicted person who may have reconciled himself E to his initial punishment, particularly if the sentence has already been served and where an increased sentence would result in a person who had been released being recalled to serve further imprisonment. The right of appeal should, therefore, be used with circumspection. If he wishes to seek leave to appeal, the Attorney-General must act quickly and take F matter up as a matter of urgency. It should be remembered that sentence is primarily a matter for the trial court, which has had an opportunity of seeing precisely the type of person with whom it is dealing – a very important factor in assessing sentence.

Cases cited G

A-G v Chagwiza 1982 (2) ZLR 165 (S)

R v Baloi 1949 (1) SA 523 (A)

Legislation considered

Magistrates Court Act [*Chapter 7:10*], s 62(1) H

Hungwe J

A Supreme Court (Magistrates Court) (Criminal Appeals) Rules 1979 (SI 504 of 1979), rr 15, 16 and 22(1)

Judgment

Hungwe J: In this case the respondents were convicted in the magistrates court on 19 March 2012 of conspiracy to commit public violence as defined B in s 188 as read with s 36 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. The respondents were sentenced each to pay a fine of US$500 or, in default of payment, to undergo 10 months' imprisonment. In addition, they were each sentenced to 24 months' imprisonment, of which 12 months were suspended on conditions of good behaviour, and the remaining 12 months were suspended on condition that each accused performs 420 C hours of community service.

The Attorney-General was aggrieved by the sentence as he was of the view that it was far too lenient. The Attorney-General made application for leave to appeal against this sentence by way of a chamber application on 5 April 2012. To this chamber application was appended the draft notice and grounds of appeal as is required by the Supreme Court (Magistrates Court) (Criminal D Appeals) Rules 1979 (SI 504 of 1979) ("the Rules"). The application for leave to appeal was out of time. Notwithstanding this anomaly, no application for an extension of time within which to apply for leave to appeal out of time was made nor was an application for condonation of the late filing of the application for leave to appeal made as is required by the Rules.

E In the heads of argument filed on behalf of the Attorney-General, the admission is made that there has been no compliance with the Rules. This court is urged in those heads, to condone the lack of compliance with the Rules by the Attorney-General on the basis that r 5 permits a departure from the Rules when this is in the interests of justice. The submission lacks F merit. The appeals rules are clear and categorical. In terms of r 15, where the Attorney-General wishes to appeal against a sentence passed by a magistrates court, he shall as soon as possible, and in any event not later than ten days from the date when that sentence is passed, apply for leave to appeal. The court has no discretion in the matter as this is a peremptory requirement. Where there has been a failure to comply with the peremptory provisions G of the Rules, a party guilty of such failure to comply must, if it is minded to pursue the proposed appeal, apply for leave. It is only then that the court may exercise its usual discretion. The applicant has not elected to do this.

There are other deficiencies in the applicant's case.

There is nothing on the papers before me showing that the applicant caused H to be placed before the clerk of the court for onward transmission to the

---

trial magistrate the application for leave to appeal together with the draft A grounds of appeal for the magistrate's comments (r 15(b)). There is no proof that the magistrate was afforded an opportunity to comment on the draft grounds as he was obliged to do in terms of Rule 16. Ordinarily, the clerk of court would have signalled that the papers had been placed before him for his attention by placing his official stamp on all copies of the applications B before they are forwarded to the registrar of this court. The clerk of court would have had to comply with the Rules by ensuring that the manuscript copy of the record of proceedings is placed before me for consideration of the application for leave (r 16(2)). As matters stand, what is before me for the determination of the application for leave to appeal against sentence are just the reasons for judgment and those for sentence. Without the full C transcript or at least the manuscript of the trial proceedings, it is difficult for a court seized with such an application, to make a determination of the question whether the applicant has good prospects of success. The failure to comply with the Rules has hamstrung the determination of the matter for which application is made. The failure to comply with the Rules must be laid at the applicant's door. D

In the unlikely event that I am wrong in the view that I hold that this matter stands to be dismissed for the above reasons, I proceed to consider the merits of the application before me.

The right of the Attorney-General to appeal against the inadequacy of the sentence is an unusual one. It does not exist either in South Africa or in E England and there have been few cases in this country where such a right was successfully claimed and exercised. There is therefore very little guidance to be found as to the principles to be followed when the Attorney-General invokes this right. Section 62(1) sets out the general parameters within which the Attorney-General may exercise his right of appeal against sentence. It states:

> "62 Attorney-General may appeal to High Court against sentence F
>
> (1) If the Attorney-General considers that the sentence imposed in any criminal case by a court is –
>
> (a) incompetent in law, he may appeal to the High Court against that sentence; or
>
> (b) inadequate – G
>
> (i) in the light of the findings of fact made by the court and the nature of the charge; or
>
> (ii) because it was based on findings of fact for which there was no evidence or on a view of the facts which could not reasonably be entertained;
>
> he may, with the leave of a judge of the High Court, appeal to the High Court against that sentence." [subsection as amended by s 7 of Act 9 of 1997] H

Hungwe J

A Two grounds of appeal are available to the Attorney-General in a case where he wishes to exercise his right of appeal against sentence. First, he may argue that the sentence is incompetent at law. Second, he may argue that the sentence imposed by the magistrate is inadequate either in the light of the findings of fact made by the court and the nature of the charge; or because it was based on findings of fact for which there was no evidence or on a view B of the facts which could not reasonably entertained. Alternatively, he may raise both grounds of appeal against sentence in appropriate circumstances. Where the incompetence of the sentence is raised, in my view, this will be easy of demonstration as the powers of that court are strictly circumscribed by the Magistrates Court Act [*Chapter 7:10*]. Where, however, the ground C of appeal raised is that of inadequacy of the sentence, then a heavier onus exists on the Attorney-General not only to demonstrate the inadequacy of the sentence imposed, but also to show that in imposing such a sentence, the court misdirected itself in light of the findings of fact made by the court and the nature of the charge or because it was based on findings of fact for which there was no evidence or because it was based on a view of the facts D which could not reasonably entertained.

Presently, the draft grounds of appeal do not in any way encompass matters specifically set out in s 62(1) of the Magistrates Court Act. The first ground relies on the averment that the sentence imposed "is manifestly lenient to the extent that justice was actually denied to the community". The second E ground purports to decry the failure by the magistrate to pass a sentence of imprisonment since, it is said, the law provided that a person convicted of conspiracy to commit a crime shall be liable to the same punishment to which he or she would have been liable had he or she actually committed it. The third ground speaks of trivialising the crime for which the respondents have been convicted. It is said that the court *a quo* ought to have considered that F "the conspiracy would have resulted in the occasioning of public violence in aggravated circumstances and that the motive driving the conspiracy was the overthrow of constitutional government".

In my view, the correct approach to adopt regarding such an appeal is whether the appellant has any prospect of success in light of the requirement set out in G s 62(1) of the Act. In applying this test, it is important to recall the words of Fieldsend CJ in *Attorney-General v Chagwiza* 1982 (2) ZLR 165 (S) at 168:

> "[The Attorney-General] will also have to bear in mind that, just as in appeals by convicted persons against sentence, the appeal court will not interfere merely because it would itself have imposed a different sentence. The approach is substantially the equivalent of that applied in appeals against the severity of H sentence: before a sentence will be increased it must be found to be manifestly

Hungwe J

> inadequate: *Attorney-General v Tobiwa & Ors* 1980 ZLR 192. It is well A recognised that sentence is primarily a matter for a trial court which has had an opportunity of seeing precisely the type of person with whom it is dealing - a very important factor in assessing sentence. An appeal court will be even more reluctant to increase a sentence than to reduce one because of the hardship to the convicted person who may have reconciled himself to his initial punishment. And this reluctance becomes greater if the sentence has already been served and B an increased sentence would result in a person who had been released being recalled to serve further imprisonment."

The right of appeal should, therefore, be used with circumspection, and there are three main situations where it is appropriate:

(1) where a magistrate has adopted an entirely erroneous view of the law;

(2) where a sentence is so inadequate as not to do justice to the community C as a whole; and

(3) where, because of special circumstances, such as the prevalence of a particular type of offence, a higher scale of penalties is called for than that being applied. (See *Attorney-General v Chagwiza supra* at 167, *per* Fieldsend CJ). D

It seems to me that the purported draft grounds of appeal were mooted on the basis of a perceived inadequacy of the sentence since there is no allegation of incompetence of the sentence. The grounds of appeal, therefore, ought to have been brought strictly within s 62(1)(b) of the Magistrates Court Act since they will be considered within the strictures imposed by that section. E Without "clearly and specifically" setting out in which respect the magistrate's findings of fact regarding sentence could be impugned, as required in terms of r 22(1) of the Supreme Court

(Magistrates Court) (Criminal Appeals) Rules 1979, I am of the firm view that the Attorney-General's prospects of success on appeal are less than dim.

It should also be borne in mind that the appeal court's approach will be, F substantially, that before a sentence will be increased, it must be found to be manifestly inadequate. The court will be more reluctant to increase a sentence than to reduce one, particularly if a prison sentence has already been served. If the Attorney-General wishes to ensure that a particular convicted person should serve a longer sentence of imprisonment than that imposed by the G magistrate, he must act quickly and take the matter up as a matter of urgency.

In my view, the correct approach to adopt when considering an application for leave to appeal should not be based on whether an appeal is arguable or not, but on its prospects of success. Support for this approach is based on sound and persuasive authority. In *R v Baloi* 1949 (1) SA 523 (A) Centlivres JA (as he then was) stated at 524: H

Hungwe J

A "In the present case Ramsbottom J granted leave to appeal because

> 'some, at any rate, of the grounds which the accused wishes to raise, or which it is wished to raise on his behalf, seem to me to be fairly arguable.'

That, however, is not the test to be applied. It is true that in *Scott v New Minerva Syndicate Ltd* 1911 AD 369 at p 371, one of the grounds on which an application for leave to appeal was granted was that the case was fairly arguable and that B in *R v Wessels* 1933 AD 395 Stratford ACJ said that:

> 'if the appeal involves a question of law on which the guilt of the accused depends, leave will be granted if that question is an arguable one'.

In both those cases the judgment was *ex tempore*, but, in any event, those cases can, in view of the decision in *R v Nxumalo* 1939 AD 580, no longer be regarded as laying down the true test. In *R v Nafte* 1929 AD 333 at p 338, Curlewis JA said:

C 'Whether a point is unarguable or not is somewhat vague and is not very appropriate'.

The same applies to the word 'arguable' and the phrase 'fairly arguable'. The word 'arguable' is misleading unless it is made clear that it is used 'in the sense that there is substance in the argument advanced on behalf of the applicant' (*per* Tindall AJP in *Beatley's Trustee v Pandor & Co* 1935 TPD 365 at p 366), for there are very few cases which are not arguable in the wide meaning of the word."

D In my opinion, the test to be applied when considering an application for leave to appeal under s 62(1) of the Magistrates Court Act is whether the Attorney-General has a reasonable prospect of success on appeal. If he has, then leave to appeal should be granted. If he has not, then leave to appeal should be refused.

E Applying the above principles to the present application, I am satisfied that the Attorney-General's appeal does not enjoy any prospect of success. In the result I make the following order:

> The application for leave to appeal against sentence be and is hereby dismissed.

F *Attorney-General's Office,* applicant's legal practitioners

Mbidzo, Muchadehama & Makoni, respondents' legal practitioners

© 2015 Juta and Company (Pty) Ltd.

Document 4 of 73

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2013/Volume 1/S v MADEYI 2013 (1) ZLR 14 (H)

S v MADEYI 2013 (1) ZLR 14 (H)

Citation 2013 (1) ZLR 14 (H)

Case No	Judgment No. HH-34-13
Court	High Court, Harare
Judge	Hungwe J & Mavangira J
Heard	4 September 2012; *CAV*
Judgment	16 January 2013
Counsel	*L Uriri*, for the appellant *F Kachidza*, for the respondent
Case Type	Criminal appeal
Annotations	No case annotations to date

Flynote

Appeal – *criminal case – grounds – need to state grounds clearly and specifically – generalisations not enough – notice not complying with such requirement may be a nullity*

Estoppel – *criminal proceedings – application to – limited application of concept in criminal proceedings – need to show previous* D *determination on same issue – concessions made by State in bail application – State not estopped from supporting conviction on appeal*

Evidence – *sexual case – corroboration – not essential – corroboration – what evidence may be taken as corroborative – not necessary that* E *corroborating evidence itself must point towards accused's guilt*

Headnote

The appellant had been convicted of the rape of a young girl and sentenced to a long term of imprisonment. He had been released on bail pending appeal, following misgivings about the safety of the conviction expressed F by State counsel.

On appeal, one of the issues raised on behalf of the appellant was that, since the State's representative had made submissions which amounted to concessions indicative of lack of support for the appellant's conviction, the respondent was bound by that concession and as such the matter the matter should be dealt with in terms of s 35 of the High Court Act G [*Chapter 7:06*]. The appellant also made submissions on the evidence itself and whether it was satisfactorily corroborated.

Held, that a notice of appeal, to be valid, must state clearly and specifically what the grounds of appeal are and make clear what the basis of dissatisfaction is: whether it is an error of law or one of fact or both, or a misdirection on the facts or on the law or both. The notice must H

A be sufficient to inform the trial magistrate and the respondent what it is that is being attacked. The respondent is required to prepare his answers to the allegations made in the notice and the magistrate must reply to the notice. The magistrate's reply enables the appellant, if he so wishes, to amend his grounds of appeal. The importance of complying with the requirements of the rules cannot be over-emphasised. Lack of B compliance may result in the court regarding such notice and grounds of appeal a nullity.

Held, further, that the doctrine of issue estoppel, which has been embraced by the Supreme Court as part of the law of Zimbabwe, prevents a party to civil proceedings, except in certain circumstances, from raising a C contention of fact or of legal consequences of facts, where he raised the contention as an essential element of his case in previous civil proceedings between the same parties or their predecessors in title, and the contention was found by the court, in a final judgment in those proceedings, to be incorrect, unless further material which is relevant to the correctness or incorrectness of the assertion, and could not, by D reasonable diligence have been adduced by that party in the previous proceedings has since become available to him. There

are two forms of the doctrine of *res judicata*: cause of action estoppel and issue estoppel. Both operate where the court has adjudicated the cause of action between two or more parties and one of them seeks to re-litigate on the same facts. Where the cause of action is the same, cause of action estoppel E operates to prevent any litigation of any matter that was raised or should have been raised in the prior proceeding. Where the cause of action in the two proceedings is different, issue estoppel operates to prevent any litigation of any issue determined in the prior proceedings.

Held, further, that in criminal proceedings, the principles of *res judicata* are F given effect through the pleas of *autrefois acquit* and *autrefois convict.* Where those pleas are not available, issue estoppel arises where the accused has been finally acquitted of a criminal offence arising out of certain conduct, is charged with a different offence, and for some reason the facts surrounding the earlier charge become relevant. Issue estoppel prevents the State from calling into question issues determined in the G accused's favour in an earlier proceeding. However, that common law position has been severely curtailed by statutory limitations placed on that right by such provisions as ss 290 and 324 of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

Held, further, that assuming that the principles appled in criminal cases, it H would be necessary to show that the same issue had been decided. This

was not the case here: the determination was not on the same issue for A which the appeal was lodged but on a different issue, that is, whether the appellant was a suitable candidate for bail. Whatever submissions the respondent made in the bail application, the issues before that forum were far removed from issues squarely placed before the appeal court. No determination of the appellant's guilt or innocence was ever made B by the court in the bail application hearing.

Held, further, that it permissible for a court to convict in a sexual case, even if there is no corroboration of the complainant, but only where the merits of the complainant and the demerits of the accused are without question. On the other hand, corroboration will not secure a conviction unless the court is in any event satisfied that the complainant is credible. In the casen C of young children, the degree of corroboration or other factors required to reduce the danger of relying on the child's evidence will vary with the age of the child and other circumstances of the case. The evidence of a single witness must be approached with caution and its merits weighed against any factors that militate against its credibility. A common sense D approach must be adopted. Where the evidence of a single witness is corroborated in any way that tends to indicate that the whole story was not concocted, the caution may be overcome, as it may be by any other feature that increases the confidence of the court in the reliability of the single witness. Corroboration is not, however, essential.

Held, further, that as to what evidence may be regarded as corroborative, E corroboration may be by facts and circumstances proved by evidence other than that of a single witness who is to be corroborated. There is sufficient corroboration if the facts and circumstances proved are not only consistent with the evidence of the single witness, but more consistent with it than with any competing account of the events spoken to by him. Accordingly, if the facts and circumstances proved by other witnesses F fit in to his narrative so as to make it the most probable account of the events, the requirements of legal proof are satisfied. Evidence may therefore be corroborative even if, taken on its own, it does not point conclusively towards a suspect's guilt. Corroboration is about the number of witnesses available to prove facts. It is not about the number of facts G available to prove guilt.

Cases referred to

Arnold v National Westminister Bank plc [1991] 2 WLR 1177 (HL)

Carl-Zeiss Stiftung v Rayner and Keeler Ltd [1966] 2 All ER 536 (HL)

Connolly v DPP [1964] 2 All ER 40; [1964] AC 1254 (HL) H

Hungwe J

A *Fox v HM Advocate* 1998 JC 94

Galante v Galante (2) 2002 (1) ZLR 521 (H)

Kilian v Messenger of the Court, Uitenhage 1980 (1) SA 808 (A)

Nivrutti Pandurang Kokate & Ors v State of Maharashtra AIR 2008 SC 1460

O'Hara v Central SMT Co 1941 SC 363

B *S v Banana* 2000 (1) ZLR 607 (S)

S v Chabalala 2003 (1) SACR 134 (SCA)

R v du Toit 1958 R & N 177 (SR)

R v Emerson & Ors 1957 R & N 743 (SR); 1958 (1) SA 442 (SR)

S v Francis 1991 (1) SACR 198 (A)

C *S v Gabriel* 1970 (2) RLR 251 (A); 1971 (1) SA 646 (RA)

R v Hogan [1974] 2 All ER 142 (CA)

S v Jack 1990 (2) ZLR 166 (S)

S v K 2000 (4) BCLR (NmS)

R v Kriel 1939 CPD 221

S v McNab 1986 (2) ZLR 280 (S)

D *S v M* 1999 (2) SACR 548 (SCA)

S v Madzomba 1999 (2) ZLR 214 (H)

S v Ncube 1990 (2) ZLR 303 (S)

S v Snyman 1968 (2) SA 582 (A)

S v Webber 1971 (3) SA 754 (A)

E *State of Uttar Pradesh v Krishna Master & Ors AIR* 2010 SC 3071

Willowvale Mazda Motor Industries (Pvt) Ltd v Sunshine Rent-a-Car (Pvt) Ltd 1996 (1) ZLR 415 (S)

Legislation considered

F Supreme Court (Magistrates Courts) (Criminal Appeals) Rules (SI 504 of 1979) , r 22(1)

Case information

L Uriri, for the appellant

F Kachidza, for the respondent

Judgment

G **Hungwe J:** The appellant was convicted by the regional magistrate, Eastern Division, of rape, as defined in s 65 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] after a contested trial. He was, on 7 December 2011, sentenced to 14 years' imprisonment, of which 4 years were suspended for five years on the usual condition. Dissatisfied with both his conviction H and sentence, he now appeals against both conviction and sentence. The facts

---

Hungwe J

upon which he was found guilty of the crime of rape in the court *a quo* can A be summarised as follows.

Sometime in December 2006, the complainant and her younger brother stayed at the appellant's residence after they lost their mother. The appellant, a priest with the Anglican Church, was a family friend of the complainant's deceased mother. Around 1900 hours on an unspecified day during the month B of December 2006, the complainant was playing outside the residence with other children when the appellant called her into the house. He took her into the spare bedroom where he lowered his pair of trousers, laid her on the bed and ravished her. He warned her against telling anyone of the event. She did not. Around the same time on the following day, he repeated the same

predatory behaviour by calling her from where she was playing with other C children and took her into the spare bedroom. He removed her skirt and pants, lowered his pair of trousers and again ravished her.

In convicting the appellant, the magistrate accepted the evidence of the complainant and rejected that of the appellant and his witnesses. He analysed the complainant's evidence, her ability to withstand gruelling D cross-examination by counsel for the appellant during the trial and concluded that she was worthy of belief. He found corroboration of her evidence in the evidence of Mrs Musara to whom the complainant had disclosed the abuse.

In his notice and grounds of appeal, it appears that the appellant takes issue with the general findings of facts by the magistrate. I say that "it appears", E because the grounds set out in the notice of appeal are incoherent and, as such, do not "clearly and specifically" set out the grounds of appeal as required by r 22(1) of Supreme Court (Magistrates Courts) (Criminal Appeals) Rules (SI 504 of 1979) ("the Rules"). As an example I recite the first and second grounds verbatim:

> "1. The learned magistrate in court *a quo* erred in conceding that the State F proved beyond reasonable doubt when it is clear from the evidence that there are so many possibilities, in particular:
>
> While the doctor, who testified, said that there was definite penetration, he could not tell when the penetration took place but the notches were not fresh. The alleged abuse could have taken place prior to 2006 or even after 2006.
>
> Apart from sexual intercourse there are other factors which can stretch G the hymen e.g. a finger or a solid object. This applies with more force considering that the complainant did not see the Appellant inserting his penis into her vagina.
>
> Any other person other than the appellant could have perpetrated the abuse. In particular, the complainant's father, Kudakwashe Fred, was considered a suspect. H

Hungwe J

> 2. For A the stronger reason, the court did not appreciate that the mere failure of the accused to win the faith of the bench does not disqualify him from an acquittal. Proof beyond reasonable doubt demands more than that a complainant should be believed and the accused disbelieved. It demands that a defence succeeds whenever it appears reasonably possible that it might be true. This insistence upon objectivity far transcends mere considerations of subjective persuasion a judicial officer may entertain towards any B evidence. The administration of justice would otherwise be held hostage of the plausible rogue whose insincere but convincing blandishments must prevail over the stammering protestations of the truth by the defendant, frightened or confused victim of false incrimination (*sic*)."

Such grounds of appeal do not make it clear what the basis of dissatisfaction C is, that is, whether it is an error of law or one of fact or both, or a misdirection on the facts or of both facts and law.

The importance of complying with the requirements of the rules cannot be over-emphasised. Lack of compliance may result in the court regarding such notice and grounds of appeal a nullity. See *R v Emerson & Ors* 1957 R & N 743 (SR); 1958 (1) SA 442 (SR); *S v Jack* 1990 (2) ZLR 166 (S); *S v Ncube* D 1990 (2) ZLR 303 (S).

Rule 22(1) of the Rules reads:

> "The appellant shall, within ten days of the passing of sentence, or, where a request has been made in terms of sub-rule (1) of rule 3 of Order IV of the Magistrates Courts (Criminal) Rules, 1966, within seven days of the receipt of the judgment or statement referred to in that rule, whichever is the later, note his appeal by E lodging with the clerk of the court a notice in duplicate setting out clearly and specifically the grounds of the appeal. . ."

As can be seen from r 22(1), the above grounds of appeal do not comply with the rules of this court. The notice of appeal does not set "out clearly and specifically the grounds of the appeal".

F That which the appellant is attacking in the judgment of the convicting court must be set out in the manner laid down by the rule. A generalisation such as set out in the appellant's grounds of appeal against conviction is not good enough. It does not point out where the magistrate erred or misdirected himself. See *R v Emerson & Ors supra*; *R v du Toit* 1958 R&N 177 (SR).

A better understanding of what is required can be gleaned from r 51(7) of G the Magistrates Courts Act 32 of 1944 (South Africa). Rabie JA (as he then was) in *Kilian v Messenger of the Court*,

Uitenhage 1980 (1) SA 808 (A) stated the rule's requirement in an extract taken from the official translation of the judgment at 234 (p 815 of the Report itself) thus:

> "Rule 51(7) provides, in so far as it is relevant, that:
>
> H 'A notice of appeal or cross-appeal shall state –

Hungwe J

> (a) . . . A
>
> (b) the grounds of appeal, specifying the findings of fact or rulings of law appealed against.'
>
> Such a notice requires a precise statement of the points on which the appellant relies, so that the respondent may know on which points he must prepare a reply, and so that the court may know on which points a decision is required. See e.g. *Himunchol v Moharom* 1947 (4) SA 778 (N) at 780; *Harvey v Brown* B 1964 (3) SA 381 (E) at 383. The magistrate must also be properly informed of the grounds on which the appeal is based, so that he can comply with the duties imposed on him by r 51(8). Paragraph 1 of the notice of appeal merely contains an allegation that the magistrate erred in making the order in question, without stating in what respect he erred, and it cannot be said that it contains a ground of appeal as required by r 51(7)." C

Although r 51(7) of the Magistrates Courts Act 31 of 1944 (South Africa) deals with civil proceedings, it, in as far as appeals are concerned, is relevant to criminal appeals. There must be stated in the notice of appeal "a precise statement of the points on which the appellant relies." A statement that the magistrate "erred in fact and in law in holding that the State had proved D beyond reasonable doubt when it is clear from the evidence that there are so many possibilities" is not precise enough. As I have pointed out above, it does not inform the respondent or the magistrate what it is that is being attacked. The respondent is required to prepare his answer to the allegations made in the notice of appeal. Rule 23(1) requires a magistrate to reply to the notice of appeal. He must set out in a statement his reasons for judgment E and sentence and these reasons must be a reply to the grounds on which the appeal is based.

The response by the magistrate enables the appellant to amend his grounds of appeal should he wish to do so. These rules are for the benefit of the appellant, the respondent and the court. See *S v McNab* 1986 (2) ZLR 280 (S). F

At the hearing Mr *Uriri*, for the appellant, sought to amend the grounds of appeal by raising an additional ground framed as follows:

> "9A.The respondent is issue-estopped, in the absence of an application to withdraw an admission, from contending to the contrary of concessions made in the bail cause in B1354/11, namely that: G
>
> 9A.1 It was imperative therefore that the trial court should have treated the victim's evidence carefully.
>
> 9B.2 Respondent [the State] does not find comfort in the evidence of the complainant. On p 2 of the transcribed record the complainant talks of having been effectively penetrated into her vagina by the applicant once on two consecutive days. She would thereafter go and bath and later join other children to play. H

Hungwe J

> A 9B.3 The complainant, who had opportunities to make a report, did not make a report at the earliest possible opportunity and "one cannot expect her at that age not to know that what had been done on her was morally wrong and criminal.
>
> 9B.4 Given her age, it is strange that no tell-tale signs of abuse were observed on her by the adults who were present and even the other children she was playing with . . ."

B In essence, the additional ground of appeal is that since the respondent made submissions which amounted to concessions indicative of lack of support of the appellant's conviction, the respondent was bound by that concession and as such the matter the matter must be dealt with in terms of s 35 of the High Court Act [*Chapter 7:06*].

C I need not point out again that I find this way of drafting grounds of appeal incompatible with the requirement of the rules of court, in that it does not set out "clearly and specifically" the basis of attacking the conviction nor does it set out the basis of impugning the conclusions of law by the magistrate. I will however proceed to deal with the appeal as if they complied with the Rules.

The heads of argument filed on appellant's behalf are bulky and extensive. D However, the content of the heads does not match the volume upon which the content is spread. Without wishing to place any limitation upon the manner in which counsel should prepare heads of argument, it is considered desirable that the first paragraph of the heads should state clearly and specifically the submissions upon which reliance will be placed. In the succeeding paragraphs the separate submissions should be dealt with seriatim; there should, of course, E be a reference in these paragraphs to the relevant parts of the record giving the relevant page and line numbers, thus: 9/16 - 30, and where the record consists of more than one volume, thus: 3/29/16 - 30; there should also be a reference to the authorities upon which reliance is placed.

I deal first with the additional grounds of appeal advanced at the hearing of F the appeal as these present an interesting submission from counsel.

The doctrine of issue estoppel has been embraced by the Supreme Court as part of the law of Zimbabwe under the general rule of public policy that there should be finality in litigation. The doctrine prevents a party to civil proceedings, except in certain circumstances, from raising a contention of fact or of legal consequences of facts, where he raised the contention as G an essential element of his case in previous civil proceedings between the same parties or their predecessors in title, and the contention was found by the court, in a final judgment in those proceedings, to be incorrect, unless further material which is relevant to the correctness or incorrectness of the assertion, and could not, by reasonable diligence have been adduced by that H party in the previous proceedings has since become available to him. See

---

Hungwe J

Willowvale Mazda Motor Industry (Pvt) Ltd v Sunshine Rent-a-Car (Pvt) A Ltd 1996 (1) ZLR 415 (S); *Galante v Galante* (2) 2002 (1) ZLR 521 (H).

English law recognizes that the same issue should not be open to successive determinations: *nemo debit bis vexari pro una et eadem causa* and *interest rei publicae ut finis litium sit* ("no one should be disturbed twice in the same matter" and "it is in the public interest that law suits should have an end"). B These maxims underpin the doctrine of *res judicata*, which has two main applications, "cause of action estoppel" and "issue estoppel". The House of Lords in *Arnold v National Westminister Bank plc* [1991] 2 WLR 1177 was concerned only with the latter species of estoppel, but Lord Keith took the trouble to define both in the following passages (at 1183 and 1184):

> "Cause of action estoppels arises when a the cause of action in the later proceedings C is identical to that in the earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject matter . . . [The] bar is absolute in relation to all points decided unless fraud or collusion is alleged . . . Issue estoppel may arise when a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to D which the same issue is relevant one of the parties seeks to re-open that issue."

Cause of action estoppel binds more tightly than issue estoppel, since the latter is relaxed where special circumstances require (which are not confined to fraud and collusion). The House of Lords, faced with the question whether a change in case law might justify a departure from issue estoppel, decided E to endorse a new exception.

There are two forms of the doctrine of *res judicata*: cause of action estoppel and issue estoppel. Both operate where the court has adjudicated the cause of action between two or more parties and one of them seeks to re-litigate on the same facts. Where the cause of action is the same, cause of action estoppel operates to prevent any litigation of any matter that was raised or F should have been raised in the prior proceeding. Where the cause of action in the two proceedings is different, issue estoppel operates to prevent any litigation of any issue determined in the prior proceedings.

Lord Guest in *Carl-Zeiss Stiftung v Rayner and Keeler Ltd* [1966] 2 All ER 536 at 551 stated the requirements of issue estoppel as: G

> ". . .(1) that the same question has been decided; (2) that the judicial decision which is said to create the estoppel was final; and, (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies . . ."

In *R v Hogan* [1974] 2 All ER 142 Lawson J offered a definition of issue estoppel thus: H

Hungwe J

> A "Issue estoppel can be said to exist when there is a judicial establishment of a proposition of law or facts between parties to earlier litigation and when the same question arises in later litigation between the same parties. In the later litigation the established proposition is treated as conclusive between those parties."

It is clear that issue estoppel is related to, but differs from, *res judicata.* A plea of *res judicata* asserts that the cause of action is the same in both the B prior and the current proceeding, so that the current proceeding should not continue, whereas issue estoppel may be raised where the causes of action in the two proceedings are different, but the same particular factual issue has arisen in both.

In criminal proceedings, the principles of *res judicata* are given effect through C the pleas of *autrefois acquit* and *autrefois convict.* Where those pleas are not available, issue estoppel arises where the accused has been finally acquitted of a criminal offence arising out of certain conduct, is charged with a different offence, and for some reason the facts surrounding the earlier charge become relevant. Issue estoppel "prevents the Crown from calling into question issues D determined in the accused's favour in an earlier proceeding". See Martin L Friedland *Double Jeopardy* (Oxford, Clarendon Press, 1969) p 117.

It seems settled now in English law that an accused can invoke the principle of "issue estoppel" against the prosecution. This is the view expressed by Lord Morris, Lord Hudson and Lord Pearce in *Connolly v DPP* [1964] 2 All ER 40; [1964] AC 1254. The position in Zimbabwe seems to be that E the plea of issue estoppel in criminal law may only be raised by the State against the accused in a criminal trial. However, that common law position has been severely curtailed by statutory limitations placed on that right by such provisions as ss 290 and 324 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]: *S v Gabriel* 1970 (2) RLR 251 (A); 1971 (1) SA 646 F (RA); *R v Kriel* 1939 CPD 221.

In light of the foregoing, I respectfully find myself in disagreement with the contention that the doctrine of issue estoppel is of application in appeal matters as contented by Mr *Uriri*. I hold this view on the basis that the pleas of *autrefois acquit* and *autrefois convict* sufficiently deal with the situations G for which, at common law, the doctrine of *res judicata* would have been applicable in civil matters. In any event, there is ample authority for the proposition that statutory provisions in procedural law have filled the gap which is dealt with by the common law doctrine of issue estoppel in England.

Further, applying the civil cases requirements of issue estoppel, *viz.*:

H (i) that the same question has been decided;

Hungwe J

(ii) that the judicial decision which is said to create the estoppel was final, A and

(iii) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies;

the second and third elements are unproblematic: if the accused was previously B acquitted and either the acquittal was upheld on appeal or the State's appeal rights expired, the acquittal is final. *In casu* the parties - the State and the particular accused person (now the appellant) – are the same. But the first requirement, whether the factual issue is the same and, indeed, whether it has been decided, is often difficult to determine. I observe, however, that C counsel for the appellant attached the State submissions in the bail application hearing rather than that court's determination. No statutory rule of court nor any rule of evidence was relied upon to attach the submissions by State counsel in the bail application. The filing of the submissions is irregular in the extreme as they fall foul of the rules of court. In any event, as I have respectfully demonstrated, no issue relevant to the present appeal came D up for decision in the application for bail nor was any such issue finally determined. The determination was not on the same issue for which this appeal was lodged but on a different issue, that is, whether the appellant is a suitable candidate for bail.

It was contented by Mr *Uriri,* for the appellant, that because the respondent E had taken a considered view on the guilt of the appellant, which he expressed before a judicial forum, therefore the respondent in the present matter, the Attorney-General, cannot now put forward a different view of the same facts. With respect, I disagree with this contention. Assuming for a moment that the doctrine exists in criminal law under the guise of *autrefois acquit* and *autrefois convict*, my

respectful view is that the issue for determination F *in casu* is different from the issue for determination before the application for bail. As pointed out by Friedland *op cit*, the doctrine applies in order to prevent the State from calling into question issues determined in the accused's favour in an earlier proceeding. The doctrine operates as a shield, during trial, rather than a sword, so to speak. It would, as such, be of limited G application in an appeal. The reason for the limited application of the doctrine in appeals ought to be understood in the context that an appeal is confined to the findings of the trial court rather than some other post-trial opinions expressed by different officers under different proceedings. As the question of bail was not before the trial court, the trial court, therefore, made no determination regarding bail. H

2013 (1) ZLR p25

Hungwe J

A The issue before the bail application was whether the appellant was entitled to bail pending appeal. Whatever submissions the respondent made in the bail application, the issues before that forum were far removed from issues which are now squarely placed before this court as set out in the grounds of appeal. Presently, the issue before this court is whether the appellant was properly convicted and sentenced. The argument by counsel for the B appellant is, if I may put it rather crudely, that where the Attorney-General (through his representative) took the view that there are prospects of success on appeal for one reason or another, then he cannot be heard to argue in favour of a finding that the appellant was properly convicted in the appeal hearing. The stronger argument against the appellant under this head is that C no determination of his guilt or innocence was ever made by the court in the bail application hearing.

The additional ground of appeal is therefore, for these reasons, dismissed.

I now turn to consider the original grounds of appeal.

These grounds boil down to taking issue with the treatment of the single D witness evidence and whether the court *a quo* unduly accepted the evidence of a child without requiring further safeguards for such acceptance. Mr *Uriri,* for the appellant, did not dwell too much on these grounds in his oral submissions before us having expended his energies on the novel ground which I have disposed of above. He however emphasised that the conviction is not safe for the reason that the complainant had not confided E the abuse to the nearest person she was reasonably expected to. Otherwise he abided by his extensive heads of argument which he prepared and filed on appellant's behalf.

It is permissible for a court to convict in a sexual case, even if there is no corroboration of the complainant, but only where the merits of the complainant F and the demerits of the accused are without question. On the other hand, corroboration will not secure a conviction unless the court is in any event satisfied that the complainant is credible. In the case of young children, the degree of corroboration or other factors required to reduce the danger of relying on the child's evidence will vary with the age of the child and other circumstances of the case. The court must, in all cases, be satisfied that the G danger of false incrimination has been removed before it may convict: *S v Madzomba* 1999 (2) ZLR 214 (H). The present complainant viewed the appellant with respect, firstly by virtue of the trust reposed in him by her own parents, and, secondly by virtue of his position in society. As a result of threats offered to her soon after each incident of abuse, she had not reported H the abuse to anyone. There is nothing abnormal in such conduct by a child

---

2013 (1) ZLR p26

Hungwe J

of ten years. The court *a quo* correctly in my view, properly assessed the A difficulties put in her way by the abuse at the time. It would have been better, of course, had she reported the abuse earlier, as evidence would have been gathered whilst still fresh, and the attendant recall processes would have worked more efficiently. This however does not detract from the fact that she was able to recall the incidents during which she suffered abuse at the hands B of the appellant. There is no suggestion that she could have mistaken the appellant for someone else. Nor was any factual basis laid for the allegation that her father was a suspect.

The correct approach in determining the guilt of an accused is, as pointed out in *S v Chabalala* 2003 (1) SACR 134 (SCA) at 139-140, to weigh up C all the elements which point towards the guilt of the accused against all that are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done

so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt. See also *S v Francis* 1991 (1) SACR 198 (A). D

There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of the single witness. See the remarks of Rumpff JA in *S v Webber* 1971 (3) SA 754 (A) at 758. The trial judge will weigh his evidence, will consider its merits and demerits and, having done so, will decide whether it is trustworthy and whether, despite the fact that E there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told. The cautionary rule referred to by de Villiers JP in 1932 may be a guide to a right decision but it does not mean "that the appeal must succeed if any criticism, however slender, of the witnesses' evidence were well founded." F

It has been said more than once that the exercise of caution must not be allowed to displace the exercise of common sense.

In recent times it has been held that the cautionary rule relating to witnesses in matters with a sexual connotation must be dispensed with: *S v M* 1999 (2) SACR 548 (SCA), where the court said the following: G

> "Prior to the decision in *S v Jackson* 1998 (1) SACR 470 (SCA), it had long been accepted that criminal cases of a sexual nature fell into a special category. It was said that there was an 'inherent danger' in relying upon the unconfirmed testimony of a complainant in a sexual case. This resulted in the courts adopting a cautionary rule of practice. The rule required –
>
> (a) the recognition of the 'inherent danger'; and H

Hungwe J

> (b) the A existence of some safeguard that reduced the risk of a wrong conviction, such as corroboration of the complainant in a respect implicating the accused, or the accused's failure to give evidence or his obvious untruthfulness".

See *S v Snyman* 1968 (2) SA 582 (A) at 585C–H.

In *S v Jackson supra* it was pointed out that the application of the cautionary B rule to sexual assault cases was based on irrational and outdated perceptions. Although the evidence in a particular case might call for a cautionary approach, this, it was emphasised in the judgment, was not a general rule: the State was simply obliged to prove the accused's guilt beyond reasonable doubt. The factors which motivated the court to dispense with the cautionary rule in sexual assault cases apply, in my view, with equal force to all cases in C which an act of a sexual nature is an element.

In *S v Banana* 2000 (1) ZLR 607 (S), following the lead set in *S v Jackson supra*, the court held that the cautionary rule in sexual cases was based on an irrational and outdated perception, and had outlived its usefulness. It was no longer warranted to rely on the cautionary rule of practice in sexual cases. Despite the abandonment of the cautionary rule, however, the courts must still D consider carefully the nature and circumstances of alleged sexual offences.

See also *S v K* 2000 (4) BCLR (NmS).

It is trite law that the evidence of a single witness must be approached with caution and its merits weighed against any factors that militate against its credibility. A common sense approach must be adopted. Where the evidence E of a single witness is corroborated in any way that tends to indicate that the whole story was not concocted, the caution may be overcome, as it may be by any other feature that increases the confidence of the court in the reliability of the single witness. Corroboration is not, however, essential.

The classic statement on the principle of corroboration comes from a civil case:

> F "Corroboration may be by facts and circumstances proved by other evidence than that of a single witness who is to be corroborated. There is sufficient corroboration if the facts and circumstances proved are not only consistent with the evidence of the single witness, but more consistent with it than with any competing account of the events spoken to by him. Accordingly, if the facts and circumstances proved by other witnesses fit in to his narrative so as to make G it the most probable account of the events, the requirements of legal proof are satisfied". *O'Hara v Central SMT Co* 1941 SC 363 at 379.

The requirement for corroboration was re-stated more recently in *Fox v HM Advocate* 1998 JC 94 at 100-101 in the following, rather different, terms:

"Corroborative evidence is . . . evidence which supports or confirms the direct evidence of a witness . . . the starting-point is that the jury have accepted the H evidence of the direct witness as credible and reliable. The law requires that,

---

Hungwe J

even when they have reached that stage, they must still find confirmation of the A direct evidence from other independent direct or circumstantial evidence . . . the evidence is properly described as being corroborative because of its relation to the direct evidence: it is corroborative because it confirms or supports the direct evidence. The starting point is the direct evidence. So long as the circumstantial evidence is independent and confirms or supports the direct evidence on the crucial facts, it provides corroboration and the requirements of legal proof are B met."

Evidence can be corroborative even if, taken on its own, it does not point conclusively towards a suspect's guilt. So, in a case where identification is in issue, a positive identification by one witness may be corroborated by a resemblance identification by another. Corroboration is about the number of witnesses available to prove facts. It is not about number of facts available to C prove guilt. Thus, a single circumstance, such as the finding of a fingerprint in a particular place, may be sufficient to prove identity (a crucial fact) provided that the finding of the print and it being from the accused's finger are each spoken to by more than one witness. Alternatively, two separate circumstances, each spoken to by separate witnesses, may be sufficient if D both point towards guilt.

In *Nivrutti Pandurang Kokate & Ors v State of Maharashtra* AIR 2008 SC 1460, the Indian Supreme Court dealing with the evidence of a child witness, observed thus:

"The decision on the question whether the child witness has sufficient intelligence primarily rests with the trial judge who notices his manners, his apparent possession E or lack of intelligence, and the said judge may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath. The decision of the trial court may, however, be disturbed by the higher court if from what is preserved in the records, it is clear that his conclusion was erroneous. This precaution is necessary because child witnesses are amenable to tutoring and often live in a world of make-believe. F Though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shaped and moulded, but it is also an accepted norm that if after careful scrutiny of their evidence the court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of a child witness."

In *State of Uttar Pradesh v Krishna Master & Ors* AIR 2010 SC 3071, G the Indian Supreme Court held that there is no principle of law that it is inconceivable that a child of tender age would not be able to recapitulate the facts in his memory. A child is always receptive to abnormal events which take place in his life and would never forget those events for the rest of his life. The child may be able to recapitulate carefully and exactly when asked about the same in the future. In a case where the child explains the relevant H

Hungwe J

A events of the crime without improvements or embellishments, and inspires confidence of the court, his deposition does not require any corroboration whatsoever. The child at a tender age is incapable of having any malice or ill will against any person. Therefore, there must be something on record to satisfy the court that something had gone wrong between the date of incident and recording of the evidence of the child witness due to which the witness B wanted to implicate the accused falsely in a case of a serious nature. Had such incident occurred, there is no reason in logic why a full blown trial where the appellant was represented by counsel would have failed to uncover it. These observations, in my view apply to the present with equal force.

The court *a quo* had the opportunity to evaluate the issues of credibility with C the able assistance of counsel during trial. The complainant was subjected to thorough cross-examination. The trial court was satisfied that, despite certain unsatisfactory features of her evidence which did not go to the gravamen of her evidence, the complainant was worthy of belief. Such a finding ought not to be lightly overturned unless there are compelling reasons on the record D justifying it. I am unable to say that such compelling reasons exist in this case. The magistrate carefully considered the totality of the evidence against the appellant before rejecting appellant's protestations of innocence as false. I find no fault in his reasoning.

As against sentence, the appellant is a church pastor and a family friend of the complainant's family. His family volunteered to look after the E complainant and her younger sibling out of the goodness of their hearts as in a pastor ministering his flock. I find nothing exaggerated in the language used to describe the treacherous behaviour displayed by the appellant when he changed from being the good shepherd to being the rapist that he was found to be by the court *a quo.* There is nothing unusual in the sentence F imposed on the appellant. The Criminal Law (Codification and Reform) Act [*Chapter 9:23*] permits the imposition of the sentence which the magistrate imposed. There is no allegation that, in assessing the appropriate sentence, the magistrate took into account factors which he was not entitled to take into account or that he had disregarded those factors which he was obliged by law to take into account. The sentence imposed sends the right message to G child rapists in particular and to rapists in general that they should not expect to be treated with kid gloves when convicted of such heinous crimes. Those persons who commit this type of crime should not expect leniency when their heinous crimes finally catch up with them. Society expects that those who stand *in loco parentis* (to) take their roles seriously and protect, rather H than abuse, those children in their care and custody. The sentence imposed

Hungwe J

in this case is in line with the usual sentences for this type of crime. In the A result, therefore, I make the following order:

The appeal against both conviction and sentence be and is hereby dismissed.

MAVANGIRA J concurred.

Kantor & Immerman, legal practitioners for the appellant B

Attorney-General's Office, legal practitioners for the respondent

© 2015 Juta and Company (Pty) Ltd.

Document 5 of 73

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2013/Volume 1/MOHADI v STANDARD PRESS (PVT) LTD 2013 (1) ZLR 31 (H)

MOHADI v STANDARD PRESS (PVT) LTD 2013 (1) ZLR 31 (H)

Citation	2013 (1) ZLR 31 (H)
Case No	Judgment No HH-16-13
Court	High Court, Harare
Judge	Zhou J
Heard	13 September 2012; *CAV*
Judgment	17 January 2013
Counsel	*E W W Morris,* for the excipient *R Dembure,* for the respondent
Case Type	Exception
Annotations	No case annotations to date

Flynote

Delict – *defamation – damages – need for amount claimed to take into account damages awarded in this and other jurisdictions – duty of lawyers not to claim excessive and unrealistic amounts*

Delict – *defamation – plaintiff – reference to – plaintiff not identified by* D *name – test – need to show that defamatory aspects of publication referred to plaintiff*

Legal practitioner – *conduct and ethics – duty to client – need to render proper advice – must avoid creating false expectations by claiming excessive and unrealistic amounts as damages*

Headnote

E The plaintiff, one of the co-Ministers of Home Affairs, claimed damages for defamation following the publication of an article in a newspaper. The article referred to the large scale theft of copper wiring alongside the main Gweru-Harare road and the lack of action by the police, and went on to say: "Recently the co-Minister of Home Affairs responsible for F the Police had his 30-tonne truck impounded with 30 tonnes of stolen copper wire on board . . . a close relative has been running a gang stripping wire from power lines for several years. The police at Beitbridge are well aware of this and have done nothing . . ." The article did not name the plaintiff. The defendants excepted to the claim, on the grounds that the words complained of contained no reference to the plaintiff and, G further, that the declaration made no proper allegations of what facts would enable the ordinary reader to identify the plaintiff as the person referred to. The plaintiff claimed damages in the sum of US$35 million.

Held, in order to succeed in a claim for defamation damages, a person must establish that the material complained of referred to or concerned him. H The test for determining whether in any publication the reference is to

the plaintiff is an objective one: whether the ordinary, reasonable man A hearing the speech would have understood the words complained of to apply to the plaintiff. There are two stages in the inquiry into the question whether the material complained of refers to or concerns the plaintiff. The first is whether the statements complained of are reasonably capable of referring to the plaintiff, either in their ordinary meaning or by reason B of some special circumstances. This is a question of law which can be determined on exception. Evidence is not admissible in that enquiry. The second leg of the inquiry is whether a reasonable person would regard the words complained of as referring to the plaintiff. Only the first stage needed to be considered *in casu*.

Held, that where the plaintiff is not identified or referred to by name or C description, such as his office or occupation, he must state the facts upon which he relies as showing that the statements complained of referred to or concerned him. While it was possible to identify the plaintiff as the co-Minister of Home Affairs being referred to (the other co-Minister being female), it was clear that the defamatory aspects of the article which the plaintiff sought to rely upon did not refer to or concern the D plaintiff as co-Minister of Home Affairs. They concerned a relative of his, as well as the police who were being accused of inaction. The article did not say or imply that the plaintiff was responsible for vandalising the electrical system. The allegation that the police impounded a motor vehicle owned by the plaintiff carrying thirty tonnes of copper wire did E not in any way mean that the plaintiff was involved in the stealing of the copper wire. Although, the article stated that a close relative of the plaintiff had been leading a gang of persons responsible for stealing copper wire from the railway company, there was no suggestion that the plaintiff is responsible for the conduct of his relative. The article did not state or suggest in any way that the plaintiff ran a criminal gang F that had been stealing copper wire. That allegation related to a relative of the plaintiff. There was no suggestion that the plaintiff influenced the police not to arrest the persons who stole the copper cables. The exception would accordingly be upheld.

It is not uncommon now for large sums of money which bear no relation G to the awards being made in this jurisdiction or other jurisdictions to be claimed as damages for defamation. The legal profession should be reminded that lawyers owe it to their clients to render proper legal advice on quantum of damages claimed, and should avoid creating false expectations in the minds of their clients regarding the amounts which they can claim. H

Cases cited A

Auridiam Zim (Pvt) Ltd v Modus Publications (Pvt) Ltd 1993 (2) ZLR 359 (H)

Demmers v Wyllie & Ors 1978 (4) SA 619 (D)

Goodall v Hoogendoorn 1926 AD 11

Ndewere v Zim Newspapers (1980) Ltd & Anor 2001 (2) ZLR 508 (S)

B *Potgieter v Ellis & Anor* 1948 (3) SA 1183 (D)

R M Ins Co (Pvt) Ltd v GCM (Pvt) Ltd 1993 (2) ZLR 407 (S)

SA Assd Newspapers Ltd & Anor v Est Pelser 1975 (4) SA 797 (A)

Taylor & Anor v Chavunduka & Ors 1995 (2) ZLR 22 (H)

Young v Kemsley & Ors 1940 AD 258

Case information

C *E W W Morris,* for the excipient

R Dembure, for the respondent

Judgment

Zhou J: This is an exception to the plaintiff's claim for damages for defamation on the ground that the words complained of carry no reference D to the plaintiff and that the declaration makes no proper allegations of facts which would enable the ordinary reader to identify the plaintiff as the person defamed. The background to the dispute between the parties is as follows:

The plaintiff is a Cabinet Minister in the current Government of Zimbabwe. He is co-Minister of Home Affairs. The second defendant is the publisher of E a newspaper known as *The Standard*. The third defendant is employed by the second defendant as editor. The first defendant is the name of a newspaper. In its issue of *The Standard* of 11-17 October 2009 the second defendant published a letter authoured by the fourth defendant under the title "*Criminal vandalism*". The full text of the letter is as follows:

> F "Driving to Harare last week I saw an astonishing sight just outside Gweru. From Gweru to Harare, a distance of more than 250 kilometres, the electrical system built after independence at a cost of over US$100 million dollars, has been stripped and lies derelict and destroyed.
>
> Tens of millions of dollars damage carried out on the side of the main road and in front of the entire country and its police force. Recently the co-Minister of G Home Affairs responsible for the Police had his 30-tonne truck impounded with 30 tonnes of stolen copper wire on board.
>
> We have heard nothing since then but I understand a close relative has been running a gang stripping wire from power lines for several years. The police at Beitbridge are well aware of this and have done nothing.
>
> This criminal vandalism on a massive scale, just when we need our railways H for exports and bulk movements of food, coal and other commodities, someone

> cripples the only major investment we have carried out in our rail system since A independence. . . ."

Based on the publication of the above letter, the plaintiff issued summons against the defendants claiming a sum of $35 000 000 for defamation. The material paragraphs of the plaintiff's declaration read as follows:

> "6. In its October 11-17 issue, the *Standard n*ewspaper published a letter written B by the fourth defendant headed "Criminal Vandalisation" (*sic*) which letter contains lies, and misleading statements of and concerning the plaintiff.
>
> 7. The article is not only false but is defamatory of and concerning the plaintiff in that it states falsely that:
>
> 7.1 the plaintiff is responsible for vandalising the electrical system from Gweru to Harare; C

7.2 the plaintiff owns a 30 tonne truck that was impounded by the police with 30 tonnes of stolen copper wire on board;

7.3 the plaintiff or his close relatives is (sic) responsible for theft of copper wire countrywide;?

7.4 the plaintiff has a criminal gang that has been stripping wire from power lines for several years and police at Beitbridge, where the plaintiff is D the Member of Parliament, is aware of but has done nothing;

7.5 the plaintiff, who is a co-Minister responsible for the police and was the sole Minister of police before the formation of the current inclusive government, has somehow corruptly managed to influence the police not to investigate or prosecute the thieves.

8. Though the plaintiff is not mentioned by name, the article in the newspaper E is couched in such a way that it leaves an ordinary reader with no doubt that the plaintiff is the subject of the article. The publication is in fact based on a similarly false and defamatory publication by an obscure online publication of 14 June 2009."

In response to the summons and declaration, the defendants filed a special plea and an exception. The special plea was based on the citation of the F first defendant, *The Standard*, which is the name given to the publication in which the article complained of was published. The plaintiff withdrew his claim against *The Standard*, thereby rendering it unnecessary for the court to determine the special plea. The exception taken is that the words complained of contain no reference to the plaintiff and, further, that the declaration G makes no proper allegations of what facts would enable the ordinary reader to identify the plaintiff as the person referred to.

It is trite that, in order to succeed in a claim for defamation damages, a person must establish that the material complained of referred to or concerned him or her. See *Ndewere v Zimbabwe Newspapers (1980) Ltd & Anor* 2001 (2) ZLR 508 (S) at 511D*; Goodall v Hoogendoorn Ltd* 1926 AD 11. The test H

Zhou J

A for determining whether in any publication the reference is to the plaintiff is an objective one. In *Young v Kemsley & Ors* 1940 AD 258 at 281 the court expressed the position in the following terms:

> "The test is whether the ordinary, reasonable man hearing the speech would have understood the words complained of to apply to (the plaintiff)."

B See also *Potgieter v Ellis & Anor* 1948 (3) SA 1183 (D) at 1187; *SA Associated Newspapers Ltd & Anor v Estate Pelser* 1975 (4) SA 797 (A) at 812.

There are two stages in the inquiry into the question whether the material complained of refers to or concerns the plaintiff. The first stage is whether the statements complained of are reasonably capable of referring to the plaintiff, either in their ordinary meaning or by reason of some special circumstances. C This is a question of law which can be determined on exception. Evidence is not admissible in that enquiry. The case of *SA Associated Newspapers Ltd & Anor v Estate Pelser* s*upra* at 811 states that the inquiry on the exception will be directed at "whether the words are reasonably capable of conveying to the reasonable reader . . . that the alleged defamatory matter refers to the D plaintiff". See *Taylor & Anor v Chavunduka & Ors* 1995 (2) ZLR 22 (H) at 27C-28E. The second leg of the inquiry is whether a reasonable person would regard the words complained of as referring to the plaintiff. The determination of this matter is not concerned with that second stage but only with the first one. See Jonathan Burchell *The Law of Defamation in South Africa* p 129.

In the instant case the article does not refer to the plaintiff by name. Where E the plaintiff is not identified or referred to by name or description such as his office or occupation, he must state the facts upon which he relies as showing that the statements complained of referred to or concerned him: Burchell *op cit* p 131. *In casu* the article contains a general complaint regarding vandalism of railway cables and the author's perceived inaction of the police in the face F of such vandalism. The only reference to a co-Minister of Home Affairs is in the context of an instance given of a motor vehicle belonging to him which was impounded by the police while carrying thirty tonnes of copper wire and to the alleged fact that the said co-Minister's close relative is believed to be leading a group which steals railway cables. The fourth respondent, who is the author of the article, further states that the police at Beitbridge are G aware of the acts of vandalism but have not acted to avert them or to bring the perpetrator to account. While it is possible to identify the plaintiff as the co-Minister of Home Affairs being referred to in the article by reference to his gender by a reader who

knows that the other co-Minister is female, it is clear that the defamatory aspects of the article which the plaintiff seeks H to rely upon do not refer to or concern the co-Minister of Home Affairs.

Zhou J

They concern a relative of the Minister as well as the police who are being A accused of inaction.

The plaintiff's declaration reveals that he relies on what is referred to as a "quasi-innuendo" or innuendo pointing to the sting to the defamation or "sting-pointing imputation". See *Auridiam Zimbabwe (Pvt) Ltd v Modus Publications (Pvt) Ltd* 1993 (2) ZLR 359 (H) at 366B-E. In para 7 of the B declaration the plaintiff points to certain defamatory meanings which he attributes to the words in the article. In the case of *Auridiam Zimbabwe (Pvt) Ltd v Modus Publications (Pvt) Ltd* s*upra* at 366E-F, the following is pointed out:

> "What is of importance in regard to the pleading of a 'quasi-innuendo' is that the plaintiff is bound by the specific meanings selected by him as being those C defamatory of him, those therefore being the limited charges which the defendant has to meet."

See also *Demmers v Wyllie & Ors* 1978 (4) SA 619(D) at 622F.

In other words, the court must examine the meanings identified and relied upon by the plaintiff in order to determine whether the defamatory aspects D of the article referred to in the plaintiff's declaration are reasonably capable of conveying to a reasonable reader that the alleged defamatory matter refers to the plaintiff. The assertion by the plaintiff that the article states that he is responsible for vandalising the electrical system from Gweru to Harare is not supported by the contents of the article. The allegation that the police impounded a motor vehicle owned by the plaintiff carrying 30 tonnes of E copper wire does not in any way mean that the plaintiff was involved in the stealing of the copper wire. In fact, the article specifically states that a close relative of the plaintiff has been leading a gang of persons responsible for stealing copper wire from the railway company. There is no suggestion that the plaintiff is responsible for the conduct of his relative. The article does not state or suggest in any way that the plaintiff runs a criminal gang that F has been stealing copper wire. That allegation relates to a relative of the plaintiff. Also, nowhere in the article is there a suggestion that the plaintiff has influenced the police not to arrest the persons who steal the copper cables.

In para 8 of his declaration the plaintiff alleges that the article complained of is based upon another article, a copy of which is attached, which was G published online on http://www.the zimbabwetimes.com on 14 June 2009. That assertion is not supported by a reading of the letter written by the fourth defendant and published by the second defendant. I agree with Mr *Morris* that the fourth defendant would not have lost the opportunity to blame the plaintiff for the matters complained of in the letter if he wanted, and had a basis, to do so. But he blames the police. H

Zhou J

A I am persuaded that the facts relied upon by the plaintiff do not show that the words in the article complained of refer to him. The plaintiff's declaration is therefore exceptionable. Mr *Morris* urged that, in the event that the exception is upheld, the court must strike down the declaration and dismiss the plaintiff's claim on the ground that the case turns upon an interpretation of the article complained of. The plaintiff did not ask for leave to amend his declaration B in the event of the exception being upheld. The correct procedure where an exception is upheld is not to dismiss the plaintiff's claim, as prayed by the defendants, but to grant the plaintiff leave to amend his pleadings if he is so advised. See *RM Insurance Co (Pvt) Ltd v GCM (Pvt) Ltd* 1993 (2) ZLR 407 (S) at 413D*; Auridiam Zimbabwe (Pvt) Ltd v Modus Publications (Pvt) Ltd* C s*upra at 373D; Taylor & Anor v Chavunduka & Ors supra* at 30D.

The court was invited by Mr *Morris* to award costs on an attorney-client scale on the ground that the amount claimed should excite the anger of the court as a *plus petitio*. It is not uncommon now for large sums of money which bear no relation to the awards being made in this jurisdiction or other jurisdictions to be claimed as damages for defamation. There is need D for the legal profession to be reminded that lawyers owe it to their clients to render proper legal advice on quantum of damages claimed, and should avoid creating false expectations in the minds of their clients regarding the amounts which they can claim. Although the amount claimed in the instant case falls in the category

of the claims referred to above, I do not consider it to be appropriate to take it into account for the purposes of considering the E costs given the basis upon which the exception has been upheld.

Accordingly, it is ordered as follows:

1. The defendants' exception is upheld with costs, and the plaintiff's declaration is set aside.
2. The F plaintiff is given leave, if so advised, to file an amended declaration within ten days of the date of this judgment.

Mabulala & Motsi, plaintiff's legal practitioners

G *Atherstone & Cook*, defendants' legal practitioners

© 2015 Juta and Company (Pty) Ltd.

Document 6 of 73

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2013/Volume 1/MILLS v TANGANDA TEA COMPANY LTD 2013 (1) ZLR 38 (H)

MILLS v TANGANDA TEA COMPANY LTD 2013 (1) ZLR 38 (H)

Citation	2013 (1) ZLR 38 (H)
Case No	Judgment No. HH-12-13
Court	High Court, Harare
Judge	Patel J
Heard	20 November 2011; *CAV*
Judgment	22 January 2013
Counsel	*C Kuhuni*, for the applicant *A Rutanhira* for the respondent
Case Type	Civil trial
Annotations	No case annotations to date

Flynote

Company – *director – authority – ostensible authority to enter into contract – when person contracting with company entitled to rely on assumption of authority on part of director – person contracting also a director with knowledge of workings of company – not entitled to make such assumption*

Company – *director – payments to – payments subject to tax – unlawfulness* D *of providing for tax-free payments – payments for loss of office – must be disclosed to members of company and approved in a general meeting – payment not so disclosed or approved unlawful*

Headnote

The applicant was the former managing director of the respondent and a E former director of another company, M Ltd, of which the respondent was a wholly owned subsidiary. He resigned from both positions. A severance package was executed. The agreement was signed by one B, representing the respondent in his capacity as group chief executive of M Ltd and being duly authorised

thereto. The applicant averred that the F respondent had complied with certain aspects of the agreement, relating to payments in lieu of notice and leave and the transfer of the applicant's motor vehicle and cellphone, but was trying to resile from the principal element pertaining to severance pay. The respondent claimed that B had no authority to execute the agreement with the applicant, in the absence of resolutions from M Ltd and the respondent authorising him to bind G the respondent to the agreement. It said that M Ltd was a distinct legal entity quite separate from the respondent company. In any event, the agreement was invalid because of the absence of due authorisation to conclude it and because its principal features would entail non-compliance with certain provisions of the Companies Act [*Chapter 24:03*]. The applicant sought summary judgment. H

2013 (1) ZLR p39

A *Held*, that M Ltd and the respondent were distinct and separate legal entities, each with its own governing board and executive management. The fact that M Ltd owned 10 per cent of the shares in the respondent did not in itself make the actions of B binding on the respondent.

Held, further, that s 12 of the Companies Act codifies the so-called *Turquand* B rule or presumption of regularity in corporate affairs. It provides that any person dealing with a company is entitled to make certain assumptions, and that the company is estopped from denying their truth. In particular, it may properly be assumed that the company's internal regulations have been duly complied with. It may also be assumed that every person described in the company's register or returns as a director, manager or C secretary of the company, and every person whom the company represents to be an officer or agent of the company, has been duly appointed and has authority to exercise the functions customarily exercised by a director, manager or secretary, or by an officer or agent of the kind concerned. However, a person is not entitled to make any such assumptions if he has actual knowledge to the contrary or if he ought reasonably to know D the contrary. The rule, however, does not protect any person who, by reason of his position within the company, ought to have known of the irregularity in question.

Held, further that the applicant was clearly not an outsider or mere employee of the respondent, but its managing director. Even if he was, as he claimed, E precluded from attending board meetings of M Ltd and the respondent at the relevant time, he could quite easily have obtained the minutes of relevant board meetings so as to ascertain decisions taken concerning his resignation and severance package. In any event, in his position as managing director, he must have known that any decision in that regard F would require a board resolution from the respondent authorising B to negotiate and conclude his severance package. The applicant was thus not entitled to take advantage of the presumption of regularity embodied in s 12 of the Act.

Held, further, that s 176(1) of the Act is designed to curb the mischief of directors of a company receiving a payment or remuneration which is G calculated by reference to the rate of taxation and without the approval of the taxing authority. This construction is fortified by s 176(2), which deems the net sum actually provided for as a gross sum subject to taxation. The agreed figure payable to the applicant could not possibly be a net amount after taxation because it included a sum as compensation for H restraint of trade.

2013 (1) ZLR p40

Held,, further, that s 178 of the Act makes it clear that the approval of the A members of a company is a prerequisite for any severance payment to a director. Full particulars with respect to the proposed payment, including the amount thereof, must be disclosed to members of the company and the proposal must be approved by the company in general meeting. Accordingly, the severance payment *in casu*, not having been disclosed B to the members of the respondent and not having been approved by them at a general meeting, was patently in violation of s 178 and consequently unlawful. Similarly s 179(1) of the Act requires the prior approval of members at a general meeting as a precondition for any Compensatory payment envisaged by that provision

Held, further, that itt was clear that the respondent had several *bona fide* C defences to the applicant's claim and that the plaintiff's case was not unassailable and unanswerable. Summary judgment would accordingly be refused.

Cases cited

Chrismar (Pvt) Ltd v Stutchbury 1973 (1) RLR 277 (G)

Howard v Patent Ivory Mfg Co (1888) 38 ChD 156

Jena v Nechipote 1986 (1) ZLR 29 (S)

Mahony v East Holyford Mining Co (1875) LR 7 HL 869

Mine Consultants and Supply Co v Borrowdale Motors (Pvt) Ltd 1990 (2) ZLR 281 (S)

Mine Workers' Union v J J Prinsloo 1948 (3) SA 831 (A)

Pitchford Invstms (Pvt) Ltd v Muzari 2005 (1) ZLR 1 (H)

Reed NO v Sagers' Motors (Pvt) Ltd 1969 (2) RLR 519 (A); 1970 (1) SA 521 (RA)

R v Rhodian Investments Trust (Pvt) Ltd 1957 R & N 723; 1957 (4) SA 631 (SR)

Royal British Bank v Turquand (1856) 6 E & B 327; (1843-60) 119 ER 886

Seniors Service (Pvt) Ltd v Nyoni 1986 (2) ZLR 293 (S)

Stewart v Zagreb Properties (Pvt) Ltd 1971 (1) RLR 180 (A); 1971 (2) SA 346 (RA)

Wolpert v Uitzigt Properties (Pty) Ltd & Ors 1961 (2) SA 257 (W)

Legislation considered

Companies Act [*Chapter 24:03*], ss 12, 13, 176, 178 and 179

Case information

C Kuhuni, for the applicant

A Rutanhira for the respondent H

Patel J

Judgment

A **Patel J:** This matter involves two separate claims by the applicant as against the same respondent. The two claims emanate from the same cause of action and involve the same facts in issue between the same parties. They were accordingly consolidated by consent on 19 November 2012 through a chamber application.

B The applicant's consolidated claim is for summary judgment. He seeks the payment of two tranches of US$83 500 each and BUPA medical aid subscriptions in the sum of GBP1332.92, together with interest at the prescribed rate, and costs of suit on a legal practitioner and client scale.

Background

The applicant is the former managing director of the respondent and a former C director of Meikles Ltd, having resigned from both positions with effect from 30 June 2011. His claim arises from a severance package totalling US$334 000 which was executed on 22 June 2011. The agreement in question was signed by one Brendan Beaumont, representing the respondent in his capacity as group chief executive of Meikles Ltd and being duly authorised thereto. D Meikles Ltd owns the entire shareholding in the respondent company. The applicant avers that the respondent has complied with certain aspects of the agreement, relating to payments in lieu of notice and leave and the transfer of the applicant's motor vehicle and cellphone. However, it wishes to resile from the principal element pertaining to severance pay. Its defence, as to the absence of proper authority to conclude the agreement and non-compliance E with statute, is merely a dilatory tactic and an abuse of court process.

The respondent accepts that the applicant did report to Beaumont as his immediate boss. However, it denies that the latter had authority to execute the agreement with the applicant, in the absence of resolutions from Meikles Ltd and the respondent authorising him to bind the respondent to the agreement. F According to a supporting affidavit from its erstwhile lawyer (now deceased), the agreement was drafted on the instructions of Beaumont in collaboration with applicant's counsel herein. Its defence, as *per* its plea, is that Meikles Ltd is a distinct legal entity quite separate from the respondent company. In any event, the agreement is invalid because of the absence of due

authorisation to conclude it and because its principal features would entail non-compliance G with certain provisions of the Companies Act.

The applicant avers that Beaumont, in his several capacities, held himself out to possess the requisite authority and that he relied upon that representation. Beaumont therefore had ostensible authority to bind the respondent to the agreement with the applicant. Moreover, the provisions of the Companies H Act which are relied upon by the respondent, do not apply to the applicant as

an employee who assumed the position of director due solely to his contract A of employment.

Requisites for summary judgment

The approach to be adopted in proceedings for summary judgment has been laid down on numerous occasions. All that the defendant need do in order to resist summary judgment is to allege facts disclosing a defence and sufficient B to establish that defence: *R v Rhodian Investments Trust (Pvt) Ltd* 1957 R & N 723; 1957 (4) SA 631 (SR) at 633-634. He must show that there is a mere possibility of his success or that he has a plausible case or that there is a triable issue: *Jena v Nechipote* 1986 (1) ZLR 29 (S) at 30. It is only when all the proposed defences to the plaintiff's claim are clearly unarguable, C both in fact and law, that the drastic relief of summary judgment may be allowed: *Chrismar (Pvt) Ltd v Stutchbury* 1973 (1) RLR 277 (G) at 279. In short, the plaintiff's case must be unassailable and unanswerable: *Pitchford Investments (Pvt) Ltd v Muzari* 2005 (1) ZLR 1 (H) at 3-4.

Relationship between respondent and Meikles Ltd

It is common cause that the respondent is a wholly owned subsidiary of D Meikles Ltd. This is confirmed by the latter's annual report of 2011 which deals with the respondent as a subsidiary of the Meikles Group. It is also not in dispute that Beaumont was the group chief executive of Meikles Ltd and, as such, the applicant's immediate superior. Nevertheless, it cannot be doubted that Meikles Ltd and the respondent are separate corporate legal entities. The E 2011 annual report explicitly draws this distinction as between Meikles Ltd and each subsidiary as being decentralised, with a formal operating board and clear definition of responsibility within well-defined policies. Again, the same report refers to and records the applicant's resignation as executive director of Meikles Ltd and as a member of its board, but makes no mention F whatsoever of his position as managing director with the respondent and his resignation from that post.

All in all, it is reasonably clear Meikles Ltd and the respondent are distinct and separate legal entities, each with its own governing board and executive management. The fact that Meikles Ltd owns 100 per cent of the shares in the respondent company does not in itself make the actions of Meikles group G chief executive binding on the respondent.

Authority to conclude agreement

Section 12 of the Companies Act [*Chapter 24:03*] codifies the so-called *Turquand* rule or presumption of regularity in corporate affairs. It provides that any person dealing with a company is entitled to make certain assumptions, H

A and that the company is estopped from denying their truth. In particular, it may properly be assumed that the company's internal regulations have been duly complied with. See, in this regard, *Wolpert v Uitzigt Properties (Pty) Ltd & Others* 1961 (2) SA 257 (W) at 264-5, and the authorities there cited.

In terms of s 12 of the Act, it may also be assumed that every person described B in the company's register or returns as a director, manager or secretary of the company, and every person whom the company represents to be an officer or agent of the company, has been duly appointed and has authority to exercise the functions customarily exercised by a director, manager or secretary, or by an officer or agent of the kind concerned. However, a person is not entitled to make any such

assumptions if he has actual knowledge to the contrary C or if he ought reasonably to know the contrary. Section 13 stipulates that a company shall be bound in terms of s 12, notwithstanding that the officer or agent concerned acted fraudulently or forged a document purporting to be sealed or signed on behalf of the company.

In essence, what these provisions enact in the corporate context are the D common law rules governing ostensible or apparent authority, entitling third parties to enforce contracts concluded with the agents or employees of their principals. See *Reed NO v Sager's Motors (Pvt) Ltd* 1969 (2) RLR 519 (A); 1970 (1) SA 521 (RA); *Stewart v Zagreb Properties (Pvt) Ltd* 1971 (1) RLR 180 (A); 1971 (2) SA 346 (RA); *Seniors Service (Pvt) Ltd v Nyoni* 1986 (2) ZLR 293 (S); E *Mine Consultants and Supply Company v Borrowdale Motors (Pvt) Ltd* 1990 (2) ZLR 281 (S).

Mr *Kuhuni* contends that the benefits of ss 12 and 13 of the Companies Act apply not only to outsiders but also to the directors of a company, particularly where the termination of their contracts of employment are in issue. He further submits that Beaumont, by virtue of his position, had ostensible authority F to act for the respondent and bind it to the agreement that he entered into on its behalf with the applicant. Mr *Rutanhira* submits to the contrary that ss 12 and 13 are not intended for the benefit of any insider who ought to have known of the alleged irregularity. I fully agree with that submission.

As I have already indicated, s 12 legislates the rule in *Royal British Bank* G *v Turquand* (1856) 6 E & B 327; (1843-60) 119 ER 886. However, it is well-established that the rule does not protect any person who by reason of his position within the company ought to have known of the irregularity in question. See *Mahony v East Holyford Mining Co* (1875) LR 7 HL 869 at 894; *Howard v Patent Ivory Manufacturing Co* (1888) 38 ChD 156; *Mineworkers* H *Union v J J Prinsloo* 1948 (3) SA 831 (A). Moreover, *Wolpert's* case *supra*

Patel J

does not establish the broad proposition contended on behalf of the applicant, A having regard to what was stated in that case at pp 264F & 266.

In the instant case, the applicant was clearly not an outsider or mere employee of the respondent, but its managing director. He alleges that he was precluded from attending board meetings of Meikles Ltd and the respondent at the relevant time. Even if this were true, he could quite easily have obtained B the minutes of relevant board meetings so as to ascertain decisions taken concerning his resignation and severance package. In any event, in his position as managing director, he must have known that any decision in that regard would require a board resolution from the respondent authorising Beaumont to negotiate and conclude his severance package. For these reasons, I take the view that the applicant is not entitled to take advantage of the presumption C of regularity embodied in s 12 of the Act.

For the same reasons, I do not think that there is any basis for invoking ostensible authority in relation to Beaumont's actions. Firstly, the fact that he was the group chief executive of Meikles Ltd does not mean that he had the requisite ostensible authority by virtue of that position to negotiate and D conclude severance packages on behalf of the respondent. There is nothing in the papers to suggest that he normally exercised that function in that particular capacity. Secondly, as I have already emphasised, the applicant was not some third party dealing with an agent or employee of the respondent. He was its managing director and, given that position, I can see no justification for extending the doctrine of ostensible or apparent authority to the facts E of this case.

Application of Companies Act to validity of agreement

Section 176 of the Companies Act prohibits tax-free payments to directors in the following terms:

> "(1) It shall not be lawful for a company to pay a director remuneration, whether F as director or otherwise, free of any taxation in respect of income, or otherwise calculated by reference to or varying with the amount of such taxation or with the rate of taxation on incomes, except under a contract which was in force on the 1st January, 1952, and provides expressly, and not by reference to the articles, for payment of remuneration as aforesaid.
>
> (2) Any provision contained in a company's articles or in any contract other than G such a contract as aforesaid, or in any resolution of a company or a company's directors, for payment to a director of

remuneration as aforesaid shall have effect as if it provided for payment, as a gross sum subject to taxation, of the net sum for which it actually provides."

Mr *Kuhuni* submits that the sum of US$334 000 payable to the applicant as severance pay in terms of clause 2(c) of the agreement is a net amount after H

Patel J

A taxation is taken into account. The payment therefore does not contravene s 176. Mr *Rutanhira* counters that this section applies, even if the payment in question is calculated by reference to the rate of taxation. I entirely agree. Section 176(1) is designed to curb the mischief of parties determining the tax element on their own without the approval of the taxman. This construction is fortified by s 176(2), which deems the net sum actually provided for B as a gross sum subject to taxation. Furthermore, even the agreed figure of US$334 000 cannot possibly be a net amount after taxation because it includes the sum of US$110 000 as compensation for restraint of trade. It follows that the severance payment stipulated in the agreement is unlawful as being in contravention of s 176(1).

C Section 178 of the Act requires the approval of the company for any payment to a director for loss of office as follows:

> "It shall not be lawful for a company to make to any director of the company any payment by way of compensation for loss of office or as consideration for or in connection with his retirement from office, without full particulars with respect to *the proposed payment*, including the amount thereof, being disclosed D to members of the company and *the proposal being approved* by the company in general meeting" (my emphasis).

Mr *Kuhuni* contends that this provision merely requires disclosure of any compensatory payment to members of the company and its ratification by a resolution of members at a general meeting. He argues that disclosure is not E a prerequisite, particularly as general meetings are only held once every year. I must emphatically disagree. Firstly, it is perfectly practicable for severance payments envisaged in s 178 to be raised at special general meetings of a company, which meetings may be convened at any time to deal with matters arising in the intervening period between annual general meetings. Secondly, F and more significantly, there is no reference in the provision to any binding agreement being submitted for mere ratification by members. Rather, the provision refers to full particulars of *the proposed payment* and the amount thereof being disclosed to members and *the proposal being approved* by the company in general meeting. In my view, the wording of the section makes it unambiguously clear that approval by members is a prerequisite for any G severance payment to a director. Accordingly, the severance payment *in casu*, not having been disclosed to the members of the respondent and not having been approved by them at a general meeting, is patently in violation of s 178 and consequently unlawful.

Section 179 deals with any payment to a director for loss of office in connection H with the transfer of a company's property. It provides that:

Patel J

> "(1) It shall not be lawful, in connection with the transfer of the whole or any part A of the undertaking or property of a company, for any payment to be made by any person to any director of the company by way of compensation for loss of office or as consideration for or in connection with his retirement from office, unless particulars with respect to the proposed payment, including the amount thereof, have been disclosed to the members of the company and the proposal is approved by the company in general meeting. B
>
> (2) Where a payment which is hereby declared to be illegal is made to a director of the company, the amount received shall be deemed to have been received by him in trust for the company."

As became apparent at the hearing of this matter, this section has no bearing whatsoever on the facts of this case. It deals with any payment made to a director by a person other than the company itself in connection with the C transfer of its undertaking or property, presumably to that person or some other party. I would simply note that s 179(1), like s 178, requires the prior approval of members at a general meeting as a precondition for any compensatory payment envisaged in the provision.

Lastly, there is the rather curious argument put forward by Mr *Kuhuni* that D the above provisions do not apply to the applicant because he first joined the respondent in 1993 as its general manager and was then appointed to the position of managing director in November 2003. Therefore, so Mr *Kuhuni* contends, as the applicant was only appointed to the respondent's board as a director by virtue of his contract of employment as managing director, he was an employee at the time of his resignation and not a director. This E contention is categorically facile and spurious in the extreme. It is plainly obvious that when the applicant was appointed as managing director he was appointed to an entirely new post. As from November 2003 he was no longer an employee but indisputably a director within the contemplation of ss 176, 178 and 179 of the Companies Act. F

Bona fide **defence and triable issues**

It is abundantly clear from all of the foregoing that the respondent has several *bona fide* defences to the applicant's claim. These pertain to its relationship with Meikles Ltd and its group chief executive, the latter's authority to conclude the agreement relied upon by the applicant, and the G validity of that agreement under ss 176 and 178 of the Companies Act. By the same token, it is equally clear that the plaintiff's case is not unassailable and unanswerable.

There is also the point that the issue of ostensible authority contended on behalf of the applicant, if it is at all arguable in the context of this case, is essentially a question of fact to be determined by *viva voce* evidence. See H

Patel J

A the headnote to *Reed's* case s*upra* and *Stewarts* case s*upra* at 349. This, together with the defences raised by the respondent, constitute triable issues to be properly ventilated in a trial.

Disposition

As regards costs, I note that the applicant brought this application some B seven weeks after the respondent had filed its plea. He was fully aware of the defences raised and must have appreciated that an application for summary judgment was improper and bound to fail. In these circumstances, and in terms of r 72, it seems just and appropriate that the respondent be awarded the costs of this application and that these costs be paid before the matter proceeds any further.

C In the result, the application for summary judgment is dismissed with costs. It is further ordered that the main action be stayed until the applicant has paid the respondent's costs relative to this application.

C Kuhuni Attorneys, applicant's legal practitioners

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

© 2015 Juta and Company (Pty) Ltd.

Document 7 of 73

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2013/Volume 1/SIGUDU v MIN OF LANDS & ANOR 2013 (1) ZLR 48 (H)

SIGUDU v MIN OF LANDS & ANOR 2013 (1) ZLR 48 (H)

Citation 2013 (1) ZLR 48 (H)

Case No HH-11-13

Court High Court, Harare

Judge	Patel J
Heard	20 November 2012; *CAV*
Judgment	22 January 2013
Counsel	*I Ndudzo,* for the applicant *T Mashiri,* for the first respondent
Case Type	Civil application
Annotations	No case annotations to date

Flynote

Administrative law – *administrative decisions and acts – validity of – acts performed by committee chaired by person having an interest in outcome of deliberations – resulting decision invalid*

Land – *acquisition – offer letter – status of such letter – no statutory basis for issue of offer letters – rights given to person receiving such letter – withdrawal of offer letter – when offer letter may be withdrawn*

Headnote

The applicant had been allocated a farm by means of an "offer letter" from the first respondent, the responsible Minister, in 2002. She took occupation of the farm, prepared the land, moulded bricks for farm buildings and purchased equipment in anticipation of commencing farming activities. In 2005 the Provincial Lands Committee held a meeting chaired by the second respondent. The meeting decided to consolidate the applicant's farm with the farm allocated to the second respondent and further resolved that the applicant should vacate her farm. The Minister asserted that the applicant's offer letter was automatically withdrawn because she had failed to comply with the conditions attaching to the offer of land. He provided no evidence of this assertion and it was accepted by the court that she had complied. The remaining issues for resolution were (a) the legality of the consolidation process; (b) whether the Minister was entitled or empowered to withdraw the offer letter; (c) whether the applicant's offer letter was duly withdrawn or cancelled; and (d) whether the applicant's right to occupy still subsisted and whether it was accordingly recognisable and enforceable.

Held, that the second respondent should never have chaired the meeting. The basic tenet of our common law is that *nemo debet esse judex in propria sua causa*. This time-honoured precept is codified in s 27(1)(b) of the

High Court Act [*Chapter 7:06*] and in s 3(1)(a) as read with s 5 of the Administrative Justice Act [*Chapter 10:28*]). This is so for the obvious reason that the proceedings of a public body or committee should be free from the possibility of bias and the attendant risk of its incumbents serving their own personal interests. The decision to consolidate the applicant's farm with the second respondent's farm was vitiated by a fundamental irregularity. It was tainted *ab initio* and must therefore be declared a nullity.

Held, further, that the standard offer letter in use under the land reform programme states that the offer is made in terms of the Agricultural Land Settlement Act [*Chapter 20:01*], but cites no specific provision of the Act. It is evident from ss 7 to 11 of the Act that the settlement of land under the Act is to be effected through the issuance of leases following investigations and reports by the Agricultural Land Settlement Board. The Act clearly does not contemplate the allocation of land for settlement through offer letters, either on their own or as precursors to formal leases; but nor does it entitle the Minister or any other authority to cancel offer letters or to terminate rights conferred thereunder. The only statutory reference to offer letters is to be found in the Gazetted Lands (Consequential Provisions Act) [*Chapter 20:28*]. Section 3(1) of the Act stipulates that no person may hold, use or occupy gazetted land without lawful authority, which term means

an offer letter or permit or land settlement lease. The holder of a valid offer letter is endowed with E the requisite lawful authority to hold, use and occupy gazetted land and is shielded from being prosecuted, convicted and evicted under s 3. Beyond this, the Act does not provide for the actual allocation or settlement of gazetted land, whether by offer letter, permit or lease, nor does it provide for the cancellation or withdrawal of any such offer letter, permit or lease. F There is thus no proper statutory basis for the creation or termination of rights granted by offer letters in general. Their basis is essentially administrative and their existence or otherwise is consequently subject to purely administrative rules and discretion – which must, of course, be exercised lawfully, reasonably and fairly, but which are unavoidably open to the possibility of abuse and malpractice, as occurred here.

G *Held* further, that the general rule is that there can be no power without the requisite authority, but administrative practices evolved through directives, circulars and the like, though without specific statutory authority, are permissible – even desirable – as long as they do not conflict in any way with the empowering legislation under which the H public authority acts nor infringe legally protected rights and interests.

Held, further, that in terms of the conditions attaching to the applicant's offer A letter, the offer could be cancelled or withdrawn for breach of any of the conditions set out in the letter. The offer was never formally terminated. The applicant was not given any notice of any alleged breach of the conditions of offer. Nor was there any formal notice or communication of the offer having been withdrawn. That the offer was automatically withdrawn could not be accepted. The power to withdraw or cancel B an offer of land must be exercised lawfully and procedurally, and this necessitates the giving of due notice to the holder of the offer letter. The applicant's right to occupy the farm had not lapsed or been lawfully terminated and therefore was duly recognisable and fully enforceable. C

Cases cited

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

MacFoy v United Africa Co. Ltd [1961] 3 All ER 1169 (PC)

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

Municipality of Green Point v Powell's Trustees (1848) 2 Menzies 380

Roberts v Hopwood [1925] AC 578 (HL) D

Legislation considered

Administrative Justice Act [*Chapter 10:28*], s 5

Agricultural Land Settlement Act [*Chapter 20:01*], ss 7, 8, 9, 10, 11 & 17(2) E

Constitution of Zimbabwe 1980, s 16B(6)

Gazetted Lands (Consequential Provisions) Act [*Chapter 20:28*], ss 2(1), 3(1) & 6

High Court Act [*Chapter 7:06*], ss 3(1)(a) & 27(1)(b)

Case information

I Ndudzo, for the applicant F

T Mashiri, for the first respondent

Judgment

Patel J: The applicant in this matter seeks an order declaring the legality of her occupation of a piece of farm land in Seke District and the nullification of the consolidation of that land with an adjoining farm. She also seeks the G eviction of the second respondent and an order for costs against him. The first respondent (the Minister) resists the application on the ground that the applicant's right to occupy the land was withdrawn.

The second respondent has not filed any notice of opposition and is accordingly in default. The first respondent was required to file his heads of argument in March 2012 and, having failed to do so,

was automatically barred. However, H

Patel J

A there being no objection from the applicant, the bar imposed upon the first respondent was uplifted by consent and his failure to file heads timeously was also condoned. Any costs incurred by reason of his late filing of heads of argument are to be borne by the first respondent.

Background

B In 2002 the Minister allocated Subdivision 2 of Denby Farm to the applicant through an offer letter dated 2 June 2002. Thereafter, the applicant took occupation, prepared the land, moulded bricks for farm buildings and purchased equipment in anticipation of commencing farming activities. In 2005 the Provincial Lands Committee held a meeting chaired by the second C respondent. The meeting took a decision to consolidate the applicant's farm (Subdivision 2) with the farm allocated to the second respondent (Subdivision 9) and further resolved that the applicant should vacate her farm.

The Minister's position is that the consolidation in dispute was procedurally effected and that the applicant's offer letter was automatically withdrawn because she had failed to comply with the conditions attaching to the offer D of land. It is common cause that there was no formal communication of the withdrawal to the applicant, even after a written request by her lawyers. The applicant asserts that her right to occupy the farm has not lapsed or been legally terminated and therefore still subsists. She also challenges the legality of the consolidation process as being tainted by bias and corruption, having been E influenced by the second respondent for his own benefit. Additionally, she contends that any offer letter or lease issued to the second respondent is not superior to her offer letter and cannot override her right to occupy the farm.

Issues for determination

At the hearing of this matter, the applicant's counsel did not persist with F his point *in limine* contesting the authority of the deponent to the opposing affidavit. Consequently, the following issues emerged for determination:

(a) whether the applicant had duly complied with the conditions attaching to her offer letter;
(b) the legality of the process consolidating Subdivisions 2 and 9 of Denby G Farm;
(c) whether the first respondent was entitled or empowered to withdraw the offer letter;
(d) whether the applicant's offer letter was duly withdrawn or cancelled;
(e) whether the applicant's right to occupy still subsists and whether it is H accordingly recognisable and enforceable.

Patel J

Compliance with conditions A

The conditions applying to the applicant's offer letter required her to take up personal and permanent residence on the holding upon acceptance of the offer, which was to be communicated to the Minister within 30 days of receipt. The applicant avers that she took occupation of the farm soon after it was allotted to her and confirmed her acceptance of the offer by notice dated B 29 June 2002. The Minister's deponent simply states that the applicant failed to take up residence or to occupy the land, without addressing her detailed averments as to the manner in which she took occupation. On balance, I am satisfied that the applicant's evidence is to be preferred over the Minister's bare denial. I accordingly find that she did comply with the conditions of occupation stipulated in her offer letter. C

Legality of consolidation

According to the applicant's counsel, which position was not questioned by counsel for the first respondent, every Provincial Lands Committee is ordinarily chaired by the appropriate Provincial Governor. The applicant's unchallenged evidence is that the relevant 2005 meeting of the Committee

in D *casu* was chaired by the second respondent, who at that time was a Deputy Minister. That meeting decided to consolidate the applicant's farm with the farm allocated to the second respondent and further resolved that the applicant should vacate her farm. The applicant contends that the second respondent abused his influence in the Committee to push for the consolidation of the E two farms. The only response by the Minister's deponent is that "the second respondent is best placed to answer these averments". The second respondent himself has failed to oppose this application and has simply not bothered to deal with the serious allegations against him.

On the undisputed facts before me, the only inference that can reasonably be drawn is that the second respondent did use his position to influence the F consolidation process and the consequent allocation of the consolidated land to himself. There is no explanation as to why he chaired the meeting in question. Even if such explanation were to be availed, there is no doubt whatsoever that he simply should not have chaired that particular meeting of the Committee. G

The basic tenet of our common law is that *nemo debet esse judex in propria sua causa* – no one should be an arbiter in his own cause. This time-honoured precept is codified in s 27(1)(b) of the High Court Act [*Chapter 7:06*] and in s 3(1)(a) as read with s 5 of the Administrative Justice Act [*Chapter 10:28*]. This is so for the obvious reason that the proceedings of a public body or committee should be free from the possibility of bias and the attendant risk of H

A its incumbents serving their own personal interests. It follows that the decision of the Provincial Lands Committee in 2005 to consolidate the applicant's farm with the second respondent's farm was vitiated by a fundamental irregularity. It was tainted *ab initio* and must therefore be declared a nullity. See *MacFoy v United Africa Co. Ltd* [1961] 3 All ER 1169 (PC) at 1172; B *Muchakata v Netherburn Mine* 1996 (1) ZLR 153 (S) at 157.

Power to withdraw offer letter

One of the conditions attaching to the applicant's offer letter (and indeed all offer letters issued by the Minister) states that the offer may be cancelled or withdrawn for breach of any of the conditions set out therein. The applicant's C position in this regard, as elaborated by her counsel, is that the Minister can only exercise powers stipulated by statute. He cannot withdraw the offer in the absence of an explicit statutory power to that effect.

In principle, where the power to create, grant or do anything is conferred by statute, the administrative authority endowed with that power can only terminate, revoke or undo that thing by or under that or another statute. In D any such case, any administrative action entailing the termination or variation of statutory rights that is not expressly or impliedly authorised by statute is *ultra vires* the enabling statute and consequently unlawful. Powers may be presumed to have been impliedly conferred because they constitute a logical or necessary consequence of powers which have been expressly conferred or E because they are ancillary or incidental to those powers. As regards implied powers generally, see Baxter *Administrative Law* (1984) at pp 404-407.

What arises for determination herein is the existence or otherwise of a statutory basis for the creation and termination of rights granted by offer letters. The standard offer letter in use under the Land Reform and Resettlement F Programme (Phase II) states that the offer is made in terms of the Agricultural Land Settlement Act [*Chapter 20:01*]. However, no specific provision of the Act is cited in this regard. Turning to the Act itself, Part III thereof regulates the settlement of agricultural land owned by the State. Section 7 broadly enables the Minister of Lands to establish schemes or make other provision for, *inter alia*, the settlement of persons on and the alienation to G such persons of agricultural land. In terms of s 8 and subject to the Act, the Minister may for this purpose issue leases to applicants in respect of holdings of land. By virtue of s 9, no such lease may be issued to any applicant until the application has been referred to the Agricultural Land Settlement Board for its consideration and report under s10. Thereafter, s 11 provides for the H issuance of a lease on such terms and conditions as may be fixed by the

Minister. Section 17(2) specifically empowers the Minister to cancel the A lease if the lessee fails to comply with any term or condition of his lease.

It is evident from these provisions that the settlement of land under the Act is to be effected through the issuance of leases following investigations and reports by the Board. The Act clearly does not contemplate the allocation of land for settlement through offer letters, either on their own or as precursors B to formal leases. By the same token, the Act does not entitle the Minister or any other authority to cancel offer letters or to terminate rights conferred thereunder.

The only statutory reference to offer letters is to be found in the Gazetted Lands (Consequential Provisions) Act [*Chapter 20:28*]. The principal object C of this Act is spelt out in its long title, *viz.* to make certain provisions that are consequential to the enactment of s 16B of the Constitution. That section was introduced by Act No. 5 of 2005 (Amendment No. 17) and provided for the compulsory acquisition of all gazetted Land. More particularly, s 16B(6) envisages an Act of Parliament making it a criminal offence for any person, without lawful authority, to possess or occupy gazetted land or D other State land. In keeping with this constitutional injunction, s 3(1) of the Act stipulates that no person may hold, use or occupy gazetted land without lawful authority. The term "lawful authority" is defined in s 2(1) to mean an offer letter or permit or land settlement lease, and the phrase "lawfully authorised" is to be construed accordingly, while "offer letter" means a letter E issued by the acquiring authority that offers to allocate to the offeree any gazetted land described in that letter. Section 6 of the Act validates any offer letter issued on or before the fixed date (*i.e.* the date of commencement of the Act) that is not withdrawn by the acquiring authority.

The object of all of these provisions is quite clear. It is to endow the holder F of a valid offer letter with the requisite lawful authority to hold, use and occupy gazetted land and thereby shield him or her from being prosecuted, convicted and evicted under s 3 of the Act. Beyond this, the Act does not provide for the actual allocation or settlement of gazetted land, whether by offer letter, permit or lease. Nor does it provide for the cancellation or G withdrawal of any such offer letter, permit or lease.

It follows from all of the foregoing that there is no proper statutory basis for the creation or termination of rights granted by offer letters in general. Their basis is essentially administrative and their existence or otherwise is consequently subject to purely administrative rules and discretion – which must, of course, be exercised lawfully, reasonably and fairly, but which H

A are unavoidably open to the possibility of abuse and malpractice. (This is precisely what appears to have happened in this case).

I am constrained to add that this is not an entirely satisfactory basis for the implementation of the Land Reform Programme generally. It seems to me that the administration and allocation of land for resettlement purposes, whatever the modality or form of allocation, should be properly and effectively B regulated, so as to create a land allocation regime that is clear, transparent and accountable, and susceptible to judicial scrutiny to ensure due process and compliance. This could be achieved by way of regulations framed either under the Agricultural Land Settlement Act [*Chapter 20:01*] or under the Rural Land Act [*Chapter 20:18*].

C I am fortified in this view by the general proposition that there can be no power without the requisite authority. As is explained by Baxter *op cit* at pp 386-387, citing *Municipality of Green Point v Powell's Trustees* (1848) 2 Menzies 380 at 380-381 and *Roberts v Hopwood* [1925] AC 578 (HL) at 602:

> "Except in the case of an exercise of power under the prerogative, a public authority has no powers other than those which have been conferred upon it by D legislation".

As regards administrative practices evolved through directives, circulars and the like, but without specific statutory authority, the learned author observes, at p 399, that they are:

> "permissible – even desirable – for so long as they do not conflict in any way E with the empowering legislation under which the public authority acts nor infringe legally protected rights and interests. Such practices cannot themselves constitute authority for the infringement of rights and interests; the notion that the administration could constitute a self-generating source of authority is completely alien to the principle of constitutional legality. It is true that administrative practice may shape the procedures adopted by public authorities, and this has been recognised by the courts. As such, however, customary practices

do not F constitute a source of authority which justifies the infringement of rights and interests; at best they may be construed as necessary or incidental to the proper functioning of the public authority concerned and therefore impliedly authorised by the empowering legislation anyway. The claim that custom might constitute a source of administrative power in itself is unacceptable and has been at least since *Entick v Carrington* (1765) 19 St Tr 1029, and there is no judicial authority G to support it".

Whether offer letter withdrawn or cancelled

In terms of para 3 of the conditions attaching to the applicant's offer letter, the offer may be cancelled or withdrawn for breach of any of the conditions set out in the letter. In view of my earlier finding that the applicant did comply H with the requisite conditions, there does not appear to have been any valid

Patel J

ground entitling the Minister to cancel or withdraw the offer made to the A applicant.

Even if any such ground did exist, it is abundantly clear that the Minister did not take any specific steps to cancel or withdraw the offer. The undisputed facts are that the offer was never formally terminated. The applicant was not given any notice of any alleged breach of the conditions of offer. Nor was B there any formal notice or communication of the offer having been withdrawn. And there is absolutely nothing in the opposing papers to suggest otherwise. The Minister's argument that the offer was automatically withdrawn simply cannot be accepted. As I have already stated above, the power to withdraw or cancel an offer of land must be exercised lawfully and procedurally, and this quite obviously necessitates the giving of due notice to the holder of C the offer letter. It follows that the procedure for cancellation or withdrawal in accordance with the conditions set out in the applicant's offer letter was never followed.

Whether right to occupy subsists and is enforceable

The ineluctable conclusion from all of the foregoing is that the applicant's D right to occupy the farm allocated to her has not lapsed or been lawfully terminated and therefore still subsists. It is accordingly duly recognisable and fully enforceable. See in this respect the remarks of Chidyausiku CJ in *CFU & Ors v Min of Lands & Ors* ZLR 2010 (2) 576 (S) highlighting the duty of the courts to assist the holders of offer letters, permits and land E settlement leases. At the end of her submissions, counsel for the Minister quite correctly conceded that there was no basis for resisting the declaratory and consequential relief sought by the applicant.

Disposition

As regards costs, the applicant claims costs on the ordinary scale as against F the second respondent. Given the latter's highly questionable and irregular role in the consolidation of his farm with that of the applicant, there appears to be no reason for declining the applicant's claim for costs against him.

In the result, it is hereby declared that:

(a) The applicant is lawfully authorised and entitled to be in occupation G of Subdivision 2 of Denby Farm in Seke District of Mashonaland East Province in terms of the offer letter issued to her by the first respondent on 2 June 2002.

(b) The purported consolidation of Subdivisions 2 and 9 of Denby Farm in Seke District of Mashonaland East Province by the first respondent's officials is null and void. H

Patel J

A Furthermore, it be and is hereby ordered that:

(c) The second respondent shall give vacant occupation of Subdivision 2 of Denby Farm in Seke District of Mashonaland East Province to the applicant, failing which the Deputy Sheriff is hereby authorised and directed to evict the second respondent and give possession of the farm B to the applicant.

(d) The second respondent shall pay the costs of this application.

Mutamangira & Associates, applicant's legal practitioners

C *Civil Division of the A-G's Office*, first respondent's legal practitioners

© 2015 Juta and Company (Pty) Ltd.

Document 8 of 73

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2013/Volume 1/S v ZHAKATA 2013 (1) ZLR 58 (H)

S v ZHAKATA 2013 (1) ZLR 58 (H)

Citation	2013 (1) ZLR 58 (H)
Case No	Judgment No. HH-13-13
Court	High Court, Harare
Judge	Patel J
Heard	25 January 2013
Judgment	25 January 2013
Counsel	Details not supplied
Case Type	Criminal review
Annotations	No case annotations to date

Flynote

Criminal law – *offences under Criminal Law Code – unlawful entry into premises followed by theft – such constituting unlawful entry committed in aggravating circumstances and higher penalty permissible – how should be charged – necessary to allege and prove aggravating circumstances before higher penalty may be imposed* D

Headnote

Section 131(1) of the Criminal Law Code [*Chapter 9:27*] enacts the crime of unlawful entry, the essential elements of which are intentional entry without permission or authority. This statutory offence repeals and replaces the common law crime of burglary or housebreaking with intent to steal, but with certain additional features. By virtue of para (a) of subs E (1), as read with paras (a) to (e) of subs (2), the offence is aggravated by any of the circumstances set out in subs (2). Section 131(1)(a) does not create a combined offence of unlawful entry and theft. What it does is to aggravate the offence of unlawful entry, by prescribing a more severe penalty therefor, in the event of any one or more of the circumstances enumerated in subs (2) being established. These circumstances include F the commission of another crime.

It is necessary for the State to prove or otherwise establish the relevant aggravating factor if it is to sustain a charge under s 131(1)(a). If it fails to do so, that factor cannot be taken into account for the purposes of assessing and imposing the more severe sentence stipulated by that provision (or G for ordering restitution). Once this is accepted, it is unavoidable that the aggravating factor or circumstance be specifically pleaded and spelt out in any charge under s 131(1)(a). It cannot

simply be left to be dealt with at some later stage in the proceedings. In the event that the State fails to prove or otherwise establish the aggravating circumstance stated in the charge, this will not be fatal to the conviction of the accused on H

A the primary charge. It would still be possible to properly convict him of unlawful entry *simpliciter* under s 131(1)(b).

It is axiomatic that a criminal indictment must clearly set out all the particulars of the charge so that the accused fully grasps the basis of the charge so as to enable him to prepare his defence. If the charge does not allude to the alleged aggravating circumstance, the accused would be prejudiced B in the preparation and presentation of his defence. For instance, the crime of robbery under s 126 of the Code attracts a considerably more severe punishment if the crime is committed in aggravating circumstances, such as possession of a firearm or dangerous weapon or the infliction of serious bodily injury. In any such case, the State must both charge the particular aggravating factor alleged and prove it in order to invoke C the more severe penalty prescribed. The same principle must apply to all crimes that provide for increased sentences when those crimes are committed in aggravating circumstances.

Case referred to

D *S v Chirinda & Others* 2009 (2) ZLR 82 (H)

Legislation considered

Criminal Law (Codification and Reform) Act [*Chapter 9:23*], s 131(1) & (2)(e)

Criminal Procedure and Evidence Act [*Chapter 9:07*], s 146

Judgment

E **Patel J:** The accused in this matter was convicted on his plea of guilty to a charge of unlawful entry in aggravating circumstances as defined in s 131(2)(e) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. Although the process of conviction is otherwise in order, the framing F of the charge warrants further scrutiny.

The accused is 34 years old and is married with two children. He is unemployed and has no savings or assets of any value. He is not a first offender, having been previously convicted for armed robbery in February 2011 under CRB No. MW153/11. His offence *in casu* involved breaking into the complainant's house and stealing various items of electrical equipment, a firearm with G ammunition and other household goods. The value of the property stolen was US$1 800 and the amount recovered was US$1 250.

In sentencing the accused, the trial magistrate took into account his admitted theft of property and found that this, coupled with the previous conviction for armed robbery, aggravated the offence in this case. He then sentenced H the accused to a term of six years' imprisonment and suspended one year on

Patel J

condition of restitution, leaving an effective custodial sentence of five years. A The eight years previously suspended in CRB No. MW153/11 was further suspended for the next five years. The effective sentence of five years was to run concurrently with the sentence in CRB No. MW153/11.

On initial review, a query was raised through the Registrar. It was noted that the accused was charged and convicted of unlawful entry in aggravating B circumstances. The charge avers unlawful entry but is silent on the theft of property within the premises in question. The trial magistrate was directed to explain why this omission was not corrected.

In his response, the trial magistrate states that, in his understanding of the charge, "what should be established are the essential elements of unlawful C entry. The issue of theft can only arise as an aggravating circumstance in the commission of the offence. Furthermore, theft may nonetheless be taken into account in assessing sentence only". In support of these propositions, the magistrate

relies upon the decision of Uchena J (with Bhunu J concurring) in *S v Chirinda & Others* 2009 (2) ZLR 82 (H).

Section 131 of the Criminal Law (Codification and Reform) Act provides as follows:

> "(1) Any person who, intentionally and without permission or authority from the lawful occupier of the premises concerned, or without other lawful authority, enters the premises shall be guilty of unlawful entry into premises and liable –
>
> (a) to a fine not exceeding level thirteen or not exceeding twice the value of any property stolen, destroyed or damaged by the person as a result of the crime, whichever is the greater, or imprisonment for a period not exceeding fifteen years, or both, if the crime was committed in any one or more of the aggravating circumstances set out in subsection (2); or
>
> (b) in any other case, to a fine not exceeding level ten or not exceeding twice the value of any property destroyed or damaged by the person as a result of the crime, whichever is the greater, or imprisonment for a period not exceeding ten years, or both.
>
> (2) For the purposes of paragraph (a) of subsection (1), the crime of unlawful entry into premises is committed in aggravating circumstances if, on the occasion on which the crime was committed, the convicted person –
>
> (a) entered a dwelling-house; or
>
> (b) knew there were people present in the premises; or
>
> (c) carried a weapon; or
>
> (d) used violence against any person, or damaged or destroyed any property, in effecting the entry; or
>
> (e) committed or intended to commit some other crime."

Patel J

A plain reading of s 131(1) makes it clear that it enacts the crime of unlawful entry, the essential elements of which are intentional entry without permission or authority. This statutory offence repeals and replaces the common law crime of burglary or housebreaking with intent to steal, but with certain additional features. By virtue of para (a) of subs (1), as read with paras (a) to (e) of subs (2), the offence is aggravated by any of the circumstances set out in subs (2). As was made abundantly clear in *Chirinda's* case *supra*, s 131(1)(a) does not create a combined offence of unlawful entry and theft. What it does is to aggravate the offence of unlawful entry, by prescribing a more severe penalty therefor, in the event of any one or more of the circumstances enumerated in subsection (2) being established.

To this extent, I am in total agreement with the very detailed views expressed by Uchena J in *Chirinda's* case. However, I must respectfully disagree with the position that the elements of theft or other aggravating circumstance need not be stated in the charge and can merely be mentioned in the State outline or agreed facts or in the prosecutor's address in aggravation. I note that this position accords with the comments elicited from the Attorney-General on the interpretation of s 131.

In my view, it is necessary for the State to prove or otherwise establish the relevant aggravating factor if it is to sustain a charge under s 131(1)(a). If it fails to do so, that factor cannot be taken into account for the purposes of assessing and imposing the more severe sentence stipulated by that provision (or for ordering restitution as was done in the case under review). Once this is accepted, it seems to me unavoidable that the aggravating factor or circumstance be specifically pleaded and spelt out in any charge under s 131(1)(a). It cannot simply be left to be dealt with at some later stage in the proceedings. In the event that the State fails to prove or otherwise establish the aggravating circumstance stated in the charge, this will not be fatal to the conviction of the accused on the primary charge. It would still be possible to properly convict him of unlawful entry *simpliciter* under s 131(1)(b). It is axiomatic that a criminal indictment must clearly set out all the particulars of the charge so that the accused fully grasps the basis of the charge so as to enable him to prepare his defence. If the charge does not allude to the alleged aggravating circumstance, the accused would obviously be prejudiced in the preparation and presentation of his defence. For instance, the crime of robbery under s 126 of the Criminal Law Code attracts a considerably more severe punishment if the crime is committed in aggravating circumstances, such as possession of a firearm or dangerous weapon or the infliction of serious bodily injury. In any such case, it cannot be doubted that the State must both charge the particular aggravating factor alleged and prove it in

Patel J

order to invoke the more severe penalty prescribed. In my view, the same A principle must apply to all crimes that provide for increased sentences when those crimes are committed in aggravating circumstances.

This is clearly recognised in subss (1) and (2) of s 146 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] which delineate the essentials of an indictment or charge as follows: B

> "(1) Subject to this Act and except as otherwise provided in any other enactment, each count of the indictment, summons or charge shall set forth the offence with which the accused is charged in such manner, *and with such particulars* as to the alleged time and place of committing the offence and the person, if any, against whom and the property, if any, in respect of which the offence is alleged to have been committed, *as may be reasonably sufficient to inform the* C *accused of the nature of the charge*.
>
> (2) Subject to this Act and except as otherwise provided in any other enactment, the following provisions shall apply to criminal proceedings in any court, that is to say –
>
> (a) *the description of any offence in the words of any enactment creating the offence, or in similar words, shall be sufficient; and*
>
> (b) any exception, exemption, proviso, excuse or qualification, whether it does D or does not accompany in the same section the description of the offence in the enactment creating the offence, may be proved by the accused, but need not be specified or negatived in the indictment, summons or charge, and, if so specified or negatived, no proof in relation to the matter so specified or negatived shall be required on the part of the prosecution" (my emphasis).

Before turning to the specific charge *in casu*, I should add that the structure E and wording of s 131, taken as a whole, leaves much to be desired, particularly in the infelicitous marriage of subss (1) and (2). It is therefore not surprising that the provision has generated substantial confusion and contradiction in the framing of charges and the conduct of criminal proceedings thereunder. I would therefore strongly recommend that the Minister of Justice and the F Attorney-General take steps to reconsider and redraft s 131 in its entirety.

In light of the views expressed herein, it is necessary to amend the charge under which the accused in this matter was convicted and sentenced. It is accordingly amended to read as follows:

> "Charged with unlawful entry into premises as defined in section 131(1)(a) of G the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] as read with section 131(2)(e) of the said Act:
>
> In that on 16 October 2009 and at No. 1657 Glen Norah A, Harare, Trymore Netsai Zhakata unlawfully, intentionally and without permission or authority from Watson Goredema, the lawful occupier of the premises concerned, or without other lawful authority, entered the said premises by means of forcibly opening the main entrance door to gain entry; and that, whilst inside the said premises, H

Patel J

> A Trymore Netsai Zhakata took the property listed in the State outline, knowing or realising that Watson Goredema was or may be entitled to own, possess or control the property, and intending to deprive Watson Goredema permanently of his ownership, possession or control of the property or realising that he may be so deprived thereof."

With the charge being amended as above, the conviction of the accused and B the sentence imposed upon him are hereby confirmed as being in accordance with real and substantial justice.

Hungwe J agrees.

© 2015 Juta and Company (Pty) Ltd.

Document 9 of 73

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2013/Volume 1/ZINWA v KADOMA MUNICIPALITY 2013 (1) ZLR 64 (H)

ZINWA v KADOMA MUNICIPALITY 2013 (1) ZLR 64 (H)

Citation	2013 (1) ZLR 64 (H)
Case No	Judgment No HB-13-13
Court	High Court, Bulawayo
Judge	Makoni J
Heard	26 October 2012; *CAV*
Judgment	31 January 2013
Counsel	*N Ndlovu,* for the applicant *S Murambasvina,* for the respondent
Case Type	Application for summary judgment
Annotations	No case annotations to date

Flynote

Contract – *validity – contract contrary to public policy or inimical to interests of community – contract in terms of which supplier of water charged fixed rate even if no water actually consumed – whether such a contract lawful*

Practice and procedure – *summary judgment – when may be refused – real* D *difficulty as to matter of law – validity of contract challenged – summary judgment refused*

Headnote

The applicant and the respondent entered into an agreement in terms of which the applicant supplied water to the municipality. It was a term of the E agreement that billing was per allocation, as opposed to consumption. The municipality failed to pay the agreed rate, but a compromise sum was agreed on. The applicant sought summary judgment. The respondent pleaded, in essence, that billing per allocation was repugnant to public policy and it should only pay for consumed water.

Held, that summary judgment should not be granted when any real difficulty F as to a matter of law arises. A contract or term may be declared contrary to public policy if it is clearly inimical to the interests of the community, or is contrary to law or morality, or runs counter to social or economic expedience, or is plainly improper and unconscionable, or is unduly harsh or oppressive. The respondent was a local authority, contracting on behalf G of its ratepayers and residents, who actually paid for the water in issue. The respondent was not a profit-making organization but a public entity. Various questions arose: was it inimical to the interests of the community to ask the respondent's residents and ratepayers to pay even if no water was received? Was the agreement between the parties not contrary to the law or morality? Is such an agreement unconscionable? Was it not unduly H

A harsh or oppressive? Where there were clearly arguable questions of law raised by the respondent and also in the light of legislation governing fairness of consumer contracts in our jurisdiction, making a summary judgment would be incompetent.

Cases cited

B *Botha & Anor v Finanscredit (Pty) Ltd* 1989 (3) SA 773 (A)

Hollandia Reinsurance Co Ltd v Nedcor Bank Ltd 1993 (3) SA 574 (W)

Karimazondo v Standard Chartered Bank Zimbabwe 1995 (2) ZLR 404 (S)

Olsen v Standaloft 1983 (1) ZLR 67 (S)

Shingadia v Shingadia 1966 (3) SA 24 (R); 1966 RLR 285 (G)

Case information

C *N Ndlovu,* for the applicant

S Murambasvina, for the respondent

Judgment

Ndou J: This is an application for summary judgment which is opposed by the respondent. The background facts are as follows.

D On 6 May 2004 the parties entered into a written agreement for the purchase and sale of raw water for a period of ten years. It was a term of the agreement that billing was per allocation as opposed to per consumption, in that the respondent undertook to pay for 15 000 mega litres of raw water per year, regardless of whether it was the same or not. The respondent failed to pay the E applicant US$547 627.81 which was due as at the end of September 2011. The parties met on 17 October 2011 and agreed on a compromised figure of $167 114.22 as being due. The respondent failed to pay the acknowledged compromise debt, prompting the applicant to issue summons claiming for the said compromise sum, together with interest at the rate of 5 per cent per annum and collection commission. The applicant also sought an order F for costs on a higher scale. The respondent entered appearance to defend.

The respondent's plea is basically that billing per allocation is repugnant to public policy and that it should pay for consumed water less what had been paid since October 2011. The applicant then maintained the present application for summary judgment. The respondent opposed the application in line with its said plea. The issue is whether it is against public policy for the applicant G to bill a local authority per allocation as opposed to per consumption. It is trite law that a contract or term may be declared contrary to public policy if it is clearly inimical to the interests of the community or it is contrary to law or morality or runs counter to social or economic expedience or it is plainly improper and unconscionable or unduly harsh or oppressive: *Botha* H *& Anor v Finanscredit (Pty) Ltd* 1989 (3) SA 773 (A) at 782 I-783 C; *Olsen*

Ndou J

v Standaloft 1983 (1) ZLR 67 (S) and *Karimazondo v Standard Chartered* A *Bank Zimbabwe* 1995 (2) ZLR 404 (S). *In casu*, the respondent is a local authority i.e. a municipality, contracting on behalf of Kadoma ratepayers and residents who actually pay for the water in issue. The respondent is not a profit-making organization but a public entity. The question is whether asking for the respondent's residents and ratepayers to pay for no water B (value) received is inimical to the interests of the said community. Is the agreement between the parties not contrary to the law or morality? Is such an agreement unconscionable? Is it not unduly harsh or oppressive? It is trite that summary judgment should not be granted when any real difficulty as to a matter of law arises: *Shingadia v Shingadia* 1966 (3) SA 24 (R); 1966 RLR 285 (G) at 25F-26A. Summary judgment proceedings are inappropriate for C dealing with clearly arguable questions of law that should properly be dealt with on exception: *Hollandia Reinsurance Co Ltd v Nedcor Bank Ltd* 1993 (3) SA 574 (W). *In casu*, there are clearly arguable questions of law raised by the respondent and also, in light of the legislation governing fairness of consumer contracts in our jurisdiction, summary judgment is incompetent.

Accordingly, the application for summary judgment is dismissed with costs. D

Cheda & Partners, applicant's legal practitioners

Jarvis, Palframan c/o Hwalima, Moyo & Associates, respondent's legal practitioners E

© 2015 Juta and Company (Pty) Ltd.

Document 10 of 73

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2013/Volume 1/MUCHINI v ADAMS 2013 (1) ZLR 67 (S)

MUCHINI v ADAMS 2013 (1) ZLR 67 (S)

Citation	2013 (1) ZLR 67 (S)
Case No	S-47-13
Court	Supreme Court, Harare
Judge	Ziyambi JA, Garwe JA & Omerjee AJA
Heard	12 February 2013
Judgment	12 February 2013
Counsel	*L Uriri,* for the appellant *F Mahere,* for the respondents
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

C **Administration of estates** – *property forming part of estate – sale of before executor appointed – when such sale lawful – sale effected to provide funds for family – need for sale to be absolutely necessary*

Headnote

The appellant bought a house from the widow of the owner of the house. At the time he did so, no executor had been appointed. The widow sold D the property through a firm of legal practitioners, which received the purchase price but did not pay the proceeds to the widow. She sold the property because the family was in financial difficulties. The appellant argued that the sale was rendered valid by s 41 of the Administration of Estates Act [*Chapter 6:01*], which provides that if "any person takes E upon himself to dispose of such estate or any part thereof, except in so far as may be . . . absolutely necessary for . . . the subsistence of the family left by the deceased . . . such person shall thereupon become personally liable to pay to the creditors and legatees of the deceased all debts due by the deceased at the time of his death or which have thereafter become due by his estate, and all legacies left by the deceased in so far as the F proceeds and assets of such estate are insufficient for the full payment of such debts and legacies".

Held, that the legislature's intention in enacting s 41 was to protect the position of beneficiaries and creditors of a deceased person pending the administration of the estate and that were the court to sanction the disposal of an estate asset in circumstances such as the present, it would G bring about the very situation which the legislature sought to prevent, thereby causing prejudice to both the beneficiaries and creditors of the estate. The clear intention was to prohibit the distribution of a deceased estate by persons other than executors. The authority to dispose of certain assets of a deceased estate before the appointment of an executor is H strictly limited to the circumstances set out in s 41. In the present case

---

it would have to be shown that the sale of the property was *absolutely* A *necessary* for the subsistence of the family. The use of the word *absolutely* is significant and is indicative of a

higher standard than mere necessity.

Cases cited

Schierhout v Minister of Justice: 1926 AD 99 at 109 B

Pottie v Kotze 1954 (3) SA 719 (A)

Legislation considered

Administration of Estates Act [*Chapter 6:01*], ss 21, 23, 41 & 42

Case information

L Uriri, for the appellant C

F Mahere, for the respondents

Judgment

Ziyambi JA: At the end of the hearing we dismissed the appeal with costs. The following are our reasons for so doing.

The subject of the dispute between the parties is an immovable property D known as plot number 13 Glynham, Masvingo ("the property"). It formed part of the estate of the late Alvin Roy Adams ("the deceased") who died on 9 July 2004. The first respondent is his widow.

About one year after the demise of the deceased, in July 2005, the first respondent, desiring to sell the property, approached the legal firm Mwonzora & Partners requesting their assistance in finding a buyer. They found the E appellant and, on 7 July 2005, the first respondent sold the property to the appellant for Z$350 000 000. It is common cause that payment was made by the appellant to Mwonzora & Partners. Thereafter the appellant moved onto the property having evicted the first respondent and her children therefrom.

Mwonzora & Partners did not transmit the proceeds of the sale to the first F respondent who continued to press for payment without success. In the end, that firm advised her to find another firm of legal practitioners to represent her as they were now representing the appellant.

The first respondent engaged the services of Messrs Robinson & Makonyere who attended to the appointment of an executor to the estate. Upon his G appointment Mr Shepherd Makonyere, the second respondent, wrote to the appellant appraising him of the position and advising him that he was liable to be evicted since the property had been purchased by him before the appointment of an executor to the estate. In response, the appellant filed an *ex parte* application in the magistrates court seeking an interdict to prevent his eviction by the executor. An interim order was granted. H

Ziyambi JA

A In his founding affidavit filed in support of his application before the magistrates court, the appellant stated his case as follows:

> "13. I aver that the threats to evict me from the premises are disturbing my peaceful occupation of the premises in that:
>
> (i) I bought the house lawfully from the first respondent and paid the purchase B price in full.
>
> (ii) I occupied the premises with the clear and express consent of both the first respondent and all beneficiaries of the said estate.
>
> (iii) I have made considerable improvements on the premises.
>
> (iv) First respondent had ostensible authority to dispose of the property by virtue of being the surviving spouse of the LATE ALVIN ROY ADAMS".

C However, at the hearing before the magistrate the appellant argued that the sale of the property had been conducted in terms of s 41 of the Administration of Estates Act [*Chapter 6:01*]. In so doing, he sought to rely on an allegation made in the opposing affidavit sworn by Chantelle Adams, the first respondent's daughter that:

> "2. When D my father died in July 2004, the family was left in a crippled financial position.

3. My mother then decided to sell the immovable property in dispute, and approached Messrs Mwonzora and Associates to make the necessary arrangements.

10. From the beginning, I did not approve the sale of the property but since E my mother was desperately in need of the money, I could not resist."

The magistrate dismissed this argument on the basis that an applicant's case must stand or fall on its founding affidavit. He discharged the rule *nisi.* The appellant appealed to the High Court which dismissed the appeal. Still dissatisfied, he has appealed to this Court.

F It was contended by Mr *Uriri*, on behalf of the appellant, that the sale of the property was effected in terms of s 41 of the Administration of Estates Act [*Chapter 6:01*] ("the Act") as it was absolutely necessary for the subsistence of the deceased's family. He submitted that although an allegation to that effect was not made in the founding affidavit, the issue was sufficiently canvassed G before the magistrate and both the magistrate and the court *a quo* had erred in taking the stance that the application stood or fell on the allegations made in the founding affidavit. In any event, he argued, the sale of an estate asset in contravention of s 41 of the Act was not a nullity since the only sanction imposed by the Act was personal liability, on the person disposing of the H estate asset, for the debts and liabilities of the estate.

Ziyambi JA

It is trite that an application stands or falls on the averments made in the A founding affidavit. See Herbstein & van Winsen *Civil Practice of the Superior Courts in South Africa* 3 ed p 80 where the authors state:

> "The general rule, however, which has been laid down repeatedly is that an applicant must stand or fall by his founding affidavit and the facts alleged therein, and that although sometimes it is permissible to supplement the allegations contained B in that affidavit, still the main foundation of the application is the allegation of facts stated therein, because these are the facts which the respondent is called upon either to affirm or deny. If the applicant merely sets out a skeleton case in his supporting affidavits any fortifying paragraphs in his replying affidavits will be struck out"

This was the principle applied by the court *a quo*. It said: C

> "In his founding affidavit, the appellant submitted that the sale should be upheld because the widow or first respondent 'had ostensible authority to dispose of the property by virtue of being the surviving spouse of the late Alvin Roy Adams'. Now, in law, the applicant's case falls or stands upon what is said in the founding affidavit. It cannot be propped up by what may chance in respondent's opposition. However, the issue of ostensible authority seems to have been abandoned during D the proceedings in the court *a quo*. It certainly is not part of the grounds of appeal. On this basis alone, the conclusion would have been inescapable that the sale of the property fell foul of the peremptory provisions of s 21 of the Administration of Estates Act [*Chapter 6:01*]".

In my view, the stance adopted by both courts below is unassailable.

In any event, as was submitted on behalf of the respondents, the appellant E failed to establish that the disposal of the property was absolutely necessary for the subsistence of the family as Mwonzora & Associates had declined to release the proceeds thereof and have, to date, not done so.

It is incredible that the very firm of legal practitioners which arranged the sale and retained the proceeds could be pressing for transfer of the property from F the first respondent who was a client at the time of the sale in full knowledge that the purchase price has not been paid to her. It is aggravating that this stance is being taken by that firm as representatives of the purchaser of the property when it was the first respondent, the seller, who first approached them and for whom they were acting at the time of the sale. The High Court referred the question of the conduct of this firm of legal practitioners to the G Law Society for investigation and rightly so, in my view. A high standard of integrity is expected from legal practitioners.

As to the status of the sale, the Act governs the administration and distribution of all deceased estates. Sections 21, 23, 41 and 42 are particularly relevant. They provide as follows: H

Ziyambi JA

A "23 Letters of administration

The estates of all persons dying either testate or intestate shall be administered and distributed according to law under letters of administration to be granted in the form B in the Second Schedule by the Master to the testamentary executors duly appointed by such deceased persons, or to such persons as shall, in default of testamentary executors, be appointed executors dative to such deceased persons B in manner hereinafter mentioned.

21 Custody of estate of person not married in community

On the death of any person not being one of two spouses married in community of property, the spouse of the deceased or, in default or absence of the spouse, the child or children of the deceased or, in default, absence or minority of the child or children, the next of kin of the deceased or, in default, absence or C minority of the next of kin, the person who at or immediately after the death has the chief charge of the house in or of the place on which the death occurs shall secure and take charge of all goods and effects of whatever description belonging to the deceased and being in the house or upon the premises at the time of death, and shall retain the same in his or her custody and possession until delivery thereof is demanded by the executor of the deceased or by any other person lawfully appointed by the High Court or any judge thereof or the D Master, to receive delivery of the same.

41 Liability in certain cases for debts and legacies

If –

(a) before letters of administration are granted by the Master to any executor for the administration of any estate, any person takes upon himself to administer, distribute or in any manner dispose of such estate or any part thereof, except E in so far as may be authorized by a competent court or by the Master or *may be absolutely necessary for the safe custody or preservation thereof or for providing a suitable funeral for the deceased or for the subsistence of the family or household or livestock left by the deceased; or*

(b) . . .

G every such person shall thereupon become personally liable to pay to the creditors F and legatees of the deceased all debts due by the deceased at the time of his death or which have thereafter become due by his estate, and all legacies left by the deceased in so far as the proceeds and assets of such estate are insufficient for the full payment of such debts and legacies:

42 Duty of person in possession of assets of estate of deceased person

Every person not being the executor of the estate of a deceased person duly appointed in Zimbabwe who has or comes into possession or custody of any property or asset belonging to such estate shall forthwith either deliver such property or asset to the duly appointed executor, if any, then being in Zimbabwe or report the particulars thereof to the Master; and if such first-mentioned person fails to do so, or parts with any such property or asset to any person H not authorized by the Master by letters of administration or other direction to

---

Ziyambi JA

receive the same, he shall, apart from any other liability he may incur thereby, A be liable for all dues payable to the public revenue in respect of such property or asset" (emphasis added).

It was submitted by Ms *Mahere* that the sale of the property was null and void by reason of its having been effected in contravention of ss 41 and 42 of the Act. In support of this submission we were referred to the following B remarks of Innes CJ in *Schierhout v Min of Justice* 1926 AD 99 at 109:

"It is a fundamental principle of our law that a thing done contrary to the direct prohibition of the law is void and of no effect. The rule is thus stated. . .So that what is done contrary to the prohibition of the law is not only of no effect, but must be regarded as never having been done - and that whether the lawgiver has expressly so decreed or not; the mere prohibition operates to nullify the act." C

In *Pottie v Kotze* 1954 (3) SA 719 (A) at 726-7 it was explained that the usual reason for upholding a prohibited act to be invalid

"is not the inference of an intention on the part of the Legislature to impose a deterrent penalty for which it has not expressly provided, but the fact that recognition of the act by the Court will bring about, or give legal sanction to, the very situation which the Legislature wishes to prevent." D

I agree with the submission by Ms *Mahere* that the intention of the legislature in enacting s 42, and indeed s 41 of the Act, was to protect the position of beneficiaries and, I would add, creditors of a deceased person pending the administration of the estate and that were the court to sanction the disposal of an estate asset in circumstances such as the present, it would bring about the very situation which the legislature sought to prevent thereby causing E prejudice to both the beneficiaries and creditors of the estate.

The clear intention as expressed in the Act, and in particular the sections thereof quoted above, is to prohibit the distribution of a deceased estate by persons other than executors.

Further, the authority to dispose of certain assets of a deceased estate before F the appointment of an executor is strictly limited to the circumstances set out in s 41. In the present case it would have to be shown that the sale of the property was *absolutely necessary* for the subsistence of the family. The use of the word *absolutely* is significant and is indicative of a higher standard than mere necessity. G

Not only was no allegation of absolute necessity made in the founding affidavit but it is clear that such necessity was not present when the property was sold. This is because the first respondent was represented at the time of the sale by the very legal practitioners who drew up the founding papers for the appellant. They would have known, had they diligently performed their duties, whether or not the requirement of absolute necessity was present. Their H

Ziyambi JA

A failure to place reliance on this aspect of absolute necessity in the founding affidavit can only mean that no such necessity existed. Their belated reliance on s 41 was a desperate attempt to redeem the application which otherwise was clearly without merit.

GARWE JA and OMERJEE AJA concurred

B *Costa & Madzonga*, the appellant's legal practitioner

Chadyiwa & Associates, first-third respondents' legal practitioners

© 2015 Juta and Company (Pty) Ltd.

Document 11 of 73

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2013/Volume 1/BRAVO (PVT) LTD v WORDHOUSE MULTIMEDIA SERVICES (PVT) LTD & ANOR 2013 (1) ZLR 74 (H)

BRAVO (PVT) LTD v WORDHOUSE MULTIMEDIA SERVICES (PVT) LTD & ANOR 2013 (1) ZLR 74 (H)

Citation	2013 (1) ZLR 74 (H)
Case No	Judgment No. HH-246-13
Court	High Court, Harare
Judge	Dube J
Heard	5 November 2011; *CAV*
Judgment	4 February 2013
Counsel	*C Takaendesa,* for the plaintiff *A Mutsiwa,* for the defendant
Case Type	Civil trial
Annotations	No case annotations to date

Flynote

Landlord and tenant – *lease – cancellation – landlord required to make election within a reasonable time whether or not to cancel – onus on plaintiff to justify termination – notice of cancellation – must be brought to the attention of lessee – how notice to be given – may be done by* D *service of summons or notice of motion*

Headnote

The first defendant leased a property from the plaintiff. It was a term of the agreement that the rent should be paid in advance. The lease provided that, in the event of failure to pay the rent by the seventh day of the E month, the landlord was entitled to cancel the lease "forthwith". The lease agreement was silent on the mode of cancellation and notification of cancellation of the lease agreement. For the month in question, the defendant paid the rent on the 27th and the next day the landlord issued summons, seeking an order for cancellation of the lease agreement, ejectment of the defendant, arrear rentals and other sums which it claimed F were outstanding. The defendant claimed that it had not breached the lease agreement and that the plaintiff had not given notice of cancellation.

Held, that where a tenant makes a late payment of rent the landlord must elect within a reasonable time, and at the latest before the rental for the next month becomes due, to cancel the lease agreement. The plaintiff G had proved that the defendant failed to pay rentals for the relevant month within the required period. The rent was tendered out of time and the fact that it was subsequently paid did not deprive the plaintiff of his right to cancel the agreement. Failure to comply with the requirement to pay rent timeously in terms of the lease agreement was a material breach justifying cancellation of the lease agreement. The plaintiff H

A had proved that it was entitled to cancel the lease agreement based on breach of contract.

Held, further, that where a contract does not make provision for the procedure for cancellation of a contract, the common law applies: a landlord has a duty to bring to the attention of the lessee the fact that he is cancelling the contract. Cancellation of a contract takes place upon the delivery B of the notice of cancellation. However, in instances where there has not been such a communication of cancellation, it takes place from the date of service of the summons or notice of motion, both of which suffice as notices of cancellation.

Cases cited C

DTTC Investments CC v Klopper [2012] ZAECPEHC 97

du Plessis v Govt of the Republic of Namibia 1995 (1) SA 603 (Nm)

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

Miller and Miller v Dickinson 1971 (3) SA 581 (A)

Parkview Properties (Pvt) Ltd v Chimbwanda 1998 (1) ZLR 408 (H)

D *Standard Bank of South Africa v Koekemoer* [2012] ZAGPPHC 300

Swart v Vosloo 1971 (1) SA 100 (A)

Zimbabwe Express Svcs (Pvt) Ltd v Nuanetsi Ranch (Pvt) Ltd 2009 (1) ZLR 326 (S)

Case information

C Takaendesa, for the plaintiff

E *A Mutsiwa,* for the defendant

Judgment

Dube J: Bravo Ltd is a company in the business of letting out properties. It owns number 125 Dartford Road, Willowvale, Harare, (hereinafter referred to as the premises). It is the plaintiff and the landlord in this matter. The F first defendant is Wordhouse Multimedia Services (Pvt) Ltd, the tenant, and leases the premises from the plaintiff. The second defendant is a director of the first

defendant. He bound himself as surety and co-principal debtor for the first defendant's obligations under the lease agreement.

The parties entered into a lease agreement in terms of which the first defendant leased the premises for US3 000 per month payable in advance. It was also a G term of the lease agreement that the tenant would pay monthly maintenance and operating costs. The plaintiff avers that the defendant has breached the terms of the contract in that it failed to pay the rental for the month of May 2009 by the first of the month in terms of the lease agreement. On 28 May 2009 the plaintiff issued out summons against the defendants seeking the H following relief,

---

2013 (1) ZLR p76

Dube J

a) An order for cancellation of the agreement of lease between plaintiff A and first defendant.

b) An order for ejectment of the first defendant from 125 Dartford Road, Willowvale Harare.

c) Payment in the sum of $9 000 being the sum owed by the defendants as arrear rentals as from November 2009 to May 2010. B

d) Payment of $1087 being money owed by the defendants as arrear operating costs.

e) Payment of damages for continued occupation by the defendant at a rate of $3000 a month for rent and $364.50 for maintenance and operating costs from 1 June 2010. C

f) An order for costs on an attorney-client scale.

The summons and particulars of claim were amended in para (c).The plaintiff now claims $4 087 as arrear rentals and operating costs from December 2009 to May 2010 plus interest.

The defendant opposes the relief sought on the basis that it did not breach D the agreement of lease and that the plaintiff failed to give it notice to cancel the contract of lease.

The plaintiff called Caesar Masuku as its witness. The witness is a property manager with Knight Frank, Zimbabwe. He testified that there is a lease agreement between the parties commencing from 1 July 2009.The second E defendant signed a deed of suretyship as a guarantor to the obligations of the first defendant under this lease agreement. The monthly rental of $3 000 per month and operating costs were required to be paid on the first of each month and in advance. The tenant was required in terms of clause 6 of the agreement to pay for the operating costs. The figure for operating costs F is constituted of monthly charges for municipal rates, water, effluent and sewerage and these fluctuate depending on consumption.

The figure of $364.50 represents operating costs and includes water and rates per month and is based on estimates because the city authorities were not delivering bills. Electricity is not included in this figure. The total operating G costs as estimated is $2 184. The tenant was supposed to pay water and property rates bills of the City of Harare as well. The plaintiff monitors the consumption of both electricity, water and rates. Credit is passed where the tenant has made payment to the relevant authorities. The actual bills are now available from the city council but were not produced. Nothing has been paid in respect of operating costs for the period in issue. As at 1 May H

2013 (1) ZLR p77

Dube J

A 2010 the tenant owed $3 000 plus operating costs totalling $2650, based on the actual bills.

The tenant owed a total of $23 184.30 for rentals and maintenance and operating costs for the period December 2009 to May 2010. The tenant paid a total $19 100, 00. The total arrears for this period are $4 084, which are made B up of the rental of $3 000 for May and operating costs totalling $1 084.30. As at the end of May 2010 the first defendant had paid a total of $22 100. The breach arises from the fact that rentals for May 2010 were paid on 27 May 2009 when the first defendant was required to pay on 1 May. After a series of meetings, a letter of demand was written to the first defendant in February 2010, and the agreement was cancelled. The lease agreement was C cancelled by the issuing of summons.

The defendants called Terence Mapiravana, the second defendant, as its witness. His evidence is as follows. He is a director of the first defendant. He confirmed the existence of the lease agreement between the first defendant and the plaintiff. The first defendant paid a total of $22 100 for the period D December to May 2009.An amount of $18 000 was for rental for 6 months, $3 000 was for good tenancy deposit and the balance of $1 100 was an estimate for operating costs. The first

defendant has been paying electricity, rates and water bills. The water and rates bills were estimated as the bills were not coming. The witness paid $1 100 for operating costs. No certificate was issued to prove operating costs. The plaintiff claims $1 087 in operating E costs, therefore the first defendant is fully paid for the period in issue. There is no evidence that the lease agreement was cancelled. If the plaintiff intended to cancel the lease agreement, it did not comply with clause 33.2 of the lease agreement which stipulates that all notices sent or served shall be delivered at the address in clause 38.1 or hand delivered and the plaintiff never delivered F any such notice. The witness only learnt at court that operating costs were being charged at $364.50 per month.

The issues that will resolve the dispute may be summarised as follows:

(a) whether the first defendant was in breach of the lease agreement as of 1 May 2010.

(b) whether G the plaintiff cancelled the lease agreement.

Clause 8.1 of the agreement provides that the rent and maintenance and operating costs shall be payable monthly in advance on the first day of each month. The agreement in clause 33.1.1 compliments clause 8 and reads as follows.

"33.1 In H the event of:

Dube J

33.1.1 the rent being in arrears after the 7th day of the month for which it is A due whether the same has been legally demanded or not; or

33.1.2 any other payment in terms of this agreement being in arrears or

33.1.3 the tenant committing or permitting a breach of or disregarding any of the terms and conditions of this Agreement and failing to remedy the breach within 7 days of the landlord giving him notice to remedy such breach; or. . .. B

The landlord shall be entitled to cancel the lease forthwith . . ."

The essence of these clauses is that rentals were due and required to be paid by the first of each month with the right to cancel the contract accruing where the rent or any other payment remains in arrears after the 7th of the month whether the rental has been demanded or not. C

Where a tenant makes a late payment of rent the landlord must make an election within a reasonable time and at the latest before the rental for the next month becomes due, to cancel the lease agreement. See *Parkview Properties(Pvt) Ltd v Chimbwanda* 1998 (1) ZLR 408 (H) for that proposition. The lease agreement specifies that if the tenant fails to pay outstanding arrear rentals and operating costs after the 7th day of the month for which it is due, D the landlord is entitled to cancel the lease agreement forthwith, whether the same has been legally demanded or not. A statement prepared by the plaintiff shows that May 2010 rentals were paid on the 27th of that month. Summons was issued on 28 May 2010. The defendants did not dispute this fact. The plaintiff has proved that the defendant failed to pay rentals for the month of E May 2010 within the required period. May rentals were tendered out of time and the fact that rentals were subsequently paid does not deprive the plaintiff of his right to cancel the agreement. The breach complained of is fairly serious. Failure to comply with the requirement to pay rentals timeously in terms of a lease agreement amounts to a material breach justifying cancellation of the lease agreement. The plaintiff has discharged the onus of proving that F it was entitled to cancel the lease agreement based on breach of contract.

The next issue is whether the plaintiff validly cancelled the lease agreement. The cancellation clause provides that in the event of breach, the landlord shall be entitled to cancel the lease agreement, 'forthwith'. The lease agreement is silent on the mode of cancellation and notification of cancellation of the G lease agreement. Summons was issued without prior notice of cancellation having been given. The plaintiff claims that it cancelled the agreement when it issued summons commencing action in this matter. There is no actual notice of cancellation.

The onus is on a plaintiff in an action for ejectment to justify the termination of the lease agreement. Where a contract does not make provision for the H

Dube J

A procedure for cancellation of a contract, the common law applies. This position was well enunciated in the cases of *Standard Bank of SA v Koekemoer* [2012] ZAGPPHC 300 and *DTCC Investment v Klopper* [2012] ZAECPEHC 97.The common law position is that a notice of cancellation must be clear and unequivocal. In *Miller and Miller v Dickinson* 1971 (3) SA 581 (A) the court held that a landlord has a common law duty to bring to the attention B of the lesser the fact that he is cancelling the contract:

> "In the absence of an agreement to the contrary, a party to a contract who exercises his right to cancel must convey his decision to the mind of the other party and that cancellation does not take place until that happens"

See *Swart v Vosloo* 1971 (1) SA 100 (A). In C *Jackson v Unity Insurance Co Ltd* 1999 (1) ZLR 381 (S), our own Supreme Court held that where a party wishes to cancel a lease agreement it must do so in no uncertain terms and remarked as follows:

> ". . . a valid notice of cancellation of lease must clearly and unambiguously inform the guilty party of the wrong party's unqualified and final decision to treat the contract at an end"

D Cancellation of a contract takes place upon delivery of the notice of cancellation. In instances where there has not been communication of cancellation, cancellation takes place from the date of the service of the summons or notice of motion. This approach was adopted in *du Plessis v Government of the Republic of Namibia* 1995 (1) SA 603 (Nm). In E *Standard Chartered Bank of SA Ltd supra* the court remarked that:

> ". . .to the extent that a notice of cancellation was required, the service of the summons on the respondent and the fact that the election to cancel the agreement was expressly stated therein, served that purpose".

Closer to home, Garwe JA in F *Zimbabwe Express Services v Nuanetsi Ranch (Pvt) Ltd* 2009 (1) ZLR 326 (S) followed the reasoning in the *du Plessis* case and accepted that a summons claiming damages was an implied notice of cancellation.

It is common cause that no formal notice to cancel the lease agreement was given. There was no formal intimation or warning of the cancellation. The fact that the contract had been cancelled was not communicated to the G defendants until at the stage when summons was issued. The cases cited confirm the position that service of summons where a notice to cancel has not previously been communicated suffices as notice of cancellation. The plaintiff's intention to cancel is exhibited in the summons. Cancellation has been proved. I am satisfied that the summons served on the defendant H constitutes due notice of cancellation of the lease agreement.

Dube J

As regards the issue of rental arrears, the evidence discloses that there are A no arrears outstanding for rentals for the period in issue. The plaintiff's witness conceded that there are no rental arrears for the period December 2009 to June 2010 and that although the tenant paid rentals for May 2010 on 27 May 2010 and late, all arrear rentals arising from that period have since been cleared. The plaintiff contended that what is outstanding is holding B over damages for rentals up to the date of ejectment.

[*The learned judge then considered the question of holding over damages and maintenance and operating costs (neither of which are relevant to this report) and continued:*]

The tenant undertook liability for costs on a legal practitioner scale in the event that the plaintiff consulted legal practitioners following any breach of C any term or condition of the lease agreement.

In the result it is ordered as follows:

(1) The cancellation of the lease agreement be and is hereby confirmed.

(2) The respondent and all those claiming occupation through him are D evicted from number 125 Dartford Road, Willowvale, Harare.

(3) Payment of damages for continued occupation by the defendant at the plaintiff's premises at the rate of $3 000 a month for rent from the 1st of June 2010 to date of defendants' ejectment.

(4) Payment of interest at the prescribed rate from 1 June 2010 to date of payment in full. E

(5) The defendants, jointly and severally with the one absolving the other, are ordered to pay costs of suit on an attorney-client scale.

Hangazha & Charamba, plaintiff's legal practitioners

Donsa Nkomo & Mutangi, defendant's legal practitioners F

© 2015 Juta and Company (Pty) Ltd.

Document 12 of 73

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2013/Volume 1/MUNEKA & ORS v MANICA BUS CO 2013 (1) ZLR 81 (H)

MUNEKA & ORS v MANICA BUS CO 2013 (1) ZLR 81 (H)

Citation	2013 (1) ZLR 81 (H)
Case No	Judgment No HH-30-13
Court	High Court, Harare
Judge	Mtshiya J
Heard	11 October 2012; 7 January 2013; 10 January 2013; 17 January 2013; 24 January 2013; 29 January 2013; *CAV*
Judgment	6 February 2013
Counsel	*E Mutandiro,* for the applicants *O Shava,* for the respondent
Case Type	Civil application
Annotations	Link to case annotations

Flynote

Arbitration – *award – labour case – registration of award with magistrates court or High Court – such registration for purposes of enforcement only – award remains award of Labour Court and under control of Labour Court*

D **Employment** – *arbitration – award by arbitrator – registration of award with magistrates court or High Court – such registration for purposes of enforcement only – award for other purposes remains under control of Labour Court*

Headnote

E Arbitral awards granted in terms of the Arbitration Act [*Chapter 7:15*] are governed by the provisions of that Act and, in like manner, awards granted through compulsory arbitration in terms of the Labour Act [*Chapter 28:01*] are governed by the provisions of the Labour Act.

In terms of s 98(14) of the Labour Act, the registration of an arbitral award F is for purposes of enforcement only. See s 98(15). The same applies to a decision, determination or order of the Labour Court registered with the High Court in terms of s 92B of the Act. The award or order remains an award or order of the Labour Court and is to be managed and controlled in terms of that Act. Accordingly, the Labour Court can vary or amend such an order even after it has been registered with the G High Court. The award is only registered with the High Court because the Labour Court has no enforcement mechanism for its orders. This reasoning would also apply to all arbitral awards obtained through compulsory arbitration in terms of the Labour Act. This is so

because s 98(9) of the Act gives the arbitrator the same powers as the Labour H Court in determining a labour dispute.

In providing for registration for enforcement purposes, the legislature did A not envisage a procedure where the applicant would be denied the registration of a certified award, although the other party would be at liberty to oppose the process of execution or enforcement on any legal or reasonable grounds. As long as the arbitral award has not been suspended or set aside on review or appeal in terms of the Labour Act, there is no B basis upon which the High Court may decline registration of the award.

Cases cited

Samudzimu v Dairibord Holdings Ltd 2010 (2) ZLR 357 (H)

Standard Chartered Bank Zim Ltd v Musanhu 2005 (1) ZLR 43 (S) C

Legislation considered

Arbitration Act [*Chapter 7:15*], First Schedule, art 35

Labour Act [*Chapter 28:01*], ss 92B and 98

High Court Rules 1971 (RGN 1047 of 1971), r 227 D

Case information

E Mutandiro, for the applicants

O Shava, for the respondent

Judgment

Mtshiya J: This is an application for the registration of an arbitral award. The application is opposed. E

There are purportedly six applicants involved. I indicated to the parties that the powers of attorney filed on behalf of the second to the fifth applicants are defective in that they were not signed by the said applicants. The powers of attorney were only signed by the commissioner of oaths. That being the case, there is only one applicant before the court. The legal practitioners F representing the applicants agreed with that observation and asked me to proceed on the basis that there is only one applicant before the court, namely the first applicant.

Furthermore, before writing this judgment, the parties confirmed to me that the second, fourth, fifth and sixth applicants had since settled the matter with the respondent. That means that the respondent still has to comply with G the award in respect of the first and the third applicants only. As already indicated, the third applicant is not properly before the court and accordingly this judgment shall relate to the first applicant only.

Notwithstanding settlement with its other former employees, the respondent did not withdraw its opposition to this application. H

Mtshiya J

A The applicant was an employee of the respondent and was laid off from employment in 2009 without benefits. The applicant, together with other employees who are not before the court, approached an arbitrator through the Labour Court. That approach appears to have led to referral to compulsory arbitration in terms of the Labour Act [*Chapter 28:01*] ("the Labour Act") On 11 February 2011 the arbitrator made an award in favour of the applicant B and his fellow employees. In terms of the said award the respondent was ordered to pay a total of $40 103.81 in respect of benefits covering the applicant and other former employees. Under the award, the first applicant was to be paid as follows:

> "5) Brian Muneka Senior Inspector Grade (8D) $50-87/wk
>
> C Period of engagement March 1999 to October 2009

(a)	Notice pay 3 months' salary	$220.41 x 3months =$661.23
(b)	Leave days. Due 3 years	$66 days x $8.47 =$559.02
(c)	Employee was paid 43.33/month instead of $220.41/month giving a shortfall	$177.08 x 17months =$3 010.36
(d)	Housing allowance from October 2009 at $25/month x 10 months	=$250.00
(e)	Transport allowance from Feb 2009 to October 2009 at $25/months x 10 months	=$250.00
(f)	Damages for loss of employment (2) month's salary for every completed year giving a total of 20 months' salary thus	$220.44 x 20 months =$4 408.20
(g)	Gratuity for 10 years	$220.41 x 15% 10yrs =$330.61
(h)	Unpaid off days = 24 days (At Time and half)	$12.70 x 24 = $304.80
Total		=$9 774.22

The respondent was served with the award in March 2011 but has not yet paid the amount owing to the applicant.

The respondent, in its opposing papers, avers that the company collapsed when negotiations to settle with the applicant were in progress. It goes on to state that the award was given in default and applications for rescission and stay of execution are before the Labour Court. The respondent also disputed the quantification of the amount owing to the first applicant.

The applicant raised a point *in limine,* arguing that the respondent's legal practitioner was not competent to swear to the opposing affidavit. On the point *in limine,* the respondent correctly submitted that r 227 of the High

---

2013 (1) ZLR p84

Mtshiya J

Court Rules 1971 permits a legal practitioner to sign or swear to an affidavit on behalf of his/her client.

I think the important issue here is for the deponent to be "a person who can swear positively to the facts or averments set out" in the affidavit. A fully instructed legal practitioner should, in my view, be able to do so. I think the rules only require the legal practitioner to have the necessary mandate, full facts and full instructions to act on behalf of his/her client so as to be able to sign and swear to documents on behalf of his/her client. In the face of r 227 of the High Court Rules 1971, I am unable to uphold the point *in limine*. The relevant r 227(4) provides as follows:

> "(4) An affidavit filed with a written application –
>
> (a) shall be made by the applicant or respondent, as the case may be, *or by a person who can swear to the facts or averments set out in therein*; and
>
> (b) may be accompanied by documents verifying the facts or averments set out in the affidavit, and any reference in this Order to an affidavit shall be construed as including such documents" (my emphasis).

The respondent is correct in saying that this application is being made in terms of subss (14) and (15) of s 98 of the Labour Act. The subsections provide as follows:

"(14)Any party to whom an arbitral award relates may submit for registration the copy of it furnished to him in terms of subsection (13) to the court of any magistrate which would have had jurisdiction to make an order corresponding to E the award had the matter been determined by it, or, if the arbitral award exceeds the jurisdiction of any magistrates court, the High Court.

(15)Where an arbitral award has been registered in terms of subsection (14) it shall have the effect, for purposes of enforcement, of a civil judgment of the appropriate court".

In his founding affidavit the applicant clearly states that he approached the F arbitrator through the Labour Court. The award was certified in terms of the Labour Act. I therefore believe the that arbitrator was appointed in terms of the Labour Act.

True, the arbitrator makes reference to Art 35 of the UNCITRAL Model Law ("the Model Law") set out in the Schedule to theArbitration Act [*Chapter 7:15*] G with respect to the enforcement of his award. However, if the matter was referred to him in terms of the Labour Act, as reflected in the founding affidavit, then the correct provision of the law applicable is s 98(14) of the Labour Act. This was compulsory arbitration. There is no averment to the effect that registration is being sought in terms of Art 35 of the Model Law which provides as follows: H

Mtshiya J

"(1) An A arbitral award, irrespective of the country in which it was made, shall be recognised as binding and, upon application in writing to the *High Court*, shall be enforced subject to the provisions of this article and of article 36.

(2) The party relying on an award or applying for its enforcement shall supply the duly authenticated original award or a duly certified copy thereof and the original arbitration agreement referred to in article 7 or a duly certified copy thereof. If the award or agreement is not made in the *English language*, the party B shall supply a duly certified translation in the *English language".*

I agree that, in terms of s 98(2) of the Labour Act, the procedures provided for in the Arbitration Act apply to labour disputes referred to compulsory arbitration. The subsection provides as follows:

"(2) Subject to this section, the Arbitration Act [*Chapter 7:15*] shall apply to a C dispute referred to compulsory arbitration".

I believe that the above attaches mainly to arbitration procedures and therefore *in casu,* the relief sought is clearly in terms of subss (14) and (15) of s 98 of the Labour Act.

In view of the above, I take the position that the reasons for opposing the D registration of an award granted in terms of the Labour Act are not necessarily those stipulated in the Arbitration Act. Voluntary awards granted in terms of the Arbitration Act are governed by the provisions of that Act and. in like manner. awards granted through compulsory arbitration in terms of the Labour Act are governed by the provisions of the Labour Act. That is why the respondent says it has approached the Labour Court for redress.

E In *Samudzimu v Dairibord Holdings Ltd* 2010 (2) ZLR 357 (H) Chiweshe JP said:

"Section 98 provides for *inter alia* the referral of matters to compulsory arbitration, the appointment of arbitrators, appeals against decisions of arbitrators, reviews and other remedies. These provisions are detailed and comprehensive. Clearly it could not have been the intention of the Legislature that parties aggrieved by F the decision of an arbitrator in a labour dispute seek remedy in terms of s 34 or 36 of the Arbitration Act.

I agree with the applicant that the correct interpretation would be that, with regards the law, the Labour Act takes precedence over the Arbitration Act and any other enactment. The intention of the Legislature was to have all labour matters initiated and resolved to finality in terms of the Labour Act. Equally, the G Legislature must have intended that such matters be dealt with by the Labour Court to the exclusion of any other court.

Sections 34 and 36 of the Arbitration Act are not applicable in cases where the award sought to be challenged relates to a labour dispute. The mechanisms for challenging such awards are provided for in the Labour Act and may be accessed through the medium of the Labour Court. No other court has jurisdiction to H entertain such matters.

Mtshiya J

Accordingly, for as long as the arbitral award has not been suspended or set A aside on review or appeal in terms of the Labour Act, there is no basis upon which this court may decline registration of the same".

I fully agree with the above enunciation of the legal principles involved.

In terms of the Labour Act, the registration of an arbitration award envisaged under s 98(14) of the Act is for purposes of enforcement only. See s 98(15) B quoted above. The same applies to a decision, determination or order of the Labour Court registered with this court in terms of s 92B of the Labour Act (see s 92B(4) quoted below). The award or order, in my view, remains an award/order of the Labour Court and is to be managed and controlled in terms of the Labour Act. That is why the Labour Court can vary or amend such an order even after it has been registered with this court. The award C is only registered with this court simply because the Labour Court has no enforcement mechanism for its orders.

Subsections (3), (4) and (5) of s 92B of the Labour Act provide as follows:

> "(3)Any party to whom a decision, order or determination relates may submit for registration the copy of it furnished to him in terms of subsection (2) to the D court of any magistrate which would have had jurisdiction to make the order had the matter been determined by it or, if the decision, order or determination exceeds the jurisdiction of any magistrates court, the High Court.
>
> (4)Where a decision, order or determination has been registered in terms of subsection (3) it shall have the effect, for purposes of enforcement, of a civil judgment of the appropriate court. E
>
> (5)If any order which has been registered in terms of subsection (4) has been rescinded or altered by the Labour Court in terms of section *ninety-two C*, the clerk or registrar of the court concerned shall make the appropriate adjustment in his register."

The above, in my view, applies to all arbitral awards obtained through compulsory arbitration in terms of the Labour Act. This is so because s 98(9) F of the Labour Act gives the arbitrator the same powers as the Labour Court in determining a labour dispute. The relevant section (i.e. 98(9) provides as follows:

> "(9)In hearing and determining any dispute an arbitrator shall have the same powers as the Labour Court".

Clearly the above provision of the law places an arbitral award obtained in G terms of the Labour Act on the same level as an order of the Labour Court.

Like in subs (14) of s 98, subs (3) of s 92B does not spell out the procedure to be followed in registering a decision, order or determination of the Labour Court with the High Court or magistrates court. The practice in the High Court, however, has always been through application, which application is H

A then served on the other party (the respondent). The respondents have, in the majority of cases, opposed applications for the registration of arbitral awards. The general argument put forward is that the award will have been appealed against or is facing a rescission application.

I do not believe that, in providing for registration for enforcement purposes, B the legislature envisaged a procedure where the applicant would be denied the registration of a certified award as we normally witness. My view is that the other party is at liberty to oppose the process of execution or enforcement on any legal or reasonable grounds. Furthermore, the other party can also seek interim relief in terms of s 92E(3) of the Labour Act which provides C as follows:

> "Pending the determination of an appeal the Labour Court may make such interim determination in the matter as the justice of the case requires".

In *Standard Chartered Bank of Zimbabwe Ltd v Musanhu* 2005 (1) ZLR 43 (S) Malaba JA (as he then was) said:

> "The object of an interim determination made under s 97(4) of the Act is to give D a party in whose favour the determination appealed against was made an interim right which he would otherwise not have because of the noting of the appeal. It may also be to grant the party against whom the judgment was made temporary relief from the burden of the obligation imposed by the determination which he would otherwise not have because of the appeal". (Section 97(4) was repealed by s 34 of Act 7 of 2005 but the provision was retained under s 92E(3)).

E The above clearly indicates that, upon an award being made, both parties have an equal choice.

The registration of an award in terms of the Labour Act is, in my view, a matter of course as long as the award remains enforceable or unsatisfied. *In casu*, what is before the court is not a review

process but a mere application F for the registration of an award, which process, I believe, can be done through a register in the High Court with a certificate of registration being granted to the beneficiary of the award.

I am in agreement with Chiweshe JP where, in the *Samudzimu* case *supra*, he stated as follows:

> G "Accordingly, for as long as the arbitral award has not been suspended or set aside on review or appeal in terms of the Labour Act, there is no basis upon which this court may decline registration of the same".

In view of the foregoing, I have no reason to decline the registration of the arbitral award as prayed for.

H It is therefore ordered as follows:

2013 (1) ZLR p88

Mtshiya J

1. The arbitral award by Conrad V Chinembiri dated 11 February 2011, to A the extent it applies to the applicant, be and is hereby registered as an order of this court; and
2. The respondent shall pay costs of suit.

C Nhemwa & Associates, applicant's legal practitioners B

Mbidzo Muchadehama & Makoni, respondents' legal practitioners

---

© 2015 Juta and Company (Pty) Ltd.

Document 13 of 73

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2013/Volume 1/S v MURISI 2013 (1) ZLR 89 (H)

S v MURISI 2013 (1) ZLR 89 (H)

2013 (1) ZLR p89

Citation	2013 (1) ZLR 89 (H)
Case No	Judgment No. HH-31-13
Court	High Court, Harare
Judge	Hungwe J & Mavangira J
Heard	6 February 2013
Judgment	6 February 2013
Counsel	No appearance for the appellant *M Mugabe*, for the respondent
Case Type	Criminal appeal
Annotations	No case annotations to date

Flynote

C **Appeal** – *criminal matter – hearing – procedure at hearing – whether court obliged to hear oral argument – appellant's counsel failing to appear but having lodged written heads of argument – court entitled to decide matter on merits*

D **Criminal law** – *offences under Criminal Law Code – bribery (s 170) – elements – no need for State to show that accused's actions objectively showed favour or disfavour to another*

Headnote

The appellant was a magistrate. He was arraigned on two counts of contravening s 3(1)(a)(ii) of the Prevention of Corruption Act E [*Chapter 9:16*] [1] and, after a contested trial, convicted. He was sentenced to undergo 36 months' imprisonment of which twelve months were suspended on condition of future good behaviour. After lengthy delays caused by problems at the magistrates courts, the appellant's appeal was set down for hearing in the High Court. On the day appointed, counsel for the F appellant sought a postponement for a week. This was granted, but on the day of the resumed hearing there was no appearance by the appellant or his counsel. State counsel moved for the dismissal of the appeal. The first issue was whether, in light of non-appearance by the appellant, the court could still proceed to hear argument from the respondent and decide the matter on the merits. On the merits, the appellant's counsel G had argued in his heads of argument that for conviction to follow, the appellant ought to have done something which, objectively considered, H showed favour or disfavour to another.

Held, that an appeal is not a trial. It is not necessary to go over everything A at the appeal hearing. Heads of argument are submitted, among other reasons, to shorten oral argument. The court will almost certainly have read these before the hearing, and to avoid wasting time, may ask counsel to deal only with particular points. It may advise counsel that it does not want to hear him at all, because its *prima facie* view is that counsel's B argument is correct, and will ask the other side to present his argument in full. Both the appellant and the respondent were represented through counsel when the matter was by mutual consent postponed to a specific date and time at the request of the appellant. There was no explanation for the non-appearance by the appellant on the day of hearing. To simply strike the matter off the roll would be inconsistent with the requirement C to treat as urgent appeals in cases where the appellant has received an unsuspended prison sentence. The court having formed a *prima facie* view of the matters raised in the appeal, a determination on the merits would move the matter to the next step and bring it to finality sooner rather than later. In terms of s 38 of the High Court Act [*Chapter 7:06*], unless, upon a reading of the record of the trial proceedings and the D heads of argument filed by the parties, the court is of the opinion that an appeal has merit on the basis of one or more of the matters set out in that section, it shall dismiss the appeal. There is no express requirement for oral argument to be presented before the court could exercise its appeal powers.

Held, further, that what constitutes the offence in terms of s 3(1)(a)(ii) is E soliciting, accepting or agreeing to accept or attempting to obtain, from any person a gift or consideration for himself or any other person as an inducement or reward, for showing or not showing or for having shown or not shown, favour or disfavour to any person in relation to his principal's affairs or business. This offence is not the same as that F under s 4, which deals with offences by public officials.

Cases referred to

Matamisa v Mutare City Council (A-G intervening) 1998 (2) ZLR 439 (S)

S v Chogugudza 1996 (1) ZLR 28 (S)

S v Takaendesa 1972 (4) SA 72 (RA) at 75G; 1972 (1) RLR 325 (A) G

Legislation considered

High Court Act [*Chapter 7:06*], s 38

Prevention of Corruption Act [*Chapter 9:16*], ss 3(1), 4 & 15(2)(a)

Supreme Court (Magistrates Court) (Criminal Appeals) Rules (SI 504 of 1979), r 4 H

Hungwe J

Case information

A No appearance for the appellant

M Mugabe, for the respondent

Judgment

Hungwe J: The appellant was a magistrate stationed at Chinhoyi Provincial Magistrates Court, Mashonaland West. He was arraigned in that court on two counts of contravening s 3(1)(a)(ii) of the Prevention of Corruption Act B [*Chapter 9:16*] and, after a contested trial, convicted. He was, on 3 April 2006, sentenced to undergo 36 months' imprisonment, of which 12 months were suspended on condition of future good behaviour. He was represented by counsel of his choice throughout his trial. After sentence was pronounced, he noted an appeal against both conviction and sentence on 11 April 2006. C Mr *Matinenga* prepared appellant's heads of argument which were filed on 28 February 2008. The respondent's heads of argument were filed on 30 May 2008. The reason for the delay appears to be related to problems which beset the courts around that time regarding stationary and equipment (the record reflects that the legal practitioners offered to assist with bond paper). There is no explanation as to what transpired between 2008 and 2011 but there is D a certificate by the parties certifying, in April 2012, that the record was an accurate transcript of the original record of trial proceedings. On the date set for the appeal hearing, 13 November 2012, Mr *Uriri* appeared for the appellant. He applied for the postponement of the matter, and by consent, the matter was postponed to 20 November 2012. On that date however, there E was no appearance by the appellant or his counsel. Counsel for the State, Mr *Mugabe*, moved for the dismissal of the matter on the merits as the matter was long outstanding on the roll. We agree with him. He presented argument for the respondent. After hearing Mr *Mugabe,* we dismissed the appeal on the turn and indicated our reasons will follow later. These are the reasons.

F The first issue that exercised our minds was whether, in light of non-appearance by the appellant, we could still proceed to hear argument from the respondent and decide the matter on the merits. In *Matamisa v Mutare City Council (A-G intervening)* 1998 (2) ZLR 439 (S) the Supreme Court expressed itself, when faced with a similar situation, as follows:

> "The comments of the Attorney-General about the nature of a hearing at the G Supreme Court are, in my view, correct. An appeal is not a trial. It is not necessary to go over everything at the appeal hearing. Heads of argument are submitted, among other reasons, to shorten oral argument. The court will almost certainly have read these before the hearing. If so, it may consider that it is not necessary to waste its and counsel's time while counsel simply reads out what he has already put in writing. Sometimes the court may ask counsel to deal only with H particular points. It may advise counsel that it does not want to hear him at all,

> because its *prima facie* view is that counsel's argument is correct, and will ask A the other side to present his argument in full.
>
> All this is part of the way this court and other courts of appeal elsewhere in the world have always conducted their proceedings" (*per* Ebrahim JA at 444E-G).

In my respectful view, these sentiments apply with equal force in appeals before this court. *In casu*, both the appellant and the respondent were represented B through counsel when the matter was by mutual consent postponed to a specific date and time at the request of the appellant. Yet there is no explanation for non-appearance by the appellant on the day of hearing. The respondent, in my respectful view, is correct in urging this court to hear and dispose of the matter on the merits. The matter cannot simply be struck off the roll. This, in my view, is inconsistent with the requirement to treat all appeals generally C as urgent matters. In any event, having formed our *prima facie* view of the matters raised in this appeal, a determination on the merits will move the matter to the next step and bring it to finality sooner rather than later.

Rule 4 of the Supreme Court (Magistrates Court) (Criminal Appeals) Rules (SI 504 of 1979) provides:

> "The prosecution and finalization of all appeals in terms of these rules, especially D any appeal, other than an appeal by the Attorney-General in terms of section 61 of *Chapter 7*:*10*, relating to a case in which the convicted person has received an unsuspended prison sentence, shall be treated by all persons concerned as a matter of urgency."

Appeals in the High Court are governed by s 38 of the High Court Act E [*Chapter 7:06*]. Section 38 of that Act provides, in respect of appeals:

> "38 Determination of appeals in ordinary cases
>
> (1) Subject to this section and section *thirty-nine*, on an appeal against conviction the High Court shall allow the appeal and quash the conviction if it thinks that the judgment of the court or tribunal before which the appellant was convicted should be set aside – F
>
> (a) on the ground that –
>
> (i) it is unreasonable; or
>
> (ii) it is not justified, having regard to the evidence; or
>
> (b) on the ground of a wrong decision on any question of law; or
>
> (c) because on any other ground there was a miscarriage of justice; G
>
> and in any other case shall dismiss the appeal."

Therefore, unless upon a reading of the record of the trial proceedings and the heads of argument filed by the parties, the court is of the opinion that an appeal has merit on the basis of one or more of the matters set out in that section, it shall dismiss the appeal. There is no express requirement for oral argument to be presented before the court could exercise its appeal powers. H

Hungwe J

A Although there are three grounds of appeal put forward by the appellant, the heads of argument relied upon by counsel took only one point. It is that the State had not proved all the essential elements of the offence and, as a result, the presumption provided in s 15(2) of the Prevention of Corruption Act could not be lawfully be invoked in favour of the State.

B In a carefully reasoned judgment, the provincial magistrate, who presided over the trial in the court *a quo*, found the following facts to have been established by the evidence adduced before him. He said:

> "In count 1, the court carefully analysed the evidence of all State witnesses and found it highly improbable that these witnesses who came from different backgrounds met and fabricated their evidence. Sarah and Agnes saw [the] accused C in his office. They spoke to him. They saw him holding a red pen and with it he marked some items on exh 1 which Sarah was supposed to get even before the matter was finalized. With the same red pen, Agnes was given a piece of paper which had two of the accused's phone numbers. The same numbers were used by Agnes and they connected her to the accused and in the presence of Sarah. Sarah and Agnes saw [the] accused use a red pen to mark exh 1. These two heard [the] accused promise that Sarah should be able to get the items marked D even before the matter was finalized."

It should be recalled that the witness Simon Kasukuwere, a prison officer, had deposed to being sent by the appellant to collect money from someone at Greens. He did not know the person who was to give him money on the appellant's behalf nor the amount to be given, let alone the reason why the E appellant was to be given money by this person. He had deferred to the appellant's instruction as he considered his rank subordinate to that of the appellant. Regarding Simon, Agnes and Sarah, the magistrate said:

> "They all said the accused received $500 000 from Sarah. Sarah and Agnes fully corroborated each other in all material respects. They visited the accused's office and had a discussion with him. They were told that lunch should be bought if F Sarah's case was to be heard on 29 December. Indeed, on that day the matter was not postponed as feared but it was heard before the accused and Sarah got the relief she had prayed for."

The appellant contends that Agnes and Sarah never sought to corrupt the appellant. Reliance is placed on a few lines (3 lines on p 13; 3 lines on p 65 and 10 lines on p 79) for this contention. What appears at p 13 reflects G events leading to the arrest of the appellant well after the offence had been committed. At p 65 Agnes simply repeats the demands for lunch by the appellant which she did not realize was an offence, yet the payment was meant to induce the appellant to show favour in the execution of his official duties. Page 79 deals with amounts which do not form part of count one H for which appellant was convicted. He was acquitted on count 2 to which

---

Hungwe J

these amounts relate. The evidence on which the appellant was convicted A clearly shows, as the magistrate demonstrated, that it is the solicitation by the appellant for money for lunch which form the basis for drawing an inference in terms of s 15(2) of the Prevention of Corruption Act, that this request, if acceded to, would result in the appellant showing favour towards the treatment of her case on 29 December. Indeed ZW$500 000 was paid to B the appellant through Simon and on 29 December, by Sarah Rice, who only partially obtained access to some items which were under legal contestation at court in a matter presided over by the appellant.

Counsel for the appellant in his heads of argument urged this court to find that the State had not proved all the essential elements of the offence charged. He relied on *S v Chogugudza* 1996 (1) ZLR 28 (S) at 30E-F where C the following appears:

> ". . . before the State could rely on the presumption in s 15(2) of the Prevention of Corruption Act, it would have to show:
>
> (a) that the accused was a public officer;
>
> (b) that in the course of his employment or in breach of his duty; D
>
> (c) he did something which, objectively considered, showed favour or disfavour to another."

The interpretation which the appellant gave to s 3(1)(a) of the Act is not supportable on the facts. Counsel correctly points out that the above passage was stated in the context of s 4 of the Act. It must be accepted that there E is a clear distinction between the two sections. Whilst s 3(1) sets out what constitutes corrupt practices, s 4 is concerned with offences by public officials. As such, there is no need to import some interpretation when the literal interpretation gives effect to the clear intention of the legislature.

In the absence of ambiguity, it must be taken to mean what it says and say F what it means. There is simply no basis for reading anything into the words employed or for putting a particular gloss on a meaning so plain and patent.

> "The rule of construction is 'to intend the Legislature to have meant what they have actually expressed'. The object of all interpretation is to discover the intention of Parliament; 'but the intention of Parliament must be deduced from the language used', for 'it is well accepted that the beliefs and assumptions of G those who frame Acts of Parliament cannot make the law'.
>
> Where the language is plain and admits of but one meaning, the task of interpretation can hardly be said to arise . . ."

See *Maxwell on Interpretation of Statutes* 12 ed at p 28, quoted by Beadle CJ in *S v Takaendesa* 1972 (4) SA 72 (RA) at 75G; 1972 (1) RLR 325 (A) at 332E-F. H

2013 (1) ZLR p95

Hungwe J

A Section 3(1)(a)(ii) provides:

> "3. Corrupt Practices
>
> (1) If –
>
> (a) any agent corruptly solicits or accepts or obtains, or agrees to accept or attempts to obtain, from any person a gift or consideration for himself or B any other person, as an inducement or reward –
>
> (i) for doing or not doing, or for having done or not done, any act in relation to his principal's affairs or business; or
>
> (ii) for showing or not showing, or for having shown or not shown, favour or disfavor to any person or thing in relation to his principal's affairs or business:
>
> (b) to (f). . . C
>
> he shall be guilty of an offence."

Section 15(2)(a) then says:

> "If it is proved in any prosecution for an offence in terms of section *three* or *four* that –
>
> (a) any agent has solicited, accepted, obtained, agreed to accept, or attempted D to obtain any gift or consideration for himself or for any other person, it shall be presumed, unless the contrary is proved, that the agent did so in contravention of section *three*. . ."

Counsel's argument suggests that, for conviction to follow, the appellant ought to have done something which, objectively considered, showed E favour or disfavour to another, in this case to Sarah. I disagree. As would be seen from s 3(1) above, what constitutes the offence in terms of s 3(1)(a)(ii) is soliciting, accepting or agreeing to accept or attempting to obtain from any person, a

gift or consideration for himself or any other person as an inducement or reward, for showing or not showing or for having shown or not shown, favour or disfavour to any person in relation to his principal's F affairs or business. What is punished is what is set out in that section. In my respectful view the trial magistrate, having correctly found that the appellant solicited for money for "lunch", which money was subsequently paid by Sarah through Simon whom the appellant had sent, cannot be faulted for convicting the appellant. The proved facts show that the appellant was approached by Agnes and Sarah after the clerk of court indicated that the G matter may not be heard early. In the discussions that took place in his office he had made certain undertakings. He has also indicated to the two women that he will need money for "lunch". Subsequent to this he had sent Simon to collect a "parcel" from the ladies one of whom had a matter pending in his court. Simon was given ZW$500 000 which he passed on to the appellant. H In these circumstances I find no merit in the argument advanced on the

Hungwe J

appellant's behalf. I therefore dismiss the appeal against conviction. There A is no appeal against sentence. Nothing further needs be said. The following order is therefore made.

The appeal against conviction be and is hereby dismissed.

MAVANGIRA J concurred. B

Muchineripi & Associates, appellant's legal practitioners

Attorney-General's Office, respondent's legal practitioners C

1 The section was repealed when the Criminal Law Code [*Chapter 9:23*] came into effect, but was extant when the appellant was convicted. The corresponding provisions are now in s 170 of the Code. – *Editor*.

1 The section was repealed when the Criminal Law Code [*Chapter 9:23*] came into effect, but was extant when the appellant was convicted. The corresponding provisions are now in s 170 of the Code. – *Editor*.

© 2015 Juta and Company (Pty) Ltd.

Document 14 of 73

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2013/Volume 1/WASHMATE MOTORS CENTRE (PVT) LTD v CITY OF HARARE 2013 (1) ZLR 97 (H)

WASHMATE MOTORS CENTRE (PVT) LTD v CITY OF HARARE 2013 (1) ZLR 97 (H)

Citation	2013 (1) ZLR 97 (H)
Case No	HH-32-13
Court	High Court, Harare
Judge	Mathonsi J
Heard	22 January 2013; 29 January 2013; *CAV*
Judgment	6 February 2013

Counsel *T Chitapi,* for the applicant
C Kwaramba, for the respondent

Case Type Civil application

Annotations No case annotations to date

Flynote

Landlord and tenant – *lease – relocation – relocation a new lease – express relocation – terms of – whether terms of expired lease are part of new contract a matter of interpretation*

Headnote

D The respondent leased out a property to the applicant for the purpose of selling cars and any other purpose incidental to that purpose. Although the written lease agreement expired on 30 September 2012, the respondent allowed the applicant to remain in occupation and to sell cars and continued to E accept rentals, including the rental for the month of January 2013. A letter was written to the applicant on 1 October, allowing the applicant to remain on the property for a further three months, ending on 31 December 2012. The respondent also generated a list of approved car sales outlets in Harare as at 1 December 2012, showing that the applicant was such an approved car sales dealer. On 9 January 2013, the respondent served the F applicant with a notice requiring it, within 48 hours, to vacate the stand, remove all its property and demolish any structures built on the stand.

The applicant sought an interdict to prevent the respondent from summarily evicting it. The issue was whether the applicant had a *prima facie* right to the relief claimed, even though open to some doubt. The other requirements for the issue of an interim interdict were satisfied. The G applicant asserted that it was entitled to remain in occupation of the premises because, although the lease agreement terminated by effluxion of time on 30 September 2012, it was relocated after that by the conduct of the parties.

Held, that an agreement for a fixed period of time terminates by effluxion H of time at the end of the fixed period and no notice is necessary. In the

case of a lease agreement, if nothing is said by the parties and the tenant A continues to pay rent, then a tacit relocation may be presumed. A landlord who does not wish this to occur may protect himself by giving the tenant notice at any time before the end of the fixed period. The tenant is not entitled to demand reasonable notice because the only object of the notice is to reaffirm the duration of the lease and make it clear that the B landlord does not consent to the tenant's continued occupation.

Held, further, that a relocation after a lease has expired is a new contract which may be express or tacit. If the re-letting is express, the question which of the terms of the expired lease form part of the new contract is a question of interpretation. Where the relocation is tacit, there is a presumption that the property is re-let at the same rent and that those C provisions that are incident to the relation of landlord and tenant are renewed. But provisions that are collateral, independent of and not incident to that relationship are not presumed to be incorporated in the new letting. Here, the respondent expressly, in its letter of 1 October 2012, relocated the lease agreement to 31 December 2012. The respondent was D merely allowing the applicant to remain in occupation for purposes of winding up its business. In addition, the conduct of the applicant was also consistent with a party which was aware of the day of reckoning. Although the lease had expired on 30 September 2012, the applicant did not do anything visible to renew the lease, nor did it try to challenge a E notice given to all car sales operators by the respondent, which notice was published in the press in December 2012. The applicant was aware not only that the lease had terminated but that even the express relocation up to 31 December 2012 was not going to be considered for renewal at all. Accordingly the applicant was left with no right whatsoever to protect at law. F

Cases cited

Chibanda v Hewlett 1991 (2) ZLR 211 (H)

Doll House Refreshments (Pty) Ltd v O'Shea & Ors 1957 (1) SA 345 (T)

Graspeak Investments (Pvt) Ltd v Delta Corporation (Pvt) Ltd & Anor 2001 (2) ZLR 551 (H) G

N & R Agencies (Pvt) Ltd & Anor v Min of Lands & Ors HB-189-11

Shungu Eng (Pvt) Ltd v Sangondimando & Ors HH-99-12

Case information

T Chitapi, for the applicant

C Kwaramba, for the respondent H

Mathonsi J

Judgment

A **Mathonsi J:** The applicant has been leasing stand 729 of the Remainder of Greencroft in the District of Salisbury, otherwise known as 729 Lomagundi Road, Greencroft, Harare, from the respondent by virtue of a written lease agreement signed in October 2009. The said lease agreement terminated by expiration of time on 30 September 2012, but the applicant continued in occupation while paying rentals which were happily accepted by the B respondent.

The applicant has now approached this court on a certificate of urgency seeking the following relief:

> "Terms of Final Order Sought
>
> That you show cause to this Honourable Court why a final order should not be C made in the following terms:
>
> 1. That the Urban Council's (Model) (Use and Occupation of Land and Buildings) By Laws, 1979 RGN 109/79 be declared *ultra vires* s 18(1)(a) of the Constitution of Zimbabwe to the extent that they deprive an individual from (*sic*) protection of the law.
> 2. That the Urban Council's (Model) (Use and Occupation of Land and D Buildings) By Laws 1979 RGN 109/79 be declared invalid on the grounds of inconsistence with the general law prohibiting resort to self-help without resort to due process of the law, for being grossly unreasonable and for being vague.
> 3. That the respondent's notice Annexure "C" be set aside as being invalid for being inconsistent with the provisions of the Administrative Justice Act E [*Chapter 10:28*].
> 4. That the respondent shall not summarily evict the applicant without a valid court order issued by a competent court.
> 5. The respondent shall pay costs of suit.
>
> Interim Relief Granted
>
> Pending F the determination of this matter, the applicant is granted the following relief:
>
> 6. The respondent is interdicted from summarily evicting the applicant from stand 729 Lomagundi Road, Harare."

The respondent leased out the property to the applicant for the purpose of selling cars and any other purpose incidental to that purpose. Although the G written lease agreement expired on 30 September 2012, the respondent allowed the applicant to remain in occupation and selling cars and continued to accept rentals including the rental for the month of January 2013. The respondent also generated a list of approved car sales in Harare as at 1 December 2012 showing that the applicant was also such an approved car H sales dealer appearing on that list.

Mathonsi J

To the applicant's chagrin, on 9 January 2013, the respondent served it with A a notice which reads in relevant part as follows:

> "Notice in terms of clause 18(2) of the Urban Council (Model) (Use and Occupation of Land and Buildings) By Laws 1979 Statutory Instrument 109 of 1979: Vacate Municipal Land

TAKE NOTICE that you are using and/or occupying Council land illegally as B you do not have either a lease or the permission of the Council.

FURTHER TAKE NOTICE, that within 48 hours from service of this notice upon you, you must do the following:

(i) Depart from the land;

(ii) Remove all your property from the land;

(iii) Demolish any structures you may have erected on the land and remove all the rubble from the land. C

If you fail to comply with this notice steps will be taken by either Council or its appointed agent to summarily evict you and demolish any structures on the land and you will be liable to pay all the expenses incurred.

Yours faithfully

DIRECTOR OF URBAN PLANNING SERVICES" D

It has been argued on behalf of the applicant that a "tacit relocation" was created when the respondent allowed the applicant to remain in occupation of the premises after the expiration of the lease on 30 September 2012, especially as the respondent continues to accept rent payment. For that reason the applicant has a case for seeking an interdict *pendente lite* or an interim interdict against the respondent barring the latter from acting in terms of E the notice given on 9 January 2013 which prompted the applicant to bring this urgent application.

The respondent has opposed the application and in his opposing affidavit, Dr Tendayi Mahachi, the Town Clerk, states that when the lease agreement expired on 30 September 2012 it was not renewed. Although not aware that F rent payments were received, he assumed that the applicant paid these in bad faith in order to legitimise its stay at the premises. While acknowledging that the applicant was listed as one of the approved car dealers, Dr Mahachi asserts that it enjoyed such status because the respondent had given it until 31 December 2012 to wind up its operations.

Dr Mahachi produced a copy of a letter dated 1 October 2012 written to the G applicant by the respondent's city treasurer which reads thus:

"The Manager

Washmate Motor Centre

Stand No 729 STL

Lomagundi Road

Harare H

2013 (1) ZLR p101

Mathonsi J

A Dear Sir/Madam

Re:NOTICE OF TERMINATION OF LEASE AGREEMENT – STAND 729 GREENCROFT LOMAGUNDI ROAD

Please be advised that at its meeting on 2 August 2012, Council under item 59 of the Environmental Management Committee minutes dated 10tJuly 2012 expressed concern at the proliferation of car sales along road verges which B had created unsightly developments in addition to inconveniencing abutting property owners. As a result, Council resolved to evict, do away with all legal and illegal car sales.

Accordingly, you are hereby formally served with a three (3) months' notice that the Agreement of Lease subsisting with the City shall be terminated on 31 December 2012. You are therefore being accorded this opportunity to wind up C tour (*sic*) businesses and ensure that you vacate the stand by the closer (*sic*) of business on Monday 31 December 2012 (*sic)*, failing which you shall be evicted without further notice and at your own cost.

Also ensure that all your outstanding rentals are paid up as at the date of termination.

Yours faithfully

CITY TREASURER"

D The letter in question bears what appears to be two different signatures dated 1 October 2012. It does not show the name of the signatories which presumably signified receipt of the letter. Neither does it show where it was served, except that it bears the address of the premises leased to the applicant. Dr Mahachi states that the applicant occupied the premises until 30 September E 2012 by virtue of the written lease agreement. Its stay subsequent to that was validated by the City Treasurer's letter of 1 October 2012 which allowed the applicant to remain in occupation until 31 December 2012. Therefore, as the applicant remained in occupation after 31 December 2012 the

respondent issued a notice in terms of s 18(2) of SI 109 of 1979, which notice it was F entitled to issue because the applicant occupied the premises without the consent and/or authority of the respondent.

In order to succeed in an application for an interim interdict, the applicant must establish the following:

(1) a *prima facie* right to the relief claimed, even though open to some G doubt;

(2) a well-grounded apprehension of irreparable harm if the interim relief is not granted and the applicant ultimately succeeds in establishing that right;

(3) a balance of convenience in favour of granting the interim relief; and

(4) the H absence of any other satisfactory remedy.

2013 (1) ZLR p102

Mathonsi J

The papers before me show that the last three of the above cited requirements A for the grant of an interim interdict do exist. This is because the respondent has already given notice of its intention to summarily evict the applicant from the premises and demolish any structures on the land. Such action being imminent, there is a well-grounded apprehension of irreparable harm.

The dispute between the parties over the premises certainly does not give B rise to a "train smash" situation on the part of the respondent, regard being had to the fact that the applicant has operated a car sales business at the same place since 2009 by virtue of a valid lease agreement. Even after the expiry of that lease the respondent still allowed the applicant to conduct that business, albeit in a state of what the respondent called "winding up", for another three months until 31 December 2012. In my view, the balance of C convenience would seem to favour the applicant.

It would appear that there would be no other remedy available to the applicant short of the interim relief that is sought. Indeed Mr *Kwaramba*, for the respondent did not advance any argument against the satisfaction of the last three requirements for an interim interdict. D

It is, however, the requirement for a *prima facie* right which is strongly contested. Mr *Chitapi*, for the applicant, advanced a lot of arguments on that point but they all boil down to the applicant's assertion that it is entitled to remain in occupation of the premises because, although the lease agreement terminated by effluxion of time on 30 September 2012, it was E relocated after that by the conduct of the parties. In that regard, Mr *Chitapi* submitted that the respondent continued to accept rent from the applicant and even published a notice in the newspaper in December 2012 which notice listed all car sale garages which were operating legally in Harare, which conduct he claimed, shows tacit relocation of the lease. Mr *Chitapi* strongly argued that once the lease agreement had been relocated, all its provisions F remained in force, including the dispute resolution provision (clause 11), which provides that the parties shall make every effort to resolve disputes amicably by negotiation and, in the event that negotiation fails, the dispute must be referred to arbitration. He went on to say that it was incompetent for the respondent to revoke s 18 of the by-laws (SI 109 of 1979) on 9 January 2012 without reference to arbitration. In any event, the applicant is now G challenging the statutory instrument.

Regarding the notice of termination dated 1 October 2012, the applicant's case is that it was simply not served upon it and can therefore not be relied upon.

What I therefore have to decide is whether the applicant has a right, even if open to doubt, which it can seek to protect. If it does, then interim relief H

2013 (1) ZLR p103

Mathonsi J

A must be granted, but if the conclusion is that no such right exists, then the application must fail.

It is common cause that the relationship between the parties was governed by the written lease agreement which expired by effluxion of time on 30 September 2012. An agreement for a fixed period of time terminates by effluxion of time at the end of the fixed period and no notice is necessary. In B the event of a lease, if nothing is said by the parties and the tenant continues to pay rent then a tacit relocation may be presumed. According to R H Christie *Business Law in Zimbabwe* 2 ed (Juta & Co Ltd) at p 273:

> "The requirement that a lease be for a specified time calls for slightly fuller treatment. Commonly the time is specified as a fixed number of months or C years, or until a fixed date, but there is no reason why it should not be specified as continuing until the happening of a certain event. In all such cases the lease terminates at the end of the fixed period or on the happening of the event, without the necessity of notice by either party: *Tiopaizi v Bulawayo Municipality* 1923 AD 317 at 325, a case on a contract of employment decided according to principles equally applicable to contracts of lease. The same passage in de Villiers JA's judgment in *Tiopaizi*'s case points out that if, at the end of the fixed period, the D landlord permits the tenant to remain in occupation the lease will continue (but not in respect of an option to renew: *Chibanda v Hewlett* 1991 (2) ZLR 211) by what is known as tacit relocation until terminated by reasonable notice; *H & J Investments (Pvt) Ltd v Space Age Products (Pvt) Ltd* 1987 (1) ZLR 242. *A landlord who does not wish this to occur may protect himself by giving the tenant notice at any time before the end of the fixed period, the tenant not being* E *entitled to demand reasonable notice because the only object of the notice is to reaffirm the duration of the lease and make it clear that the landlord does not consent to the tenant's continued occupation*" (the emphasis is mine).

Cooper *South African Law of Landlord and Tenant* (1973 edition) defines a tacit relocation at p 319, a passage quoted with approval by Sandura JP (as he then was) in *Chibanda v Hewlett* 1991 (2) ZLR 211 (H) at 216C, as follows:

> F "A tacit relocation is an implied agreement to relet and is concluded by the lessor permitting the lessee to remain in occupation after the termination of the lease and accepting rent from the lessee for the use and enjoyment of the property."

In the present case I must decide whether there was tacit or express relocation. This is because, while Mr *Kwaramba* for the respondent bases the respondent's case on a letter dated 1 October 2012 addressed to the applicant in which G the lease is extended to 31 December 2012 which would mean an express relocation, Mr *Chitapi* for the applicant denies the existence of such letter or that it was served properly upon the applicant. I have stated that the letter was addressed to the business premises of the applicant and not the *domicilium citandi et executandi* given in the expired lease agreement, which H the applicant contends was not proper service in terms of the agreement. The

---

applicant further argues that the letter was not served at all. I have already A said that a copy of the letter is appended with two signatures and a date of receipt which is 1 October 2012.

If the letter of 1 October 2012 was served on the applicant and the applicant did not contest its contents, then its silence would mean acquiescence and the terms of the letter would be applicable. The letter makes it clear that the lease B agreement would not be renewed and that the applicant had until 31 December 2012 to wind up its operations. The letter was signed for, presumably at the applicant's business, a clear indication that it was received, just a day after the lease agreement expired. The applicant did not do anything to challenge its contents. Instead it continued paying rent as required by that letter. To then say that the letter was not received is, in my view, self-serving, under C circumstances suggesting otherwise. I am satisfied that, on a balance of probabilities, the respondent has proved that the letter of 10 October 2012 was served on the applicant.

The issue of whether or not this was proper service is in my view not important, bearing in mind that the lease agreement containing the address for service D in Emerald Hill ,Harare, had expired. The point is made by Ramsbottom J in *Doll House Refreshments (Pty) Ltd v O'Shea & Ors* 1957 (1) SA 345 (T) 348F-H, which is quoted with approval in *Chibanda supra* at 216 F-H that:

> "It is, I think, clear that a relocation after a lease has expired is a new contract which may be express or tacit. If the reletting is express the question which of the terms of the expired lease form part of the new contract is a question of E interpretation as is explained in *Webb v Hipkin* 1944 AD 95. Where the relocation is tacit, there is a presumption that the property is relet at the same rent and that those provisions that are 'incident to the relation of landlord and tenant' are renewed. But provisions that are collateral, independent of and not incident to that relation are not presumed to be incorporated in the new letting."

I make a finding that the respondent expressly relocated the lease agreement F by its letter of 1 October 2012 to 31 December 2012 which letter was drawn to the attention of the applicant by service upon an individual (or is it individuals?) who signed for it on the same date. To say that the respondent intended to import into the "new contract" the provision in the expired lease relating to service of correspondence at 70 Broadlands Road Emerald Hill, G Harare would be stretching the imagination to elasticity limit.

The respondent was merely allowing the applicant to remain in occupation for purposes of winding up its business. It clearly would not have intended to be saddled with difficult and harsh provisions relating to service of the notice at an address other than the premises re-let to the applicant. I am fortified in that view by the pronouncement of Sandura JP in *Chibanda* H

2013 (1) ZLR p105

Mathonsi J

A *supra* at 218A-B in relation to a tacit relocation that a lessor should not be taken to have agreed to the importation of a term that is too onerous unless he has done so in express terms. *In casu*, the respondent relocated the lease expressly and did not expressly import the *domicilum citandi et executandi* which was given in the expired lease into the relocation. I therefore come to the inescapable conclusion that the respondent was not required to deliver B the notice at an address other than the premises re-let. In that regard, the applicant was aware of the terms of the relocation and in particular of the fact that it had until 31 December 2012 to vacate.

The conduct of the applicant is also consistent with a party which was aware of the day of reckoning. Although the lease had expired on 30 September C 2012, it did not do anything visible to try and renew the lease. Although the applicant was aware of the notice given to all car sales operators by the respondent, which notice was published in the newspaper in December 2012, it did nothing to challenge that notice until it was served with a notice in terms of the regulations which the respondent invoked. I say the applicant was aware of the published notice because it specifically says so in para 6 D of its founding affidavit, which reads:

> "In or about October and November 2012 the respondent started demolitions of car sale garages which it deemed illegal. It is common knowledge that the respondent published a notice in the newspaper in December 2012 in which it publicized the names of car sale garages which were legally in operation . . ."

E What the applicant omits is to mention is that the notice in question, as published in the newspaper, had the following preamble:

> "Pursuant to the on-going crackdown on illegal car sales, illegal billboards, vending and other illegal activities, below is a list of registered car sales/parking garages operating in the City.
>
> Their operations were approved by the City Council and validated via the issuance F of leases. *Operators are advised to cease operations when their leases expire. Operators not on this list must cease immediately*.
>
> Failure to comply with this notice will result in UNRELENTING ENFORCEMENT ACTION being taken against defaulters."

Rocket science is not required to deduce that the applicant, which is one of those operators listed on the notice, was aware that the lease had not only G terminated but that even the express relocation up to 31 December 2012 was not going to be considered for renewal at all. Accordingly the applicant was left with no right whatsoever to protect at law.

That brings me to the issue of the applicant's signal failure in this application to disclose material facts which it was aware of. I have already found that the H letter of 1 October 2012 relocating the lease agreement for a fixed period up

---

2013 (1) ZLR p106

Mathonsi J

to the end of year 2012 was indeed served on the applicant. It was therefore A imperative for the applicant to disclose the existence of that letter in its founding affidavit. It did not. By its own admission, the applicant did have sight of the newspaper publication that I have cited above which means that it was aware that the respondent had specifically directed that the applicant should cease operations on 31 December 2012. This was a very material B fact which the applicant was obliged to disclose in its application. It again did not. Instead, the applicant elected to attach a document omitting the preamble damning in its effect on the applicant's case.

Indeed, true to its outlook, when the applicant was served with a notice in terms of the by-laws on 9 January 2013, which notice advised of its imminent summary eviction, the applicant proceeded the following day on C 10 January 2013 to pay the rent for January 2013. In doing so, the applicant was clearly not acting in good faith because it was aware of the position of the respondent. It cannot therefore be allowed to rely on the payment of the January 2013 rent to build a case which it does not have.

This court has repeatedly stated that the utmost good faith must be shown by litigants making applications of this nature in placing all material facts before D the court so that the court can make an informed decision: *N & R Agencies (Pvt) Ltd & Anor v Ndlovu & Anor* HH-198-11, *Shungu Engineering (Pvt) Ltd v Songondimando & Ors* HH-99-12 and *Graspeak Investments (Pvt) Ltd v Delta Corporation (Pvt) Ltd & Anor* 2001 (2) ZLR 551 (H) at 554D.

I conclude that the applicant has not shown to my satisfaction that it has a E *prima facie* right which it can protect through the medium of a temporary interdict. While the applicant is at liberty to contest the propriety of SI 109 of 1979 that does not translate to a *prima facie* right which entitles the applicant to interim relief of an interdict.

Accordingly the application is dismissed with costs. F

T H Chitapi & Associates, applicant's legal practitioners

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

© 2015 Juta and Company (Pty) Ltd.

Document 15 of 73

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2013/Volume 1/IN RE MOYO 2013 (1) ZLR 107 (H)

IN RE MOYO 2013 (1) ZLR 107 (H)

Citation	2013 (1) ZLR 107 (H)
Case No	Judgment No. HB-16-13
Court	High Court, Bulawayo
Judge	Cheda J
Heard	25 January 2013; *CAV*
Judgment	7 February 2013
Counsel	Details not supplied
Case Type	Application for guardianship
Annotations	No case annotations to date

Flynote

Family law – *child – guardianship – application for award of guardianship to relative of orphaned minors – application to remove child to another country – what court must consider*

Headnote

D An applicant who seeks to be awarded guardianship of a minor child and for approval to remove the child to another country must not only prove his or her relationship with the minor and some consent from other relatives, but must submit, among other requirements, depending on the circumstances: (1) sufficient proof of his or her right of stay in the foreign country; (2) proof of

financial support or regular income; E (3) proof of suitable accommodation; and (4) in the case of a child of school-going age, proof of adequate arrangements for the child. The list is not exhaustive. In all this, the court will always bear in mind the need for the safety and comfort of the children in the host country

Cases referred to F

Au v Au [1979] Fam Law 116 (CA)

Chamberlain v de la Mare [1983] 4 FLR 434 (CA)

Re *J (an infant)* 1981 (2) SA 330 (Z)

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

G *Thain v Taylor* [1926] Ch 676 (CA)

Judgment

Cheda J: On 16 October 2012 the applicant applied for guardianship of two minor children at the children's court, Bulawayo. The application was granted on 14 November 2012 by that court. It was then forwarded to me H for confirmation of the proceedings in terms of the usual procedure.

2013 (1) ZLR p108

Cheda J

The background and genesis of this application is that the applicant is a state A registered nurse residing in the United Kingdom and employed as such. The minor children are her deceased's sister and brother-in-law respectively. Upon the death of their parents, these minor children were being looked after by their maternal grandmother, who is a retired nurse here in Zimbabwe.

The applicant now applies for their guardianship on the basis that she is a nurse B in the United Kingdom and that she has been financially supporting them.

It is trite law that the High Court is an undisputed upper guardian of all minors in Zimbabwe. For that reason, the law empowers this court or a judge thereof to carefully consider all factors where a minor child's or children's custody or guardianship is an issue. The court should be slow in acceding to C applications to remove children from its jurisdiction. On that score, it should, in my view, do so only when it is in the interest of the said children that they be removed to a new environment: *Chamberlain v de La Mare* [1983] 4 FLR 434 (CA); *Au v Au* [1979] Fam Law 116 (CA) and In re *Maposa* 2007 (2) ZLR 333 (H). In that regard, any person who desires to assume guardianship should be of both financial and social good standing, to the extent of being D unimpeachable: *Thain v Taylor* [1926] Ch 676 (CA) at 864.

An applicant who seeks to be awarded guardianship of a minor child must not only prove her relationship with the minor and some consent from other relatives, but must submit, among other requirements, depending on the circumstances: E

(1) sufficient proof of her right of stay in the foreign country;

(2) proof of financial support or regular income;

(3) proof of suitable accommodation; and

(4) in case of a child of school-going age, proof of adequate arrangements for the child. F

The list is not exhaustive. In all this, the court will always bear in mind the need for the safety and comfort of the children in the host country: see Re *J (an Infant)* 1981 (2) SA 330 (Z). The fact that the adoptive parent is in the diaspora is not enough legal reason to shepherd a minor child or children to a foreign land. In my view, if our courts fail to be stringent in their determination G of such applications they may easily find themselves unconsciously assisting or abetting child trafficking.

The court *a quo* granted its order without sight of proof of applicant's socio-economic standing. There is a possibility of an error in its conclusion.

For the above reason the following order is made: H

2013 (1) ZLR p109

Cheda J

A **Order**

(1) The order granted by the children's court at Bulawayo on 14 November 2012 be and is hereby set aside; and

(2) The matter is referred back for a further inquiry in line with the principles laid down in this judgment.

B Kamocha J agrees.

Webb, Low and Barry, applicant's legal practitioners

© 2015 Juta and Company (Pty) Ltd.

Document 16 of 73

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2013/Volume 1/NDLOVU v NDLOVU & ANOR 2013 (1) ZLR 110 (H)

NDLOVU v NDLOVU & ANOR 2013 (1) ZLR 110 (H)

Citation	2013 (1) ZLR 110 (H)
Case No	Judgment No HB-18-13
Court	High Court, Bulawayo
Judge	Ndou J
Heard	14 June 2012; 15 June 2012; *CAV*
Judgment	7 February 2013
Counsel	*N Ndlovu,* for the plaintiff *S Mlaudzi,* for the first defendant
Case Type	Civil application
Annotations	No case annotations to date

Flynote

Prescription – *extinctive – debt – what is – declaratory order – not a debt and not liable to prescription*

Headnote

The applicant sought a declaratory order to the effect that the purported sale of his house to the first defendant was unlawful and void and for D an order restoring possession of the house to him. The application was made well over three years after the first defendant had taken possession of the house. The only issue was whether the claim had prescribed in terms of the Prescription Act [*Chapter 8:11*].

Held, that it is only a "debt", as defined in the Act, that can prescribe. A claim arising from a "debt" must be "by reason of obligation" on the part of the E debtor arising from statute, contract, delict or otherwise. A declaratory order is a remedy to secure the public interest of certainty or correct legal position. Such a remedy cannot prescribe. The applicant's claim is based on the alleged

nullity of a sale transaction and did not arise from a "debt" as defined in the Act. Accordingly, prescription did not apply. F

Cases cited

MacFoy v United Africa Co Ltd [1961] 3 All ER 1169 (PC)

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

Oertel & Ors NNO v Director of Local Govt & Ors 1981 (2) SA 77 (T)

Legislation considered G

Prescription Act [*Chapter 8:11*], s 2 (definition of "debt")

Case information

N Ndlovu, for the plaintiff

S Mlaudzi, for the first defendant H

Ndou J

Judgment

A **Ndou J:** The plaintiff's claims against the defendants are for:

1. An order declaring the sale of house no. 3750 Magwegwe North, Bulawayo to the first defendant by Nkululeko Ndlovu unlawful, null and void.
2. An order that the plaintiff is the rightful and legal owner of stand no. B 3750 Magwegwe North, Bulawayo.
3. An order directing the first defendant to transfer stand no. 3750 Magwegwe North, Bulawayo into the plaintiff's name at the second defendant's offices within 5 days of this order, failure of which the Deputy Sheriff be directed to sign transfer papers in the stead of the first defendant
4. An C order directing the first defendant and those claiming through him to vacate house no. 3750 Magwegwe North, Bulawayo, within five days of this order, failure to which the Deputy Sheriff be directed to evict the first defendant and all those claiming through him.
5. Alternatively, the first defendant be ordered to pay the plaintiff a sum of R150 000, being the current market value of the house, on grounds D of unjust enrichment within 10 days of this order.
6. The first defendant to bear costs of suit at an attorney-client scale.

The salient facts of the matter are as follows. The plaintiff purchased the property in question from the second defendant in 1978. The plaintiff lived in the house from 1978 to 1999, when he retired and went to live at his rural E home in Zhombe. He left his son Nkululeko Ndlovu ("Nkululeko") living on the property. It is the plaintiff's case that Nkululeko sold the house to the first defendant without his knowledge and consent. It is alleged that he used a fake general power of attorney to achieve this fraudulent sale of the property. As a result of this fraudulent sale, the plaintiff caused the arrest of F his son, who was charged with theft by false pretences. Nkululeko died in prison before the criminal trial took place. The first defendant has refused to vacate the house or transfer it back to the plaintiff or pay current market value of the house. That resulted in this action against the first defendant.

The first defendant has raised a special plea that the plaintiff's claim has prescribed. The parties have made submissions on the question of prescription G and want me to determine this issue first. This judgment is confined to the issue of prescription. It is beyond dispute that the plaintiff became aware of the sale to the first defendant by Nkululeko as far back as 2002. In February 2005 he made valliant attempts to reverse the sale, using extra-judicial methods. He only approached this court on 11 November 2009 when he instituted H this action. The legal proceedings were instituted well after three years. The

---

Ndou J

issue is whether the claim has prescribed in terms of the Prescription Act A [*Chapter 8:11*] (the "Act). It is clear from the pleadings that the plaintiff's claim is for a declaratory order premised on the fact that the general power of attorney used in selling his house was forged and therefore a nullity. In s 2 of the Act a debt is defined as follows:

> "In this Act –
>
> "debt", without limiting the meaning of the term, includes anything which may B be sued for or claimed by reason of an obligation arising from statute, contract, delict or otherwise".

The point worth noting in this definition of "debt" is that the suit or claim must be "by reason of obligation" on the part of the debtor arising from one of the stated bases. In my view, a declaratory order is a remedy to secure the C public interest of certainty or correct legal position. Such a remedy cannot prescribe – *Oertel & Ors NNO v Director of Local Govt* 1981 (2) SA 477 (T) at 492. In that case the court held:

> "Public rights are excluded from the operation of the Prescription Act . . . and 'debt' in the Act must be necessarily restricted to such claims as have arisen in the field of private law. Whilst every debt encompasses an obligation not every D obligation constitutes a debt for the purposes of the Prescription Act."

Further the claim is based on the fact that sale is null and void *ab initio*. As stated by Lord Denning in *MacFoy v United Africa Co Ltd* [1961] 3 All ER 1169 (PC) at 1172:

> "If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. E There is no need for an order of the court to set it aside. It is automatically null and void without much ado, though it is convenient to have the court declare it to be so . . . you cannot put something on nothing and expect it to stay there. It will collapse . . ."

In *Ngani v Mbanje & Anor* 1987 (2) ZLR 111 (S) at 115E-F it is stated:

> "this claim is based on the alleged nullity of a sale transaction and does not arise F from a 'debt' as defined in the Act."

Accordingly, the first defendant's special plea of prescription is dismissed with costs.

Cheda & Partners, plaintiff's legal practitioners G

Samp Mlaudzi & Partners, first defendant's legal practitioners

---

© 2015 Juta and Company (Pty) Ltd.

Document 17 of 73

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2013/Volume 1/PETA v BUWU & ANOR 2013 (1) ZLR 113 (H)

PETA v BUWU & ANOR 2013 (1) ZLR 113 (H)

Citation	2013 (1) ZLR 113 (H)
Case No	HH-29-13
Court	High Court, Harare
Judge	Chitakunye J
Heard	7 February 2013
Judgment	7 February 2013
Counsel	*C McGown*, for the applicant *C Nyika*, for the first and second respondents

Case Type Civil application

Annotations No case annotations to date

Flynote

C **Company** – *winding up – grounds for – "just and equitable" – company formed by husband and wife in order to buy a property – breakdown of marriage occurring and husband retaining sole control of company and property – winding up ordered*

Headnote

D The applicant and the first respondent were married. They formed a company, the second respondent. Each spouse had a 50 per cent share in the company. An immovable property was acquired and registered in the company's name. This immovable property was the company's only asset. After several years the marital relationship began experiencing problems, which E culminated in the applicant (the wife) moving out of the house. Later, the first respondent moved out as well, leaving tenants in occupation. The applicant brought proceedings for the winding up of the company, alleging various breaches of the Companies Act [*Chapter 24:03*], as well as averring that the relationship between the two shareholders was now untenable. The first respondent stated, *inter alia*, that the breakdown in F the relationship between him and the applicant could not be a basis for winding up the company, which was a separate legal entity.

Held, that in terms of s 206(g) of the Act, a company may be wound up if the court is of the opinion that it is just and equitable that the company should be wound up. Where an association is formed on the basis of a personal relationship which involves mutual confidence (such as exists G when a pre-existing partnership is converted into a limited liability company), the company can properly be wound up on the "just and equitable" principle when the personal relationship of confidence and trust which must prevail between partners is eroded and the members cease to act towards one another honestly and reasonably and with H friendly co-operation in managing the affairs of the company. Those

members who are not responsible for the destruction of that relationship A will be entitled to claim that it is just and equitable for the company to be wound up. The only way to protect the applicant's interests and ensure that she benefitted from her investment would be to order that the company be wound up.

Cases cited B

Ebrahimi v Westbourne Galleries [1972] 2 All ER 492 (HL)

Sultan v Freyfern Entrprs (Pvt) Ltd & Anor 2000 (1) ZLR 188 (H)

Legislation considered

Companies Act [*Chapter 24:03*], ss 206(c) & (g), 207(1) proviso (1) C (a), 208(2) & 221

Case information

C McGown, for the applicant

C Nyika, for the first and second respondents

Judgment

Chitakunye J: The applicant and first respondent lived together in a D marital union. During the blissful days of their union they formed a company namely Cristed (Pvt) Ltd (the second respondent) in which each one had a 50 percent share. An immovable property was acquired and registered in the second respondent's name. This immovable property is the only asset of the

company. After several years of cohabitation, the marital relationship E began experiencing problems which culminated in the applicant moving out of the house. Later the first respondent moved out as well, leaving the second respondent's tenants in occupation. The relationship between the applicant and the first respondent broke down to an extent that they were no longer on talking terms.

On 4 February 2010, the applicant filed this application for the winding up F of the second respondent. She alleged that since its inception the company had never traded and in terms of s 206(c) of the Companies Act [*Chapter 24:03*] the company should be wound up. The company has never complied with the Companies Act requirements, such as filing annual returns. Apart from the issue of not complying with the Companies Act, the relationship G between the two shareholders is now untenable.

The respondents opposed the application. The respondents raised points *in limine* in which they contended that;

i. This application, purportedly in terms of s 206 of the Companies Act, is defective for non compliance with s 79 of the Deeds Registry Act [*Chapter 20:05*], that is the applicant should have cited the Registrar of H

Chitakunye J

A Deeds, because ultimately the immovable asset owned by the second respondent will have to be sold;

ii. The application is not in compliance with r 250 of the High Court Rules, 1971

iii. The applicant is not competent to bring this application as in terms of s B 207 of the Companies Act; she can only do so if there are less than two members remaining.

iv. The applicant has predicated her application on s 206(c) of the Act, which provides for the winding up of a company which has not traded within a year from inception. In this case, the main purpose of forming the company was to own the house and this was achieved. It cannot C therefore be said the company has not traded.

v. The applicant does not base her claim on s 206 (g) and she could not do so because the applicant had other remedies she could resort to besides winding up of the company.

The respondents contended that the breakdown in the relationship between D the applicant and the first respondent cannot be a basis for winding up the second respondent. The second respondent is a separate legal entity.

Upon perusal of the papers filed of record and listening to counsel there are a number of factors that are common cause. These include that the parties were in a love relationship and cohabiting and that that relationship led to E the parties forming a company, the second respondent.

The objects of the second respondent are as articulated in the Memorandum and Articles of Association and these included acquisition and owning an immovable property, namely House no. 656 Glenwood Drive, Glen Lorne, Harare, in which the parties lived together for a number of years. Each of F the parties owns 50 percent of the shares in the second respondent.

When the love relationship went sour the applicant left the immovable property. The first respondent later left the property and rented it out. The rental proceeds have not been shared or used in a way that is beneficial to the applicant.

It appeared not disputed that the first respondent has virtually elbowed the G applicant out of the company. The applicant is no longer involved in the management and administration of the second respondent. In the year 2009 the applicant obtained an order from the magistrates court which, *inter alia*, ordered the first respondent to pay an amount of USD 300 per month to the applicant from rental proceeds. The first respondent has not complied with H that court order despite not having appealed against it; at least no evidence

---

Chitakunye J

of any form of challenge to that order was tendered justifying the non A -compliance with the court order.

It is also common cause that though there are still two share holders with equal shares, the first respondent has been the sole shareholder running the company, to the exclusion of the applicant, since the breakdown of their love relationship. This exclusion has been forced on the applicant by the B first respondent.

A careful analysis of the circumstances of this case discredits the respondents' points *in limine.* The first point *in limine* was that the applicant should have cited the Registrar of Deeds because the order sought involves the sale of an immovable property which will necessitate entries in the Deeds Office. C A careful reading of the applicant's papers shows that this application is for winding up of the second respondent and for the appointment of a liquidator. The powers of the liquidator as stated in s 221 of the Companies Act are wide. It is for the liquidator to decide whether any property should be sold or not.

The contention that the applicant is not competent to make this application D because there are still two members in the company is misguided. The papers filed of record and submissions made shows that of the two shareholders, one has been effectively booted out and so the company is now run and operated by one shareholder. In effect, only one member remains. This, in my view, fits with the requirement of proviso (i)(a) to s 207(1)(i)(a) of the Act.

The respondents' contention, that the applicant restricted herself to s 206(c) E of the Companies Act and that since the company was formed to own a property which it owns this ground is unsustainable, is rather shortsighted. Whilst indeed the applicant cited s 206(c), she did not end there. She went on to cite the breakdown in the relationship between the shareholders and directors to an extent that only one shareholder is in effect remaining. She F complained about the way she was kicked out of the company; those facts clearly fit into s 206(g). This the respondents seemed to recognize when in their opposing affidavit they said s 206(g) would not succeed because there are other remedies in terms of s 208(2) which provides that:

> "Where the petition is presented by members of the company as contributories G on the ground that it is just and equitable that the company should be wound up, the court, if it is of the opinion –
>
> (a) that the petitioners are entitled to relief either by winding up the company or by some other means; or
>
> (b) that in the absence of any other remedy it would be just and equitable that the company should be wound up; H

Chitakunye J

> A shall make a winding-up order, unless it is also of the opinion both that some other remedy is available to the petitioners and that they are acting unreasonably in seeking to have the company wound up instead of pursuing that other remedy."

Section 206 of the Companies Act states:

> "A company may be wound up by the court –
>
> (a) . . .
>
> (b) . . . B
>
> (c) if the company does not commence its business within a year from its incorporation or suspends its business for a whole year;
>
> (d) - (f)
>
> (g) if the court is of opinion that it is just and equitable that the company should C be wound up."

Whilst there was some contest as to whether s 206(c) is applicable, bearing in mind that the company owns a house, there was no disagreement that s 206(g) may be applicable. The disagreement on this subsection is whether or not there is an alternative remedy in terms of s 208. The circumstances of the case are such that there is no dispute that the company was formed by D the applicant and the second respondent at a time when they were lovers and living together. They are the two shareholders and directors of the company. The facts that are common cause show that that personal relationship is no longer there. The applicant has been kicked out of the company and the first respondent is operating the company alone without involving the applicant. E The applicant has been left in the dark about the goings on in the company. The parties are virtually not communicating.

The circumstances fit that scenario envisaged in s 206(g) of the Act. In *Ebrahimi v Westbourne Galleries* [1972] 2 All ER 492 (HL) the basic factors of the just and equitable principle were set out

as:

1. The F fact that an association which is formed or is continued on the basis of a personal relationship which involves mutual confidence such as exists when a pre-existing partnership is converted into a limited liability company can properly be wound up on the just and equitable principle.
2. If it is agreed expressly, or if it can be implied, that all the members or shareholders shall participate in the management of the business, the G exclusion of one or more of the shareholders from the conduct of the business of the company will offend the just and equitable principle.
3. The principle may also be properly invoked in those cases where there are restrictions on the transfer of the member's interests in the company such that when confidence is lost or a member is removed from management, H he cannot take out his stake and go elsewhere."

2013 (1) ZLR p118

Chitakunye J

Where an applicant establishes a *prima facie* case that the above factors A exist, the court may grant an application for winding up of the company so affected. In *Sultan v Freyfern Enterprises (Pvt) Ltd & Anor* 2000 (1) ZLR 188 (H) at 193A-C, Chatikobo J, commenting on the above guidelines, stated:

> "What emerges from these guidelines is that if there is justifiable lack of confidence in the conduct and management of the company's affairs which stems from the B conduct of the directors with regard to the company's business or if there exists a deadlock between members of the company, then a company can be wound up on the 'just and equitable' principle. The 'deadlock' principle is founded on the analogy of a partnership and is confined to small, domestic companies. If, in such a small domestic company, the personal relationship of confidence and trust similar to that which must prevail between partners is eroded and the members cease to act towards one another honestly and reasonably and with friendly co C - operation in managing the affairs of the company, then those members who are not responsible for the destruction of that relationship will be entitled to claim that it is just and equitable for the company to be wound up on that ground."

In casu there is no doubt that confidence and trust has been lost as between the parties. The first respondent has effectively barred the applicant from participating in the affairs of the company as shareholder and as director. D Despite a court order requiring him to pay some proceeds from the company's activities to the applicant, the first respondent has defiantly refused to do so. Clearly the applicant can no longer enjoy her interests in the company. The only way to protect the applicant's interests and ensure she benefits from her investment is to order that the company be wound up. E

The respondents' contention that the applicant has other remedies is without merit. As aptly noted by Chatikobo J in the *Sultan* case, at 193E-F, the alternative remedy envisaged under s 208(2) of the Act must be realistic and sufficient. The learnt judge stated thus:

> "I perceive this to mean that there should, in the particular case, be a realistic, sufficient and reasonable remedy, other than a winding up order, by which the F applicant's interests in the business can be protected. Where such a remedy exists and it can be resorted to with minimal expense and bickering, it would be unreasonable for the applicant to insist that the company be wound up. If, however, the alternative remedy is one which involves protracted negotiations whose outcome is uncertain at the time the proceedings are determined, the court should be reluctant to decline to wind up the company. The alternative remedy, G to be a realistic option, must be available to the applicant when he launches the proceedings and, I venture to suggest, it should be one which is capable of restoring the lost confidence between the 'partners'."

I am of the view the alternative remedies alluded to by the respondents are not capable of restoring confidence, let alone assuring the applicant of the safety of her interests in the business. As already alluded to above, the applicant H

2013 (1) ZLR p119

Chitakunye J

A obtained a court order in a bid to secure some of the interests in the company, but the first respondent has not honoured that. The first respondent has not shown that he will respect any remedy that would protect the applicant's interests in the company.

I am of the view that the winding-up of the company is the only remedy B available to applicant. The application for the appointment of a liquidator should therefore be granted.

The last clause in the applicant's draft is a prayer to be paid 50 percent of the rentals received by the second respondent as an equal share of the proceeds. This appears to be a recitation of the order she claimed to have been granted C at the magistrates court. If the order has not been complied with there are ways to enforce it rather than through this application. In any case, the parties did not address their minds to this relief.

In her answering affidavit and heads of argument the applicant asked to be awarded costs on a higher scale. In her founding affidavit she had not asked for costs at this stage. It would appear it is the respondents' attitude D in opposing the application that spurred the applicant to now seek an award of costs. Whilst it is true that the application would not have been costly had the respondents not opposed the application, the question is whether such opposition can be said to have been without just cause.

I am of the view that the circumstances of the case do not justify an award E of costs against the respondents at this stage.

Accordingly it is hereby ordered that:

1. The second respondent, Cristed (Pvt) Ltd, be and is hereby provisionally wound up pending the grant of a final order for the winding up of the company or the discharge of this order.
2. Subject F to subs (1) of s 274 of the Companies Act [*Chapter 24:03*], Wilbert Nyamupfukudza be and is hereby appointed as provisional liquidator of the second respondent with the powers set out in s 221(2) (a) to (g) of the Companies Act [*Chapter 24:03*].
3. The G respondent company and any other interested party may appear before this court sitting at Harare on. . .. .day of. . .. . 2013, to show cause why a final order should not be made placing the second respondent in liquidation and ordering that the costs of these H proceedings shall be costs of liquidation.[1]

Chitakunye J

4. A copy of this order shall be served on the second respondent and Edward A Buwu, presently of 656 Glenwood Drive, Glen Lorne, Harare, who is one of the two directors and shareholders of the second respondent
5. This order shall be published once in the *Government Gazette* and once in a daily newspaper circulating in Harare.
6. Any person intending to oppose the application on the return day of this B order shall:
   - 6.1 give due notice to the applicant's legal practitioners, Venturas & Samukange of 2nd Floor, Tanganyika House, Corner Third Street and Kwame Nkrumah Avenue, Harare.
   - 6.2 serve on the applicant and on the respondents a copy of any affidavit C which he files with the Registrar of the High Court.

Venturas & Samukange, applicant's legal practitioners

Chikumbirike & Associates, respondents' legal practitioners D

1 The date is not given in the judgment received by the editors.

1 The date is not given in the judgment received by the editors.

© 2015 Juta and Company (Pty) Ltd.

Document 18 of 73

Source:

S v M (A JUVENILE) 2013 (1) ZLR 121 (H)

Citation	2013 (1) ZLR 121 (H)
Case No	Judgment No. HB-19-13
Court	High Court, Bulawayo
Judge	Ndou J and Cheda AJ
Heard	22 October 2012; *CAV*
Judgment	7 February 2013
Counsel	*K Ngwenya,* for the appellant Miss *S Ndhlovu,* for the respondent
Case Type	Criminal appeal
Annotations	No case annotations to date

Flynote

Criminal procedure (sentence) – *general principles – juvenile offenders – probation offer's report and recommendations – should not be disregarded without good reason – such disregard a misdirection – involvement of accused's family in rehabilitation – need for court to court to consider* D *such involvement and offers of assistance*

Criminal procedure (sentence) – *general principle – sexual offences – juvenile offenders – sexual passions more easily aroused – court may take judicial notice of the fact*

Headnote

E The appellant, a juvenile, had been convicted of two counts of rape of girls aged six and four years, respectively. A probation officer had placed before the court *a quo* a detailed report on the appellant's family relationships, education, background, personality, traits, circumstances surrounding the commission of the offence, attitude towards the offence, F the victim, motivational analysis, prognosis, treatment plan and had made recommendations on how best to deal with appellant. The probation officer had recommended that the charges be withdrawn before plea and that the appellant be placed under supervision of a probation officer. The appellant's uncle undertook to take over the guardianship and upkeep of the appellant, having learnt of the appellant's predicament. He further G undertook to, at his own expense, secure a professional psychologist or counsellor to ensure the reformation and rehabilitation of the appellant. The magistrate disregarded the recommendations of the probation officer and the efforts by the appellant's uncle to assist with his reformation and rehabilitation. Instead, the trial magistrate sentenced him to be placed at H a state reformatory in Harare for a period of three years. The appellant

was then lodged in a conventional prison in which he mixed with adult A convicts pending transfer to Harare.

Held, that it was a misdirection to disregard the probation officer's report regarding the management of the appellant without good and sufficient reasons for doing so. Again, for no good reason, the court *a quo* spurned the uncle's efforts. The courts have emphasized the importance of not only B the probation officer's opinion in formulating a scheme of management for a juvenile offender, but also the involvement of the juvenile's family and education authorities in efforts to

rehabilitate the offender. The sentence would be replaced with one of corporal punishment and the appellant would be placed under supervision of a probation officer.

Held, further, that it is a matter notorious enough for judicial notice to be C taken of it, that at no time in life, other than in youth, are sexual passions more easily aroused. At the same time, callow youth lack insight and experience and therefore more readily act in a foolish manner than a mature person (*dicta per* Korsah JA in *S v Five* 1988 (2) ZLR 168 (S) at 171 followed). D

Cases cited

S v Five 1988 (2) ZLR 168 (S)

S v Gwarada 1981 ZLR 17 (A)

S v Julius GS-269-80

S v Tendai & Anor 1998 (2) ZLR 423 (H) E

Case information

K Ngwenya, for the appellant

Miss *S Ndhlovu,* for the respondent

Judgment

Ndou J: This is an appeal against sentence only. The appellant attends a F conventional boarding school, Cyrene High School, where he is doing form three. The appellant was convicted and sentenced by a Bulawayo regional magistrate of two counts of rape. The sexual assaults were perpetrated on two female minors aged four years and six years respectively. The offences were committed at the same place, one after the other and therefore close G in space and time. At the time when the appellant committed the offence he was on school holidays and residing at a relative's place. A probation officer had placed before the court *a quo* a detailed report on the appellant's family relationships, education, background, personality, traits, circumstances surrounding the commission of the offence, attitude towards the offence, the victim, motivational analysis, prognosis, treatment plan and had made H

A recommendations on how best to deal with appellant. The probation officer had observed and concluded that:

(a) the appellant lacked proper guidance;

(b) the appellant was of broken parentage;

(c) the family set up was dysfunctional;

(d) the B appellant was deserving more of sympathy than condemnation;

(e) the commission of the offences was "spontaneous and serious";

(f) the appellant was remorseful;

(g) the appellant was experimental with a tendency to put into effect what he saw on television; and

(h) the C appellant would not likely commit a similar offence as he had been frightened about the offences.

Accordingly, the probation officer had recommended that the charges be withdrawn before plea and that the appellant be placed under supervision of a probation officer. Detailed submissions in mitigation were placed before D the trial court and of note was the evidence of Nkululeko Ndlovu, a business consultant, a professional and family man who undertook to take over the guardianship and upkeep of the appellant, having learnt of the appellant's predicament. Nkululeko Ndlovu is an uncle to the appellant. He further undertook to, at his own expense, secure a professional psychologist or E counselor to ensure the reformation and rehabilitation of the appellant. The trial magistrate had other ideas. She disregarded the recommendations of the probation officer. She also disregarded efforts by the appellant's uncle to assist with his reformation and rehabilitation. Instead, the trial magistrate sentenced him to be placed at a state reformatory, Northcott Training

Institute, Mount Hampden, Harare for a period of three years in terms of s 351 as read with F s 352(2) of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. The appellant was thus lodged in a conventional prison in which he mixed with adult convicts pending transfer to Harare. At the behest of the appellant, this court intervened under case number HCB 107/12 and ordered the removal of the appellant from Khami Prison to Luveve Remand Home, pending transfer to Harare. Under cover of case number HC 1366/12 this court further stayed G the execution of appellant's sentence and the appellant was released back to school pending his appeal against sentence. The reasoning by the trial magistrate overlooked the fact that the appellant was just a child when he committed the offences. Further, the two victims were both his close relatives. He abused them at the same time, on the same day and at about the same H time.To conceal his deeds, the appellant gave his victims sweets.

Ndou J

The trial magistrate failed to give due consideration and weight to the fact that the A appellant's behaviour was driven by mere experimenting and excitement of youth. In *S v Five* 1988 (2) ZLR 168 (SC) Korsah JA states:

> ". . . it is a matter notorious enough for judicial notice to be taken, that at no time in life, other than in youth, are sexual passions more easily aroused. At the same time, callow youth lack insight, and experience and therefore more readily acts B in a foolish manner than a mature person . . .".

See also *S v Julius* GS 269-80 and *S v Gwarada* 1981 ZLR 17 (A).

The trial court disregarded the probation officer's report regarding the management of the appellant without good and sufficient reasons for doing so. This is a misdirection – *S v Tendai & Anor* 1998 (2) ZLR 423 (H). In that case the court emphasized the importance of not only the probation officer's C opinion in formulating a scheme of management for a juvenile offender, but also the involvement of the juvenile's family and the education authorities in efforts to rehabilitate the offender.

For no good and sufficient reasons the court *a quo* spurned the uncle's efforts. Once the trial court opined that appellant's conduct required a D deterrent sentence it fell off focus and lost the judicial vision and objective i.e. to sentence a juvenile in order to facilitate and achieve its reformation and rehabilitation. It was apparent that our penal institutions are critically constrained as the appellant had to be kept in prison with adult prisoners pending transfer to Harare. The court did not investigate how long the appellant would be in adult prison custody before being transferred to the Northcott E Training Institute. The trial magistrate's reasons for sentence are scant and do not evince that she struck a right balance between the aggravatory and mitigatory factors.

The State rightly conceded that the appeal has merit.

Accordingly, the appeal against sentence is upheld. The sentence imposed by F the court *a quo* on 19 April 2012 is set side and substituted with the following:

> The accused is sentenced to 6 cuts with a rattan cane to be administered by a designated officer of Bulawayo Prison. In addition the accused is placed under supervision of a probation officer of Department of Social Services, Plumtree. G

Cheda AJ agrees

Phulu & Ncube, appellant's legal practitioners

Criminal Division, Attorney General's Office, respondent's legal practitioners H

© 2015 Juta and Company (Pty) Ltd.

Document 19 of 73

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2013/Volume 1/ALTEM ENTERPRISES (PVT) LTD v JOHN SISK & SON (PVT) LTD 2013 (1) ZLR 125 (S)

ALTEM ENTERPRISES (PVT) LTD v JOHN SISK & SON (PVT) LTD 2013 (1) ZLR 125 (S)

Citation	2013 (1) ZLR 125 (S)
Case No	Judgment No. S-4-13
Court	Supreme Court, Harare
Judge	Ziyambi JA, Garwe JA & Makarau JA
Heard	6 March 2012; *CAV*
Judgment	12 February 2013
Counsel	*L Uriri*, for the appellant *H Zhou*, for the respondent
Case Type	Civil appeal
Annotations	Link to case annotations

Flynote

Landlord and tenant – *tenant – statutory tenant – rent payable – amount of rent not agreed – tenant obliged to pay an objectively reasonable rent, based on rental value on open market*

Headnote

D A tenant has no right to occupy property save in return for payment of rent. Where there is no agreement on the amount of rental payable, the lessee is liable to pay the lessor a reasonable amount for the use and occupation of the property, the rental value of the property in the open market being E the criterion for the assessment of this amount. This would also apply to a lessee who remains in occupation after the termination of a lease whilst negotiations for a new lease are in progress. Normally, where there is no agreement on the rental, the lessee must continue to pay the last agreed rental, but that would only apply in a normal economic environment. It would not be applicable in a situation such as occurred in Zimbabwe in F 2008 and 2009, where there were two revaluations of the local currency and finally the introduction of foreign currency, which resulted in the local currency becoming moribund.

A tenant who seeks protection of his statutory tenancy must endeavour to pay fair rent. Such fair rent must be objectively and not subjectively assessed. The tenant cannot relieve himself of his obligation to pay fair G rent by tendering some arbitrary and paltry sum entirely incommensurate with the rentable market value of the leased premises.

Cases referred to

Chidyausiku v Nyakabambo 1987 (2) ZLR 119 (S)

H *Negowac Services (Pvt) Ltd v 3D Holdings (Pvt) Ltd* 2009 (2) ZLR 446 (H)

Garwe JA

Parkside Hldgs (Pvt) Ltd v Londoner Sports Bar 2005 (2) ZLR 68 (H) A

Legislation considered

Rent Regulations 2007 (SI 32 of 2007), s 30

Case information

L Uriri, for the appellant B

H Zhou, for the respondent

Judgment

Garwe JA: This is an appeal against the judgment of the High Court (Patel J, in *John Sisk & Co (Zimbabwe) (Pvt) Ltd v Altem Entprs (Pvt) Ltd & Anor* 2011 (1) ZLR 433 (H)) in ordering the eviction of the appellant and all those claiming rights through it, from premises known as Lot 2, C Manresa, Acturus Road, Harare and payment of holding over damages in the sum of US$800 per month from 1 March 2009 to 31 August 2010 and in the sum of US$1 575 per month from 1 September 2010 to the date of vacant possession of the premises.

The background to this matter is as follows. In 1998 the respondent and the appellant entered into a lease agreement in respect of a property known as Lot D 2, Manresa, Arcturus Road, Harare. The lease agreement was for an initial period of three years commencing 1 June 1998 but was to run for a further seven years until 31 May 2008. After that date the appellant remained in occupation and therefore became a statutory tenant. The appellant remains in occupation to this date. E

On 26 March 2010, the respondent issued summons out of the High Court seeking an order for the eviction of the appellant and all those claiming through it and holding over damages. The basis of the respondent's claim was that it required the premises for its own use, alternatively that it had terminated the lease owing to a number of breaches on the part of the appellant. The breaches cited by the respondent were that the appellant had last paid F rentals in July 2007, that the appellant had erected a permanent structure on the premises without the respondent's authority and relevant local authority approval, that the appellant had sublet a portion of the premises without its consent and lastly that the appellant had failed to maintain the premises in a good state of repair. G

In its plea before the High Court, the appellant disputed that it had breached the agreement in any of the ways alleged by the respondent. In particular, the appellant averred that it had attempted to pay rentals by cheque but on three occasions the respondent refused to accept the cheques and returned them. The last such cheque was for the sum of ZW$1 which the appellant issued after the removal of several zeros from the Zimbabwe dollar. That H

A cheque was issued on 6 August 2008 and bore the inscription at the back "Rent payment for 24 months".

In its judgment, the court *a quo* found that, although there was evidence that the appellant had breached the agreement by sub-letting part of the premises to one Munengwa, the respondent had failed to give the requisite 14 days' B notice to the appellant to rectify the breach and accordingly had not accrued the right to cancel the agreement. The court also found that the claim by the respondent that the appellant had constructed a permanent structure on the premises and that it had failed to keep the premises in a state of repair had not been proved. The court further found that since the quantum of the rental was not agreed, the appellant was under obligation to pay what it considered C to be fair rental for the premises commensurate with the rentable market value of the premises. The court concluded that the tender of ZW$1 was patently absurd and that therefore the appellant was in clear breach of the obligation to pay rental from August 2008. Consequently the court *a quo* made the order that is the subject of the appeal.

D In its notice of appeal the appellant has attacked the judgment of the court *a quo* on two bases. These are:

(a) that the court *a quo* misdirected itself in concluding that the appellant had lost its entitlement to the benefit of statutory tenancy with effect from August 2008 because it had failed to tender a fair rental when there E was clear evidence that the respondent had refused to accept rentals from the appellant.

(b) that the court *a quo* erred in concluding that the tender of ZW$1 was not fair in the absence of evidence of what would have constituted fair rental, regard being had to the fact that the rental previously paid of ZW$6 million had been reduced to a fraction of a cent following the F revaluation of the Zimbabwe dollar.

The respondent also filed a cross-appeal, not against the final order made, but against the findings by the court *a quo* that the other breaches of the lease agreement had not been proved and that the respondent had not shown it genuinely required the premises for its own use.

G At the hearing of the matter before this court, Mr *Zhou*, for the respondent, conceded that since the cross-appeal was not directed at the substantive order, the cross-appeal was not properly before the court and should be struck off. This concession was made in the light of the decision of this court in *Chidyausiku v Nyakabambo* 1987 (2) ZLR 119 (S). Although the cross-appeal H is no longer the subject of this appeal, it has in my view raised a fundamental

---

Garwe JA

question on whether the decision in *Chidyausiku v Nyakambambo* is entirely A correct. I will revert to this aspect shortly.

In his submissions before this court, Mr *Uriri*, for the appellant, argued that since the last rental to be accepted had been Z$6 million, it was that amount that the appellant was obliged to pay, irrespective of the effect of inflation. When the local currency was revalued in June 2008 and several zeros removed B from the Zimbabwe dollar the sum of Z$6 million was reduced to $0.06. The appellant had then decided to pay rent for twenty four months and had accordingly tendered ZW$1.00 revalued. Since the parties were not agreed on the new rental payable, the appellant had a duty to continue paying the last agreed rental. For this proposition, Mr *Uriri* relied on the decision of the High Court in *Negowac Services (Pvt) Ltd v 3D Holdings (Pvt) Ltd* 2009 (2) ZLR 446 (H). C He further argued that the obligation on the appellant was to pay the rent due and not fair rent.

Mr *Zhou*, on the other hand, submitted that since the parties were not agreed on the rental payable, the appellant should have paid fair rental and a cheque payment of Z$1.00 was not fair. D

The real, and perhaps only issue, for determination before this court is the construction to be given to the words "rent due" in s 30 of the Rent Regulations SI 32 of 2007 and, depending on such construction, whether the $1.00 tendered by the appellant in August 2008 constituted the rent due. Before attempting to make a determination of the above issue, I feel obliged, as already indicated, to express my personal view on the correctness E or otherwise of the decision of this court in *Chidyausiku v Nyakabambo*. I confess that I do so without the benefit of argument from both counsel.

Chidyausiku v Nyakabambo supra is authority for the proposition that, in order to be valid, a notice of appeal must be directed to the whole or part of the order made by the court *a quo* and not to its reasons for making the F order in question. Gubbay JA (as he then was) remarked at 124F-125A:

> ". . . what this court is being asked to do is not to reverse the order of the learned judge but to cure the procedural defects by either considering the merits of the application itself or remitting the matter for the learned judge to do so. Once that is done, the appellant will be content whatever the outcome should happen to be. That this is the approach is evident from the wording of the so-called G prayer to the notice of appeal, which omits to seek an order that the application brought in terms of r 18 be dismissed."

I am prepared to accept that, as a general rule, the above remarks correctly reflect the law of this country. To the extent, however, that the judgment suggests that this is a hard and fast rule I am inclined to differ. There may well be cases, such as the present, where the slavish adherence to the above H

Garwe JA

A principle would not only cause prejudice but would result in a certain degree of absurdity. I revert to the facts of this case to justify why I am of this opinion.

In the court *a quo*, the respondent approached the court seeking the eviction of the appellant as well as holding over damages. It had several causes of action. The main was that it required the premises for its own use. In the B alternative, it alleged several breaches of the lease agreement. These were that the appellant had, without authority, sublet a portion of the leased premises, that the appellant had constructed a permanent structure without authority, that the appellant had failed to maintain the premises in a state of repair and lastly that the appellant had failed to pay the rental due. It will be apparent from the above that each breach alleged by the respondent

constituted a C separate cause of action which, if proved, would have justified, either singly or cumulatively, the eviction sought in the prayer.

The court *a quo* rejected the respondent's claim that it required the premises for its own use. It also rejected all but one of the respondent's claims that the appellant had breached the agreement. Having accepted that the appellant D had failed to pay the rent due, the court then ordered the eviction of the appellant as well as holding over damages. However, the appellant appealed to this court against that order. It was at this stage that the respondent had to make a difficult decision.

If the appeal filed by the respondent were to succeed, then the order of eviction and holding over damages would fall away. Since the issue before E the Supreme Court would be only whether the court *a quo* was correct in holding that the appellant had failed to pay the rent due, there would be no basis for the respondent to attack the other findings by the court *a quo*, which findings could also justify the order of eviction and payment of holding over of damages, unless the respondent also cross appealed against those findings. F This is what the respondent, represented by Mr *Zhou*, did. However, faced with the decision of this court in *Chidyausiku v Nyakambambo* s*upra* the respondent was forced to concede that the cross-appeal did not comply with the law, as it did not seek any relief on the substantive order made. My understanding of the respondents' position was that, in the event the main appeal succeeded, this court should revisit the finding made by the court *a* G *quo* in dismissing the other causes of action and, in the event that any one of them succeeded, then the eviction and holding over damages would stand.

Speaking for myself, I find nothing wrong with such an approach and indeed it seems to me that in a case such as this one there is no other alternative. Hopefully this issue will come up for consideration by a full court so that the H principle can be revisited in order to ascertain whether it still makes good law.

2013 (1) ZLR p130

Garwe JA

The only issue that falls for determination is whether the court *a quo* was A correct in determining that the tender of ZW$1 did not constitute tender of the rent due. The place to start is s 30 of the Rent Regulations (SI 32 of 2007). That section provides in relevant part:

> "For the purpose of subsection (2), 'rent due', in relation to dwelling, means –
>
> (a) so long as an order fixing the rent for a dwelling is in force, the authorised B rent fixed by that order; or
>
> (b) rent agreed under the terms of the lease agreement."

It is clear from the above definition that the legislature had in mind two situations. These were, firstly, where the rent was fixed in terms of an order by the Rent Board and, secondly, where the rent is agreed in terms of the lease agreement. The definition does not however cover a situation, such as C the present, where the rent was no longer agreed.

It is correct that the appellant had been paying the sum of Z$6 000 per month as rent. However, the cheque payments for May, June and July 2008 were returned by the respondent because the respondent believed that the appellant had breached the lease agreement and should vacate the premises D rather than continue to pay rentals and remain in occupation. In August 2008, the appellant forwarded another cheque to the respondent in the sum of Z$1.00 with the inscription "Rent payment for 24 months" at the back.

That the amount of rent as at August 2008 had not been fixed or agreed upon is not in dispute. Neither party had sought an order from the Rent Board to fix a E fair rental in respect of the premises. No agreement had been reached on what rental would be payable for the occupation of the premises, notwithstanding the stance by the respondent that the appellant was to vacate the premises. By the Presidential Powers (Temporary Measures) (Currency Revaluation and Issue of New Currency) Regulations (SI 109 of 2008), gazetted on 30 July 2008, new bank notes were introduced whilst the old bearer cheque continued F to be legal tender but at the revalued rate. It is correct, therefore, that as at August 2008 the rental of Z$6 million previously paid by the respondent would have been a fraction of a cent. Despite the revaluation of the local currency, hyperinflation continued unabated, resulting in the gazetting of the Presidential Powers (Temporary Measures) (Currency Revaluation and Issue G of New Currency) Regulations (SI 6 of 2009) which became effective on 2 February 2009. That legislation also had the effect of slashing a number of zeros from the existing currency.

Given the fact that no agreement had been reached on the quantum of rent due, can the tender of Z$1 be said to have been a valid one? The appellant has argued that in terms of the law, its obligation was to pay the "rent due" H

Garwe JA

A and not "fair rent" and that the suggestion that it should have paid fair rental is at variance with the Rent Regulations. Whilst that may be correct up to a point, the position is clear that the Regulations did not specifically provide for a situation, such as the present, where there may be disagreement on what constitutes the rent due. One must of necessity resort to the common law to answer this question. In other words, where the parties are not agreed B on what rental is payable and there is no order by the board, what rental is payable in exchange for occupation of premises?

The position is settled that a tenant has no right to occupy property save in return for payment of rent and that, where there is no agreement on the amount of rental payable, the lessee is liable to pay the lessor a reasonable C amount for the use and occupation of the property, the rental value of the property in the open market being the criterion for the assessment of this amount. This would also apply to a lessee who remains in occupation after the termination of a lease whilst negotiations for a new lease are in progress: W E Cooper *Landlord & Tenant* 2 ed p 59.

Whilst it is noted that in *Parkside Holdings Private Limited v Londoner Sports* D *Bar* 2005 (2) ZLR 68 (H), the High Court held that in a situation where there is no agreement on the rental, the lessee must continue to pay the last agreed rental, that finding would be correct in a normal economic environment and not applicable to a situation such as the one under consideration where there was revaluation of the local currency both in 2008 and 2009 and the introduction E of foreign currency which resulted in the local currency becoming moribund.

In dealing with the appellant's obligation under the lease, Patel J in the court *a quo* remarked at 445B-E:

> "It is settled law that where the amount of rent payable has not been agreed upon by the parties, the lessee must pay that amount which it contends represents a fair rental. The lessee's failure to do so entitles the lessor to cancel the lease and F repossess the tenanted premises by ejecting the lessee. See *Supline Investments (Pvt) Ltd v Forestry Company of Zimbabwe* 2007 (2) ZLR 280 (H) at 281, where it was held as follows:
>
> > 'A tenant has an undisputed obligation to pay rental for property that he hires from the landlord. That is the *sine qua non* for his continued occupation of the leased property. He has no right to occupy the landlord's property G save in return for payment of rent. Where the tenant disputes the amount of the rentals chargeable for any premises, in my view, that challenge does not absolve the tenant from paying any rentals at all. The minimum that the tenant in such a situation must pay is the amount that it contends represents fair rentals for the premises. This, the tenant must pay to avoid being ejected on the basis of non-payment of rentals even if its challenge to H what constitutes fair rentals is subsequently validated. At most, the tenant

---

Garwe JA

> > can pay the disputed amount and claim or be credited with the difference A once its contentions as to what constitutes fair rentals are validated'.
>
> I would add to these principles the additional requirements that the lessee's contention as to what represents a fair rental must be reasonably formed and defensible by some commercial criterion. He cannot relieve himself of his obligation to pay fair rent by tendering some arbitrary and paltry sum entirely incommensurate with the rentable market value of the leased premises." B

I agree with the above remarks, which accord with both common sense and the common law. Indeed, one of the functions of the Rent Board is to fix fair rent, the intention being to ensure that a landlord continues to receive a fair but not excessive consideration in exchange for the occupation and use of his premises. C

In my view, a tenant who seeks protection of his statutory tenancy must endeavour to pay fair rent. Such fair rent must be objectively and not subjectively assessed.

In the present case, the appellant tendered Z$1 as rental for 24 months. It had not been asked to pay rental for two years in advance. It obviously must have appreciated that Z$1 as at 6 August 2008 was not reasonable value for D occupation of the premises for 24 months. Even after the

introduction of the foreign currency system, it felt no obligation to pay any rentals for the whole of 2009, believing, one would assume mischievously, that the $1 it had paid in August 2008 was, in terms of the agreement, sufficient rental for 24 months. Indeed, Mr Fraser did concede that the tender of Z$1 was neither E fair nor reasonable. In holding that the appellant lost the right to protection as a statutory tenant, Patel J remarked at 444G-445A:

> ". . . The amount tendered was unquestionably derisory and could not possibly have represented a fair rental for the premises by any measure of value, mercantile or otherwise. The subsequent tender of US$800 per month, 24 months later, was premised on the contention that the intervening period had been duly F accounted for by the payment of ZW$1 in August 2008. This contention was not only mischievous but also obviously fallacious. Moreover, the tender had been overtaken by events, in particular, the cancellation of the lease and the institution of this action six months before."

Again I am inclined to agree with the above remarks. The appellant lost its right to statutory tenancy. The court *a quo* consequently was correct in ordering G the eviction of the appellant and the payment of holding over damages.

In the circumstances, I agree that the appeal is without merit and that it must fail.

The appeal is accordingly dismissed with costs. H

2013 (1) ZLR p133

Garwe JA

A ZIYAMBI JA and MAKARAU JA concurred.

Kantor & Immerman, appellant's legal practitioners

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

---

© 2015 Juta and Company (Pty) Ltd.

Document 20 of 73

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2013/Volume 1/SPECISS COLLEGE v CHIRISERI & ORS 2013 (1) ZLR 134 (S)

SPECISS COLLEGE v CHIRISERI & ORS 2013 (1) ZLR 134 (S)

2013 (1) ZLR p134

Citation	2013 (1) ZLR 134 (S)
Case No	Judgment No. S-2-13
Court	Supreme Court, Harare
Judge	Ziyambi JA, Garwe JA and Omerjee AJA
Heard	12 June 2012; *CAV*
Judgment	12 February 2013
Counsel	*T Mpofu* for the appellant *P Mabundu* for the respondent
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Employment – *disciplinary proceedings – charge – "sabotage" – meaning – can include withdrawal of labour, resulting in interruption of services necessary to operations of employer*

Employment – *industrial action – right to strike – must be exercised within the parameters of Labour Act – failure to do so renders collective job* D *action unlawful – consequences thereof*

Words and phrases – *"sabotage" – meaning in context of labour relations – can include withdrawal of labour by an employee with intention of forcing employer to comply with employee's demands*

Headnote

The appellant was an educational institution, and the respondents were tutors E employed by the appellant. A withdrawal of labour was called for by the respondents' union as a means of forcing the appellant to negotiate salaries. The strike was called off but the respondents nevertheless withdrew their labour at the beginning of the new school term. As a F result, new students wishing to register for classes were turned away, tuition fees were not collected and those who did attend classes received no tuition. Misconduct proceedings were conducted in respect of most of the participants in the collective job action. The respondents, who had played a leading role in inciting other employees to participate in the collective job action, as well as another employee, were charged G with "sabotage" under the employment code of conduct and, having been found guilty, were dismissed from employment. The code defined "sabotage" as "any wilful act by an employee to interfere with the normal operations of the employer's business by damaging any plant, machinery, equipment, raw materials or products or by interrupting any supplies of power, fuel, materials or services necessary to the operations". H

A They successfully appealed to the Local Joint Committee which set aside their dismissals on the basis that sabotage was not proved. The appellant appealed without success to the National Employment Council and to the Labour Court. The Labour Court held that although by the withdrawal of their labour the respondents had made it "difficult and perhaps impossible for the business of teaching to be conducted", their actions did not amount B to "sabotage" within the meaning of the code. It held that where the code referred to an interruption of services, it meant the interruption of services to third parties and not the services of the employee himself.

Held, that the respondents had the right to withdraw their labour was beyond question. That right must, however, be exercised within the parameters set out in the Labour Act [*Chapter 28:01*]. Failure to do so will render C the collective job action unlawful. Any employee who participates in such unlawful collective job action risks dismissal from his employment and the non payment of wages or salary for the period thereof. No notice was given to the appellant of the impending strike or no attempt had been made to conciliate the dispute as required by s 104(2)(b). The collective D job action was therefore unlawful.

Held, further, that sabotage is a deliberate action aimed at weakening another entity through subversion, obstruction, disruption, or destruction. In a workplace setting, sabotage is the conscious withdrawal of efficiency, generally directed at causing some change in workplace conditions. Apart from the wilful and malicious destruction of an employer's property, E sabotage also means interference with an employer's normal operations, especially during a labour dispute. Sabotage can therefore mean the withdrawal of labour with the intention of forcing the employer to comply with the employees' demands. The unlawful withdrawal of their services by the respondents constituted sabotage. They interfered with the normal operations of the appellant to the extent that those services F were not available to the appellant, to its loss, during the period of the strike. Their conduct amounted to an interruption of services necessary to the operations of the appellant, who was dependent on those services for its functioning. The respondents were, therefore, properly found guilty of the misconduct of sabotage and dismissed by the appellant.

Legislation considered G

Labour Act [*Chapter 28:01*], ss 104(2) and 109(6)

Case information

T Mpofu for the appellant

H *P Mabundu* for the respondent

2013 (1) ZLR p136

Ziyambi JA

Judgment

Ziyambi JA: This is an appeal against a judgment of the Labour A Court setting aside the dismissal of the respondents and reinstating them to their former positions in the employ of the appellant.

The appellant, as its name suggests, is a college whose core business is delivering education and training to students of varying ages. The respondents were employed by the appellant as tutors. It is common cause that a withdrawal B of labour was called for by the respondents' union as a means of forcing the employers to negotiate salaries. It is also common cause that the strike was called off but the respondents nevertheless withdrew their labour on 6 September 2006, which was the beginning of the new school term. As a result, new students wishing to register for classes were turned away, tuition fees were not collected and those who did attend classes received no tuition. C

Misconduct proceedings were conducted in respect of most of the participants in the collective job action, the allegation being that the collective job action was unlawful. Thirteen of the participants were given final warnings while the respondents, who had played a leading role in inciting other employees to participate in the collective job action, as well as one employee who was D already on a final written warning, were charged with *sabotage* and, having been found guilty, were dismissed from employment. The respondents successfully appealed to the Local Joint Committee which set aside their dismissals on the basis that sabotage was not proved. The appellant appealed without success to the National Employment Council and to the Labour Court. Before the latter court it was contended on behalf of the appellants E that by unlawfully withdrawing their labour the respondents had interrupted services necessary to the operations of the employer's business.

The court *a quo* dismissed the appeal on the basis that although by the withdrawal of their labour the respondents had made it "difficult and perhaps impossible for the business of teaching to be conducted" their actions did F not amount to sabotage within the meaning of the Code. It said:

> "The employee has been given the right to strike. This right must be exercised in a given manner. When exercised it necessarily entails the withdrawal of one's labour. In a lot of cases this withdrawal results in the operations of a business being interrupted completely. In other words the employee would have interrupted his supply of services, so to speak. But is this the kind of interruption that was G meant to be curbed? If it is then it would mean giving with the right hand and taking away with the left hand. It appears more appropriate that the interruption of services is of third parties and not services of the employee himself. . .."

The learned President then proceeded to give a treatise on the right to strike which was, bearing in mind that the strike was unlawful as I shall demonstrate later in this judgment, totally uncalled for. H

2013 (1) ZLR p137

Ziyambi JA

A The appeal was premised on the following grounds, namely, that the court *a quo* erred:

(i) in failing to find that the withdrawal of labour by the respondents amounted to an unlawful collective job action;

(ii) in finding, given the circumstances, that the respondents had a right to B withdraw their labour; and

(iii) in finding that the respondents had not committed the disciplinary offence of sabotage as defined in the applicable code of conduct.

I will deal separately with each ground of appeal.

(i) The failure to find that the withdrawal of labour by the C respondents amounted to an unlawful collective job action

Allen Musevenzi, the third respondent, was the chairman of the Workers' Committee of the appellant. The letter notifying him of the intention to institute disciplinary proceedings against him

stated as follows:

> "It is alleged that you engaged in a collective job action by refusing to carry out D your normal duties on Wednesday 6 September 2006 between approximately 0800 and 1000. You engaged in this collective job action:
>
> 1. Without submission of 14 days written notice to Speciss College of your intent to resort to such action (as it required by section 104 (2) of the Labour Act).
> 2. After having been informed verbally that such action was illegal.
> 3. After E having been warned by the Managing Director's Notice following the previous such action by certain staff on 29 March 2004 that any future such action would result in Speciss imposing the most severe legal penalties against those involved.
> 4. Without having made any effort to establish whether the collective job action was still being called by your principals.
>
> F Your engagement in this illegal collective job action constitutes the offence of Sabotage (Item 9 of the Group IV schedule of offences in the NEC for the Commercial Sector Employment Code of Conduct) in that your actions interfered with and interrupted services necessary to the operations of the Campus. Your involvement in the illegal collective job action is aggravated by the fact that you were observed to be instigating and leading the action at the Campus. This G offence can result in dismissal for a first offence."

The same charges were preferred against Maxwell Chiriseri, the first respondent, and Emmanuel Chidodo, the second respondent ("Chidodo"). Chidodo was not a first offender, having received a penalty of a final written warning the previous year for being absent from his workstation without H authority.

2013 (1) ZLR p138

Ziyambi JA

Section 104 of the Labour Act [*Chapter 28:01*] ("the Act") sets out, in subss A (1) and (2), the right to strike and the parameters for the lawful exercise of that right. It provides:

> "104 Right to resort to collective job action
>
> (1) Subject to this Act, all employees, Workers' Committees and Trade Unions shall have the right to resort to collective job action to resolve disputes of interest. B
>
> (2) Subject to subsection (4), no employees, workers' committee, trade union, employer, employers' organisation or federation shall resort to collective job action unless –
>
> (a) fourteen days' written notice of intent to resort to such action, specifying the grounds for the intended action, has been given –
>
> (i) to the party against whom the action is to be taken; and C
>
> (ii) to the appropriate employment council; and
>
> (iii) to the appropriate trade union or employers' organisation or federation in the case of members of a trade union or employers organisation or federation partaking in a collective job action where the trade union or employers organisation or federation is not itself resorting to such action; and D
>
> (b) An attempt has been made to conciliate the dispute and a certificate of no settlement has been issued in terms of section *ninety-three*."

That the respondents had the right to withdraw their labour is, therefore, beyond question. That right must, however, be exercised within the parameters set out in the Act. It is not disputed that no notice was given to the appellant of the E impending strike or that no attempt had been made to conciliate the dispute as required by subs (2)(b) of s 104. In the circumstances, the collective job action was unlawful by reason of its non-compliance with s104. The Labour Court made no finding on the lawfulness or otherwise of the collective job action in which the respondents had participated. It ought to have done so and the failure so to do was a misdirection on its part. F

The consequences of a collective job action will depend on the lawfulness or otherwise of it. While there may be no repercussions consequent upon a lawful strike, the same cannot be said in respect of an unlawful strike. In terms of s 109 (6) of the Act, employees who participate in an unlawful collective job action "shall be jointly and severally liable, at the suit of any G injured party, for any injury to or death of a person, loss of or damage to property or other economic loss, including the perishing of goods caused by employees' absence from work, caused by or arising out of or occurring during such collective action".

Further, an employee who participates in an unlawful collective job action risks dismissal from his employment and non-payment of wages or salary H

2013 (1) ZLR p139

Ziyambi JA

A for the period of such unlawful collective job action. In this connection, it is to be noted that engaging in *"any unlawful collective job actions as defined by the Labour Relations Act as amended from time to time"* is a dismissible offence in terms of the relevant code of conduct, which is the NECCS Employment Code of Conduct (hereinafter referred to as "the Code"), and that the conduct of the respondents in engaging in an unlawful collective B job action warranted dismissal on that ground.

(ii) The finding, given the circumstances, that the respondents had a right to withdraw their labour

In view of the non-compliance with s 104 of the Act, it is clear that the respondents did not lawfully exercise their right to withdraw their labour. C Put differently, in the purported exercise of their right to strike they defied the very law which gave them that right. No right can exist to act unlawfully. This ground is also decided in favour of the appellant.

(iii) The finding that the respondents had not committed the disciplinary offence of sabotage as defined in the applicable D Code of Conduct

The offence of sabotage is defined in the Code as follows.

> "*SABOTAGE*
>
> *Any wilful act by an employee to interfere with the normal operations of the employer's business by damaging any plant, machinery, equipment, raw materials* E *or products or by interrupting any supplies of power, fuel, materials or services necessary to the operations"*.

Sabotage has been defined as:

> "Noun 1: The act of doing deliberate damage to equipment, transport, machines, etc to prevent an enemy from using them, or to protest about something. . .
>
> F *Verb* 1: to damage or destroy something deliberately to prevent an enemy from using it or to protest about something. . .
>
> *Verb* 2: to prevent something from being successful or being achieved, especially deliberately". See *Oxford Advanced Learner's Dictionary* 8 ed.

It is defined in *Wikipedia* as:

> G "a deliberate action aimed at weakening another entity through subversion, obstruction, disruption, or destruction. *In a workplace setting,* sabotage is the conscious withdrawal of efficiency generally directed at causing some change in workplace conditions. . ." (my emphasis)

In *Black's Law Dictionary* 8 ed, it is defined as:

> "1.. . . the destruction, damage, or knowingly defective production of materials, H premises, or utilities used for national defense or for war. . .

2013 (1) ZLR p140

Ziyambi JA

> 2. The wilful and malicious destruction of an employer's property or interference A with an employer's normal operations especially during a labour dispute" (my emphasis).

In its ordinary meaning, therefore, "sabotage" can mean the withdrawal of labour with the intention of forcing the employer to comply with the employees' demands. While such withdrawal of labour when exercised in the context of a lawful strike is permitted by law, it is contended by the B appellant that the unlawful withdrawal of services by the respondents in this matter constituted sabotage as defined in the Code.

The court *a quo* was of the view that while the actions of the respondents constituted an interruption of supply of services to the employer such interruption was not meant to be proscribed by the Code but rather it was C the interruption of the services, not of the employee, but of third parties to the employer, which was intended to be proscribed.

I am unable to agree with this view. For to do so would mean that an employee who, during the course of an unlawful collective job action, deliberately refrains from sending a signal of the arrival of a train to the next station D knowing that his failure to send the signal might cause a derailment of the train and such a derailment does eventuate, could, in answer to a charge of sabotage, take refuge in the fact that the withdrawal of his labour does not constitute sabotage.

In my view, the unlawful withdrawal of their services by the respondents did constitute sabotage. They interfered with the normal operations of the E appellant to the extent that those services were not available to the appellant, to its loss, during the period of the strike. Their conduct amounted to an interruption of services necessary to the operations of the appellant who was dependent on those services for its functioning. They were, therefore, properly found guilty of the misconduct of sabotage and dismissed by the appellant.

In the result, the appeal succeeds with costs. F

The judgment of the court *a quo* is set aside and substituted with the following:

The appeal is allowed.

The determination of the Disciplinary Committee to dismiss the respondents is hereby upheld. G

GARWE JA & OMERJEE AJA concurred.

Gill, Godlonton & Gerrans, appellant's legal practitioners

Maganga & Company, respondents' legal practitioners H

© 2015 Juta and Company (Pty) Ltd.

Document 21 of 73

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2013/Volume 1/S v MAKUMBE 2013 (1) ZLR 141 (H)

S v MAKUMBE 2013 (1) ZLR 141 (H)

Citation	2013 (1) ZLR 141 (H)
Case No	Judgment No. HH-39-13
Court	High Court, Harare
Judge	Mavangira J and Hungwe J
Heard	25 September 2012; *CAV*
Judgment	13 February 2013
Counsel	Ms *S Njerere,* for the appellant *E Nyazamba,* for the respondent
Case Type	Criminal appeal
Annotations	No case annotations to date

Flynote

Criminal procedure (sentence) – *general principles – factors to consider – deterrence – need for deterrence should not lead to punishment disparate to offender's deserts*

Criminal procedure (sentence) – *general principles – factors to consider –* D *plea of guilty – weight to be given to – should not be disregarded*

Criminal procedure (sentence) – *statutory offences – penalty provided by legislation – fine or imprisonment or both provided for – when custodial sentence may be considered*

Headnote

E The appellant was convicted on his own plea on a charge of negligent driving. He was driving a pickup and failed to stop at an intersection, although the traffic lights were red against him. His failure to stop resulted in a collision with another motor vehicle which was travelling through the intersection. The magistrate sentenced him to nine months' imprisonment, of which three months were suspended. In addition, the appellant F was prohibited from driving class 2 motor vehicles for a period of six months. The relevant provision in the Road Traffic Act [*Chapter 13:11*] provides for a maximum sentence, where the vehicle concerned is not a commuter omnibus or a heavy vehicle, of a fine not exceeding level 7, or imprisonment for a period not exceeding six months, or both such G fine and such imprisonment. In her reasons for sentence, the magistrate said that she attached little weight to the appellant's plea of guilty, saying that it was not a sign of contrition and that the appellant had no other option but to so plead "because the negligence was so gross and glaring."

Held, that as the appellant was convicted of a statutory offence, the trial court ought to have been guided in its assessment of an appropriate H sentence by the penalty provisions of the Act. The sentence imposed

---

by the trial court did not fall within the range of sentences stipulated A by the relevant provision of the Act. Even if imprisonment might have been found to be appropriate, he ought not to have been sentenced to a period of imprisonment exceeding six months. Where a penalty provision provides for a fine or imprisonment or both, the court ought to be satisfied that a fine will not meet the justice of the case before it B considers the custodial option, as well as the length thereof.

Held, further, that a plea of guilty must be recognised for what it is – a valuable contribution towards the effective and efficient administration of justice. It must be made clear to offenders that a plea of guilty, while not absolving them, is something which will be rewarded. The magistrate unduly minimised the value of, or the weight to be attached to, the C appellant's plea of guilty. This led to a miscarriage of justice.

Held, further, that it is important for courts to guard against such excessive devotion to deterrence that it obscures other relevant considerations, and so leads to a punishment which is disparate to the offender's deserts. Here, the magistrate gave excessive devotion to the need for the court to "register its displeasure by imposing stiffer penalties", and in the D process proceeded not only to impose an unduly harsh sentence but also to impose one that was incompetent.

Held, further, that regarding the prohibition from driving, as the appellant was driving a class 4 motor vehicle, it was a misdirection for the trial court to prohibit him from driving class 2 motor vehicles. The prohibition, if E appropriate, should have related to the class of vehicle that the appellant was driving at the time of the accident.

Held, further, that a fine was a permissible penalty and was appropriate in the circumstances of this case.

Cases cited F

S v Gono 2000 (2) ZLR 63 (H)

S v Gorogodo 1988 (2) ZLR 378 (S)

S v Harington 1988 (2) ZLR 344 (S)

S v Kadonzvo 1990 (1) ZLR 186 (S)

S v Mpofu (2) 1985 (1) ZLR 285 (H) G

S v Ncube & Anor 1983 (2) ZLR 1 (S)

S v Sidat 1997 (1) ZLR 487 (S)

Legislation considered

Road Traffic Act [*Chapter 13:11*], s 52 H

2013 (1) ZLR p143

Mavangira J

Case information

A Ms *S Njerere,* for the appellant

E Nyazamba, for the respondent

Judgment

Mavangira J: This is an appeal that was noted out of time. An application for condonation of the late filing of the appeal was not opposed by the B respondent. Condonation was granted.

The appellant appeals against the sentence that was imposed on him by the court *a quo.* He was convicted on his own plea on a charge of negligent driving in contravention of s 52(20) of the Road Traffic Act [*Chapter 13:11*] ("the Act"). The facts are that the appellant, who was driving a Mazda B1800 in a northerly direction along Rekayi Tangwena Road, failed to stop at the C intersection with Coventry Road. The traffic lights were red against him. His failure to stop resulted in a collision with another motor vehicle which was travelling east along Coventry Road.

The appellant was sentenced to nine months' imprisonment, of which three months were suspended on the usual and appropriate condition of future D good conduct. In addition, he was prohibited from driving class 2 motor vehicles for a period of six months.

The respondent has indicated that it does not oppose the appeal. Section 52(2) of the Act stipulates that a person who drives a vehicle on a road negligently shall be guilty of an offence and liable, where the vehicle concerned is not E a commuter omnibus or a heavy vehicle, to a fine not exceeding level 7 or to imprisonment for a period not exceeding six months or to both such fine and such imprisonment

While appeal courts are reluctant or slow to interfere with a trial court's sentencing discretion, they will readily do so in circumstances where the F sentence imposed is disturbingly inappropriate or the sentencing discretion has been exercised capriciously or upon the wrong principles: *S v Ncube & Anor* 1983 (2) ZLR 1 (S); *S v Gono* 2000 (2) ZLR 63 (H).

In casu, as the appellant was convicted of a statutory offence, the trial court ought to have been guided in its assessment of an appropriate sentence by the penalty provisions of the Act that was contravened . The sentence imposed G by the trial court does not fall within the range of sentences stipulated by the relevant provision of the Act. As the appellant was not driving a heavy vehicle or a commuter omnibus, even if imprisonment might have been found to be appropriate, he ought not to have been sentenced to a period of imprisonment that exceeds six months. In *S v Harington* 1988 (2) ZLR 344 (S) H at 359F Dumbutshena CJ stated:

2013 (1) ZLR p144

Mavangira J

> "The Legislature prescribes a sentence of 25 years imprisonment as a maximum A penalty for contravening s 3 of the Official Secrets Act. It is the ceiling of a range of sentences which a court may impose for a contravention of the section."

At 359H he also stated:

> "Fairness and justice exclude a passionate approach to sentencing. Courts should also, when assessing sentence, avoid insensitivity to one side or an exaggerated sense of the wrong done to society." B

He proceeded at 360C:

> "Fairness does not exclude the element of mercy and it also does not exclude a robust approach to sentencing."

Dumbutshena CJ further stated at 361H that what had gone wrong in that case was that the learned Judge President in the court below had pitched his C sights too high and scanned sights far beyond

the ambit of s 3. *In casu* the trial magistrate passed an incompetent sentence. She erred and the sentence must, and therefore will, for that reason be set aside.

In her reasons for sentence the magistrate said that she attached "little weight to the (appellant's) plea of guilty which is not a sign of contrition but rather D had no other option but to so plead because the negligence was so gross and glaring." In *S v Sidat* 1997 (1) ZLR 487 (S) McNally JA said at 493B:

> ". . . a plea of guilty must be recognised for what it is – a valuable contribution towards the effective and efficient administration of justice. It must be made clear to offenders that a plea of guilty, while not absolving them, is something which will be rewarded. Otherwise, again, why plead guilty?" E

Further, in *S v Mpofu (2)* 1985 (1) ZLR 285 (H) Reynolds J stated at 291F-292A:

> ". . . What a plea of guilty does accomplish, though, is to contribute to the smooth and efficient administration of the system of criminal justice. . . . But in the first respect mentioned the plea merits recognition and credit to an extent. It is a fact that a significant portion of offenders, although knowing full well that they are F guilty of the crime charged, still hotly protest their innocence. It is by no means uncommon for such persons to attack the *bona fides* and veracity of the most honest and impartial of witnesses, to prolong trials extensively and unnecessarily, to concoct specious and spurious defences, and generally to cause a considerable waste of public time and money. This is against public interest. I believe that it is more for this reason than any other, such as the so-called automatic right based on a supposed declaration of contrition, that the courts generally allow G an offender some mitigation of sentence if he pleads guilty. In this way such an offender is encouraged to adopt the more honest and laudable procedure of making a clean breast of his culpability, and of facing up to the consequences of his misconduct."

In casu the trial magistrate appears to have unduly minimised the value of or the weight to be attached to the appellant's plea of guilty. This led H

Mavangira J

A to a miscarriage of justice, more so when viewed in light of her imposing a sentence that is not only outside, but also in excess of, the permissible maximum. It is also trite that, where a penalty provision provides for a fine or imprisonment or both, as in this case, the court ought to be satisfied that a fine will not meet the justice of the case before it considers the custodial option, as well as the length thereof. In the instant matter, the relevant section B stipulates a fine not exceeding level 7. The concession and proposal by the respondent's counsel that the sentence be set aside and that it be substituted with a fine of $200 thus finds favour with this court, for it is important for courts to guard against excessive devotion to the cause of deterrence as that may so obscure other relevant considerations as to lead to a punishment C which is disparate to the offender's deserts: See *S v Gorogodo* 1988 (2) ZLR 378 (S) at 382H-383A. It appears that the trial magistrate gave excessive devotion to the need for the court to "register its displeasure by imposing stiffer penalties" and, in the process, further proceeded to not only impose an unduly harsh sentence but also went on to irregularly "overshoot" the applicable and pertinent penalty provision.

D Regarding the prohibition from driving, whilst the appellant was involved in an accident whilst driving a class 4 motor vehicle, the trial court prohibited him from driving class 2 motor vehicles. This was a misdirection, as such a prohibition has no basis in law. The prohibition, if appropriate, has to relate to the class of vehicle that the appellant was driving at the time of the E accident. It did not. Furthermore, as the appellant is a first offender, para (a) of subs (4) of s 52 is applicable. It provides as follows:

> "(4) Subject to Part IX, a court convicting a person of an offence in terms of subsection (1) involving the driving of a motor vehicle –
>
> (a) *may*, subject to paragraph (c), *if the person has not previously been convicted* of such an offence or of an offence, whether in terms of a law of F Zimbabwe or any other law, of which the dangerous, negligent or reckless driving of a motor vehicle on a road is an element within a period of five years immediately preceding the date of such first-mentioned conviction, *prohibit the person from driving for such period as such court thinks fit;* " (emphasis added).

Whilst the section, by the use of the word "may", gives discretion to the G court to decide whether or not to prohibit the convicted person from driving, it appears to me that the court must exercise the discretion judiciously, and the manner of the exercise of that discretion can only be discernible from the reasons given therefor. *In casu* there is no recording of the specific reasons why the trial magistrate decided to exercise her discretion in the manner in H which she did.

Mavangira J

A fine is a permissible penalty in terms of the Act as stated above. In *S v* A *Kadonzvo* 1990 (1) ZLR 186 (S) a fine was found to be appropriate on a conviction for reckless driving, in circumstances where the appellant, who was driving an omnibus carrying passengers, failed to yield to a vehicle approaching from the opposite direction on a narrow bridge. The omnibus collided with the oncoming vehicle and ran off the bridge into the river B below. Eleven persons were injured, two of them seriously. *In casu* a fine would have met the justice of the case.

As rightly submitted by the State, the offence, as well as the conviction of the appellant, occurred in 2008 and, whatever the message was intended to get to the appellant, it has been received by now. I do not, however, agree with the appellant's counsel's submission that the sentence of the court *a quo* be C substituted with a level 2 fine. A sentence of $10 in the circumstances of this case would, in my view, make a mockery of justice. The State's submission that an appropriate sentence would be a level 5 fine appears to be nearer a more realistic assessment.

In the result, and for the above reasons, the sentence of the court *a quo* is D hereby set aside and is substituted with the following:

> The accused is sentenced to a fine of $200 or, if he fails to pay the fine, 3 months' imprisonment.

HUNGWE J concurred. E

© 2015 Juta and Company (Pty) Ltd.

Document 22 of 73

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2013/Volume 1/ESTATE HEDLEY v ANGWA CITY INVESTMENTS THREE (PVT) LTD & ORS 2013 (1) ZLR 147 (H)

ESTATE HEDLEY v ANGWA CITY INVESTMENTS THREE (PVT) LTD & ORS 2013 (1) ZLR 147 (H)

Citation	2013 (1) ZLR 147 (H)
Case No	HH-41-13
Court	High Court, Harare
Judge	Uchena J
Heard	29 November 2012; *CAV*
Judgment	14 February 2013
Counsel	*C Mucheche,* for the applicant *P Nyeperai*, for the first respondent
Case Type	Civil application
Annotations	No case annotations to date

Flynote

Administration of estates – *curator bonis – sale by curator bonis of property forming part of estate – perishable property – may only be sold when sale authorised by the Master – sale of immovable property – need for* D *authorisation by High Court or by person appointing curator bonis – sale of property by any person to provide for funeral or subsistence of deceased's family – such sale not lawful after administration of estate in hands of the Master*

Headnote

E In terms of s 22 (2) of the Administration of Estates Act [*Chapter 6:01*], a *curator bonis* can only dispose of perishable property forming part of an estate and then only when specially authorised by the Master. Immovable property is not perishable and cannot be sold by a *curator bonis* in terms of the section. Under s 91 of the Act, a *curator bonis* cannot sell immovable property belonging to or forming part of any estate under his F guardianship, unless the High Court or any judge thereof has authorised such sale or unless the person by whom any such *curator bonis* has been appointed (such as the Master) has directed such sale to be made.

Section 41(a) of the Act, as read with the proviso to s 41, authorises any person, without the authority of a competent court or the Master, to take it upon himself to take the deceased's property into his safe custody for G its preservation or to sell the deceased's property when it is absolutely necessary for the purpose of providing a suitable funeral for the deceased or for the subsistence of the deceased's family or household or livestock, and limits such person's liability to the deceased's estate or its creditors, in the circumstances there mentioned. "Any person" is a phrase of very H wide meaning and can mean any person without exception. However, the

section must be read in conjunction with the other provisions of the Act, A and it is clear that the intention of the legislature in enacting s 41(a) was to enable "any person", before the appointment of an executor, to take it upon himself to act for the preservation of the deceased's property, or to sell the deceased's property for the purposes of giving the deceased a decent burial or for the sustenance of the deceased's family or livestock. B This was intended to provide for situations which arise before an estate can be properly administered under the authority of the courts and the Master. It is inconceivable that the legislature could have envisaged the use of s 41(a) in circumstances where the Master has already been involved in the administration of a deceased estate. Section 41(a) is not applicable if the person taking it upon himself to dispose the deceased's property C does so for fraudulent purposes. The authorization and protection against liability given to persons who take it upon themselves to intervene for the deceased's burial or the deceased's dependents by disposal of the deceased's property does not extend to fraudsters.

Cases cited D

Chitsinde & Anor v Musa & Anor S-20-11

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

Katsande v Katsande & Ors 2010 (2) ZLR 82 (H)

Legislation considered E

Administration of Estates Act [*Chapter 6:01*], ss 22(1) & (2), 41(a) & (b), & 91

Case information

C Mucheche, for the applicant

P Nyeperai, for the first respondent F

Judgment

Uchena J: The applicant is the Estate of the late Jean Moir Hedley, represented by John Moir Rosslyn Hedley in his capacity as its *curator bonis*. The first respondent, Angwa City Investments (Pvt) Ltd, purchased a flat belonging to the applicant's estate. The applicant is challenging the legality of that sale. The second respondent, Saint Sebastian Estate Agents, G is the first respondent's estate agent, with a mandate to manage the flat in dispute. The third respondent, the estate of the late Israel Gumunyu is cited for the involvement of the late Israel Gumunyu in the sale of the applicant's flat without the Master's authority, and his failure to hand over the purchase price

to the applicant. Israel Gumunyu committed suicide when this matter was being investigated, leaving his estate to answer for his handling of the H

2013 (1) ZLR p149

Uchena J

A applicant's estate. The fourth respondent, the Registrar of Deeds, is being cited in his official capacity as the officer responsible for the registration of immovable properties. The fifth respondent, the Master of the High Court, is being cited in his official capacity as the officer responsible for the administration of deceased estates.

Jean Moir Hedley died testate, leaving behind three adult children. In her will B she bequeathed all her estate to John Moir Rosslyn Hedley and appointed an executor testamentary. In anticipation of the pending inheritance, but not in accordance with his mother's will, John took all the papers pertaining to his late mother's estate to the Will Writing Centre where he handed them to Israel Gumunyu who promised to handle the estate. In para 2 of her will C the late Jean Moir Hedley appointed National Executor and Trust (Pvt) Ltd to be the executor and administrator of her estate. Israel Gumunyu sold the applicant's flat without the Master's authority. This got him in trouble which he apparently avoided by taking his life. The avoidance was, however, only personal and of a temporary nature, as his estate is still to account for his handling of the applicant's estate.

D The applicant seeks an order in the following terms:

1. The agreement of sale entered into by and between the applicant as represented by Israel Gumunyu in his capacity as its *curator bonis* and the first respondent is declared null and void *ab initio*.
2. The fourth respondent be and is hereby ordered to cancel deed of transfer E number 4483/10 in favour of the first respondent and register the property known as an undivided 2.38 percent share being share number 20 in certain piece of land situate in the District of Salisbury, being stand 1773 Salisbury Township, measuring 2379 square metres, in the name of the applicant.
3. The F third respondent be and is hereby directed to reimburse the first respondent the purchase price it paid to Israel Gumunyu for the property called an undivided 2.380 percent share, being share number 20 in certain piece of land situate in the District of Salisbury, being stand 1773 Salisbury Township, measuring 2379 square metres, pursuant to the null and void agreement of sale entered into by and between the applicant G as represented by Israel Gumunyu in his capacity as its *curator bonis* and the first respondent on 3 September 2010
4. The first and third respondents shall pay the costs of this application.

The first and second respondents opposed the applicant's application, and filed a counter claim for arrear rentals and the eviction of John Moir Rosslyn H Hedley from the flat in dispute. The third to fifth respondents did not file

---

2013 (1) ZLR p150

Uchena J

any opposing papers. The second respondent filed opposing papers and A participated up to the filing of Heads of Argument. In its heads of argument it said it would abide with the order of the court. It thus did not participate in this litigation any further.

The facts of this case are common cause. Mr *Nyeperai* for the first respondent does not dispute them but sought to hang the legality of the purchase of the B applicant's flat without the Master's authority on s 41 (a) of the Administration of Estates Act [*Chapter 6:01*] (hereinafter called "the Act"). He submitted that the late Israel Gumunyu sold the flat at the instance of John Moir Rosslyn Hedley, the beneficiary of the late Jean Moir Hedley's will. He further submitted that John was in desperate need of cash and had suggested the sale of the flat when Gumunyu had not succeeded in timeously accessing C money from the late Jean Moir Hedley's foreign accounts. That is not in dispute. It is common cause, that John Moir Rosslyn Hedley and his two siblings wrote letters to the Master in which they were persuading him to authorise Israel Gumunyu to sell the flat. The issue is whether or not s 41 (a) of the Act authorises a *curator bonis* to do under it what he is prohibited from doing by other sections of the same Act. D

Mr *Mucheche,* for the applicant, submitted that the authority of a *curator bonis* is restricted by ss 22(2) and 91 of the Act. Section 22(2) of the Act provides as follows:

"(2) Every such *curator bonis* may collect such debts and may sell or dispose of such perishable property belonging to the estate as the Master shall specially E authorize."

Mr *Mucheche* submitted that in terms of s 22(2) of the Act a *curator bonis* can only dispose of perishable property and only when specially authorised by the Master. He submitted that immovable property is not perishable and can not be sold by a *curator bonis*. He further submitted that if a *curator bonis* needs the Master's special authority to sell perishables, the legislature F could not have required less stringent restrictions for him to sell immovables. I agree with Mr *Mucheche*'s interpretation of s 22(2). Mr *Nyeperai,* for the first respondent, agreed with Mr *Mucheche*'s general interpretation of s 22(2), but disputed Mr *Mucheche*'s submission on the intention of the legislature on the sale by the *curator bonis* of immovables. G

Mr *Mucheche* for the applicant also submitted that in terms of s 91 of the Act a *curator bonis* cannot sell immovable property belonging to or forming part of any estate under his guardianship, unless the High Court or any judge thereof has authorized such sale or unless the person by whom any such *curator bonis* has been appointed has directed such sale to be made. Section 91 of the Act provides as follows: H

A "No tutor, either testamentary or dative, and no curator, either nominate or dative, or *curator bonis* shall sell, alienate or mortgage any immovable property belonging to any minor or forming part of any estate under the guardianship of such tutor or curator, unless the High Court or any judge thereof has authorized such sale, alienation or mortgage or unless the person by whom any such tutor testamentary or curator nominate has been appointed has directed such sale, alienation or mortgage to be made."

B Mr Mucheche submitted that s 91 prohibits the sale of immovables by a *curator bonis* unless he has been authorised to do so by the High Court, a judge of the High Court or by the person who appointed him. I agree with his submission.

The clear meaning of s 91 is that a *curator bonis* cannot sell immovable C property without being authorised to do so by the High Court, a Judge of the High Court, the testator or the person who appointed him. In this case Israel Gumunyu was appointed *curator bonis* by the Master in terms of s 22 (1). He thus could not sell the applicant's immovable property without the Master's authority. That is probably why he had asked John and his siblings for letters of support to request the Master to authorise him to sell the flat. It D is not in dispute that he thereafter sold the flat without the Master's authority.

Mr *Nyeperai,* for the first respondent, does not dispute this interpretation of s 91, and that in terms of it Israel Gumunyu was not entitled to sell the flat without the authority of either the High Court, a judge of the High Court or the Master. He however submitted that the provisions of s 41(a) of the Act E authorised him to do so as it does any other person. Section 41(a) provides as follows:

"If –

(a) before letters of administration are granted by the Master to any executor for the administration of any estate, any person takes upon himself to administer, distribute or in any manner dispose of such estate or any part thereof, except F in so far as may be authorized by a competent court or by the Master or may be absolutely necessary for the safe custody or preservation thereof or for providing a suitable funeral for the deceased or for the subsistence of the family or household or livestock left by the deceased; or

(b) :

Provided that when any person who is sued for the payment of any debt or legacy G which he has rendered himself personally liable to pay in manner aforesaid proves to the satisfaction of the court before which he is sued that the true amount and value of the property which has actually been duly administered, distributed and disposed of by him did not exceed a certain sum, and that his administration, distribution or disposal of the same was not fraudulent, then and in every such case such person shall only be personally liable for so much of such sum as he H fails to prove has been distributed or disposed of in such manner and for such

---

purposes as by law the same ought to have been distributed or disposed of, and A for the amount of the costs by him incurred in and concerning such suit by the plaintiff therein, notwithstanding that by reason

of such person's personal liability having been restricted in manner aforesaid such plaintiff has not recovered from such person any part of the debt or legacy sued for".

Mr *Nyeperai* submitted that a *curator bonis* can, like "any other person", within which definition he falls, dispose of the deceased's property without B any authorization for the benefit of the deceased's family. In this case he relies on John's desperate need for cash.

Section 41(a) as read with the proviso to s 41 authorizes any person without the authority of a competent court or the Master to take it upon himself to take the deceased's property into his safe custody for its preservation or to C sell the deceased's property when it is absolutely necessary for the purpose of providing a suitable funeral for the deceased or for the subsistence of the deceased's family or household or livestock, and limits such person's liability to the deceased's estate or its creditors, in the circumstances there mentioned. The words "any person" have a very wide meaning and can mean any person without exception. That is the meaning Mr *Nyeperai* for the first respondent D sought to give to s 41(a). His submissions are persuasive when considered from a general perspective. He submitted that the need to sell arose from the apparent desperation of John, the beneficiary of the applicant. That would, if that was the only consideration to be given to the interpretation of s 41 (a), have given him success. E

Mr *Mucheche* for the applicant submitted that provisions of a statute should be construed in harmony with each other, so that there would be no conflicts between sections of a statute. He submitted that if the legislature wanted to include a curator *bonis* within the meaning of the words "any person" in s 41(a) they would not have limited his authority to dispose the deceased's property in ss 22(2) and 91. My understanding of his submission is that the F interpretation of s 41(a) of the Act must be sought *ex visceribus actus.* This means the intention of the legislature in enacting s 41 (a) of the Act must be sought "from the bowels of the Act". The "bowels of the Act" here refers to other parts of the Act, in this case including ss 22(2) and 91.The resultant interpretation becomes clear when the section in issue is read and interpreted G together with provisions which precede and follow it. Mr *Mucheche* was therefore arguing that the legislature could not have given the *curator bonis* powers under s 41(a) which it had taken away from him in ss 22(2) and 91. I agree with Mr *Mucheche.*

The intention of the legislature in enacting s 41(a) was to enable "any person" to take it upon himself, before the appointment of an executor, to act for the H

Uchena J

A preservation of the deceased's property, or sell the deceased's property for purposes of giving the deceased a decent burial or for the sustenance of the deceased's family or livestock. This was intended to provide for situations which arise before an estate can be properly administered under the authority of the courts and the Master. It is inconceivable that the legislature could have envisaged the use of s 41(a) in circumstances where the Master has already B been involved in the administration of a deceased estate. In this case the Master had already appointed Israel Gumunyu the applicant's *curator bonis.*

I therefore find that Israel Gumunyu had no authority to sell the applicant's flat. When the Act is read and interpreted as a whole he could only have validly sold the flat with the Master's authority. The sale was therefore illegal C and a nullity. The fact that the first respondent was an innocent purchaser is not relevant as the sale was a nullity. See *Karitawu v Karitawu & Ors* 2007 (2) ZLR 64 (H), *Chitsinde & Anor v Musa & Anor* S-20-11 and *Katsande v Katsande & Ors* 2010 (2) ZLR 82 (H) in which a judge of the Supreme Court and two judges of the High Court held that the issue of innocent purchaser does not turn a non-sale into a valid sale.

D The applicability of s 41(a) of the Act in this case is further excluded by its not being applicable if the person taking it upon himself to dispose the deceased's property does so for fraudulent purposes. The authorization and protection against liability given to persons who take it upon themselves to intervene for the deceased's burial or the deceased's dependents by disposal E of the deceased's property does not extend to fraudsters. In this case Israel Gumunyu had asked the deceased's children for letters supporting his being authorised to sell. Without reverting back to them he sold the flat without the Master's authority. He did not deposit the purchase price into the applicant's account. An officer from his office, who deposed to the applicant's supporting affidavit, agreed with what John the applicant's curator *bonis* deposed in F his founding affidavit. On p 12 of the record and para 20 of his founding affidavit John said:

"Unfortunately probably having realised the gravity of the situation he was in, Mr Gumunyu committed suicide, having abused his office by intentionally and unlawfully defrauding and depriving my late mother's estate of a significant part of its property, to my prejudice as the beneficiary therein."

G This was a direct allegation of fraud, yet Clever Mandizvidza who is employed by the Will Writing Centre as its operations manager on p 29 of the record and para(s) 2 and 3 of his supporting affidavit said:

"2. Mr John Moir Rosslyn Hedley approached our offices some time in February 2010 seeking advice on how he could wind up his late mother's estate. Mr H Gumunyu then advised him that our office could handle the matter for him.

2013 (1) ZLR p154

Uchena J

3. I can confirm that what Mr Hedley has deposed to in his founding affidavit A as far as his dealings with Mr Gumunyu in this case are concerned is true and correct."

This is a telling admission by the late Mr Gumunyu's office that the applicant's estate was fraudulently dealt with by Gumunyu. If it was otherwise his office would have exonerated him. If, for example, the money was in their account B pending its being deposited into the applicant's account, Mandizvidza would have said so. The admission by his office is strengthened by his committing suicide.

In his founding affidavit John said he handed everything to Gumunyu. That included the deceased's will which clearly appoints someone else as the executor. Why would Gumunyu offer to handle the deceased's estate when C he and his Will Writing Centre were not the appointed testamentary executor? This suggests fraud, as confirmed by the subsequent events culminating in the disappearance of the purchase price. The sale of the applicant's flat by Gumunyu is tainted with fraud and nothing can hang on it. The applicant's application must succeed and the first respondent's counter claim for the D eviction of John from the flat in dispute must fail. The applicant's draft order seeks an order against the third respondent in favour of the first respondent. The first respondent vehemently resisted the applicant's application. It cannot therefore benefit from an application it resisted in whole until the end of the parties' submissions. If the first defendant chooses to recover from the third E respondent it can institute its own proceedings.

The applicant had in its draft order sought costs against the first and third respondents. The third respondent did not oppose the applicant's application. It therefore did not cause the applicant costs beyond those which would have been necessary for it to apply for a default judgment against it. The second F respondent participated up to the filing of its heads of argument. The applicant had to deal with its opposition to that stage. The rest of the applicant's costs were caused by the first respondent. It will therefore be ordered that the first second and third respondents pay the applicant's costs incurred as a result of their necessitating and opposing the applicant's application. Each respondent's liability should be limited by the extent of its resistance to the G applicant's application.

I therefore order that:

1. The agreement of sale entered into by and between the applicant as represented by Israel Gumunyu in his capacity as its *curator bonis* and the first respondent is declared null and void *ab initio*. H

2013 (1) ZLR p155

Uchena J

2. The A fourth respondent be and is hereby ordered to cancel deed of transfer number 4483/10 in favour of the first respondent and register the property known as an undivided 2.380 per cent share being share number 20 in certain piece of land situate in the District of Salisbury, being stand 1773 Salisbury Township, measuring 2379 square metres in the name of the applicant.
3. The B first, second and third respondents shall jointly and severally, the one paying the others to be absolved, pay the applicant's costs up to the filing of its application.
4. The first and second respondents shall jointly and severally, the one paying the other to be absolved, pay the applicant's costs from the filing C of their notices of opposition to the filing of the second respondent's heads of argument.
5. The first respondent shall pay the rest of the applicant's costs.

Matsikidze and Mucheche, applicant's legal practitioners

D *Costa & Madzona,* first respondent's legal practitioners

Bvekwa Legal Practitioners, second respondent's legal practitioners

© 2015 Juta and Company (Pty) Ltd.

Document 23 of 73

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2013/Volume 1/MANDALA v GLENS REMOVALS AND STORAGE ZIMBABWE (PVT) LTD 2013 (1) ZLR 156 (H)

MANDALA v GLENS REMOVALS AND STORAGE ZIMBABWE (PVT) LTD 2013 (1) ZLR 156 (H)

Citation	2013 (1) ZLR 156 (H)
Case No	Judgment No. HH-78-13
Court	High Court, Harare
Judge	Bere J
Heard	17 October 2011; 18 October 2012; *CAV*
Judgment	14 February 2013
Counsel	*N P Gonese,* for the plaintiff *H Nkomo*, for the defendant
Case Type	Civil trial
Annotations	No case annotations to date

Flynote

Contract – *enforceability – paratie executie clause – sale of moveables delivered to creditor by debtor – contract valid and enforceable – right of debtor to seek protection of court upon just cause shown – liability of debtor must be agreed between parties or established through court* D *process – not open to creditor unilaterally to determine level of debt and then enforce clause – debtor entitled to seek the protection of court*

Contract – *pactum commissarium – unenforceable in terms of law of Zimbabwe*

Headnote

"An agreement for the sale by means of *paratie executie* of movables, E delivered to a creditor by a debtor is valid and enforceable. It is, however, open to the debtor to seek the protection of the court if, upon any just ground he can show that, in carrying out the agreement and effecting a sale, the creditor has acted in a manner which has prejudiced him in his rights" *(dicta per* Kotzé JP in *Osry v Hirsch Loubser and Co Ltd* 1922 CPD 531 at 547 applied). F

The plaintiff lodged her household goods with the defendant for storage at agreed monthly charges. When she did so, she personally gave contact address in the United Kingdom. This was the only document signed by her. It was a specific term of the agreement between the parties that should the storage charges remain unpaid for three consecutive months, the G defendant would have the right to sell part or all of the goods by public auction in order defray the accrued charges.

Following an alleged default by the plaintiff in the payment of storage charges, the defendant sold the bulk of her property by public auction. The court accepted that the plaintiff was never advised of the arrear payments as the correspondence meant for her attention was sent to the wrong address and not to her H

A contact address in the United Kingdom. At issue between the parties was whether the defendant had breached the contract or whether it had acted wrongfully and unlawfully in selling the property to defray its charges. Liability was disputed and parties were not agreed as to how much money was owed to defendant. It was submitted on behalf of the defendant that the contract was one of *paratie executie* and was thus B enforceable. The plaintiff, on the other hand, submitted that the clause relied upon by the defendant in disposing of the property was *pactum commissarium* and unenforceable.

Held, that although *paratie executie* in appropriate circumstances remains part of our law, subject to the qualification that the creditor is precluded C from acting in a manner which prejudices the debtor in his right, it did not assist the defendant in this case. The principle was inapplicable as the plaintiff was unaware of the proposed sale of her property and there was no agreement as to how much she owed defendant. Her liability ought to have been established first through a court process.

Held, further, that the clause in the contract upon which the defendant relied D to sell the plaintiff's property without her knowledge, consent or approval was a *pactum commissarium* which was unenforceable.

Held, further, that in the circumstances and in accordance with the relief the plaintiff sought she was entitled to an award based upon the replacement value of her property which had been sold and a further award damages E for her pain and suffering occasioned by the defendant's unlawful conduct.

Cases cited

Aitken v Miller 1950 SR 227; 1951 (1) SA 153 (SR)

Changa v Standard Finance Ltd. 1990 (2) ZLR 412 (S)

Chimutanda Motor Spares (Pvt) Ltd v Musare and Anor 1994 (1) ZLR 310 (H) F

Osry v Hirsch, Loubser & Co Ltd 1922 CPD 531

Case information

N P Gonese, for the plaintiff

H Nkomo, for the defendant

Judgment

G **Bere J:** On 18 October 2012, I pronounced my decision in this case. I indicated my reasons would follow. Here they are:

The plaintiff originally issued summons in this court on 24 October 2005 against the defendant, seeking an order to compel the defendant to return her property which had been deposited with the defendant for safe keeping H when the plaintiff left this country for the United Kingdom.

Bere J

The plaintiff had also sought, in the alternative, to be paid the estimated A equivalent value of the goods in question. Additionally the plaintiff sought to recover general damages for pain, emotional stress and trauma caused by the unlawful disposal of her property without her consent and knowledge.

The plaintiff's claims were originally pegged in the local currency.

Owing to the advent of dollarisation, on 30 September 2010, and by consent, B the plaintiff's claim was amended to reflect the currency currently in use in this country.

The plaintiff's claim was amended, in the alternative, to read that in the event of the defendant failing to restore the plaintiff's property, the defendant be ordered to pay a sum of US$25 000, being damages suffered by the plaintiff C when the defendant wrongfully and unlawfully sold the plaintiff's property.

The plaintiff's claim for damages for pain and suffering, emotional stress and trauma was put at US$3 000.

The interest at the prescribed rate on the total amounts of claims was claimed from the date of summons to date of full payment. D

The facts that are not in dispute

The facts giving rise to this action can be summarised as follows:

On 28 March 2000 the plaintiff lodged her household goods with the defendant for storage at agreed monthly charges. When the plaintiff lodged her goods with the defendant she personally gave her contact address as 48A E Manor Avenue, Brockley, London SE4 1PD. This is apparent from exh 1 (receipt for goods) signed by the plaintiff at the time the goods were taken into the defendant's storage. This is the only document which was signed by the plaintiff.

It is not in dispute that the plaintiff's stored goods were to attract a monthly F storage charge and that payment in this regard was to be made in advance.

In addition, it was a specific term of the agreement between the plaintiff and the defendant that should the storage charges "remain unpaid for three (3) consecutive months, Glens reserves the right to sell part or all the goods by public auction without notice in order to defray the accrued charges".

It is the alleged violation of this clause of the contract that has led to these G proceedings.

Following the alleged default by the plaintiff in the payment of storage charges, the bulk of her property was sold through public auction. Some of the property which could not possibly have been sold, like the plaintiff's marriage and educational certificates, could not be accounted for. The same H

A happened with other household goods which did not appear on the list of items sold by public auction. These were simply not traceable.

It is also common cause that after the defendant had taken what it believed was due to it, there was some residue due to the plaintiff and that it was not until the plaintiff had gone to the defendant to enquire about her goods that B she was advised of both the sale and the residue.

The plaintiff's property was sold by public auction without her knowledge and in disposing of the property in the manner it did, the defendant relied on the terms of the conditions of storage as perceived by it.

This matter was referred for trial on only one issue, namely: "Whether or not the defendant breached the contract between the plaintiff and the defendant or C alternatively whether or not the defendant acted wrongfully and unlawfully in the circumstances, if so the quantum of damages."

The evidence

Only two witnesses gave evidence in this case, namely, the plaintiff and Mr Josephat Murape, the defendant's representative.

D The parties were not in agreement on virtually all the issues they testified on and in particular as to the alleged arrears at the time of the sale of the plaintiff's property. The defendant through its representative put the figure for arrears at Z$1 152 850.35 but could not provide a satisfactory explanation as to how that figure was arrived at, suggesting that because of hyperinflation E at the time the originally agreed storage charges kept on being changed. The witness said all these changes were in correspondence sent to the plaintiff's locally chosen addresses.

The plaintiff's approach in this regard was to vehemently deny ever receiving any correspondence or notices from the defendant. The plaintiff put up a very strong and persuasive argument that in the only paper that she signed F and lodged with the defendant before her departure for the United Kingdom she gave her contact address as the UK one. This averment accords with or is consistent with exh 1 which is the only document signed by the plaintiff.

When it was suggested to the plaintiff in cross-examination that the relevant notices to alert her of the arrear charges were either sent to 34 Greg Avenue, Number 16 2nd Crescent Street, Warren Park, Harare and to 7 Delomo Place, G Mt Pleasant, Harare, the plaintiff denied ever instructing the defendant to use any of such addresses and maintained that her contact address, which the defendant was supposed to use in accordance with her written instructions, was 48A Manor Avenue, Brockley, London SE4 1PD.

The plaintiff denied ever giving the defendant instructions to send any H correspondence to any other place other than the aforesaid United Kingdom

---

Bere J

address. The plaintiff maintained she did not know anyone on the addresses A allegedly used by the defendant. She further maintained that she did not know of a place called 7 Delomo Place, Mt Pleasant, where some of the letters addressed to her were sent but that her place was called 7 *Delano* Place, Mt Pleasant (my emphasis), a factor which even the defendant's counsel was later to concede in his written submissions.

The evidence of Murape corroborated the plaintiff's evidence that none of B the correspondence to the plaintiff was ever addressed to her chosen United Kingdom address in accordance with her clear instructions on exh 1.

If the court accepts that the correspondences meant for the attention of the plaintiff were sent to the wrong addresses (which factor the court has no option but to accept) it must therefore be the natural conclusion that the C plaintiff must be believed when she said she was never advised of the arrear payments and further that the defendants unilaterally decided to sell her property to allegedly defray the accrued charges which she was not aware of.

Was it competent for the defendant to sell the plaintiff's property without any recourse to court D

The main thrust of the defendant's position is that the contract allegedly entered into by the plaintiff and the defendant allowed the latter to act in the manner it did.

In his closing submissions, counsel for the defendant equated the contractual arrangement to one governed by what is referred to as a "*paratie* execution E clause", which he argued has support in our law. Counsel referred me to *Changa v Standard Finance Limited* 1990 (2) ZLR 412 (S) where there is some reference to this principal of our law.

There can be no argument in my view that "*paratie* execution" in appropriate circumstances remains part of our law, subject to the qualification that the creditor is precluded from acting in a manner that prejudices the debtor in F his/her rights.

In this jurisdiction the operation of "*paratie excutie*" as a principle of our law can be traced back to *Aitken v Miller* 1950 SR 227; 1951 (1) SA 153 (SR) *per* Beadle J where the headnote reads at p 153:

> "In Southern Rhodesia an agreement for the sale by means of *paratie executie* G of movables, delivered to a creditor by a debtor, is valid and enforceable".

The qualification in the operation of paratie excutie is succinctly put in the following terms in *Osry v Hirsch, Loubser and Co Ltd* 1922 CPD 531 at 547:

> "It is, however, open to the debtor to seek the protection of the court if, upon any just ground he can show that, in carrying out the agreement and effecting a sale, the creditor has acted in a manner which has prejudiced him his rights." H

Bere J

A It occurs to me that *paratie excutie*, as a principle of law is not something that our courts have blindly followed. I will later in this judgment deal with either its applicability or non-applicability in the instant case.

In contrast, counsel for the plaintiff in this case put up an equally strong and persuasive argument that in her submission the clause that governed the B plaintiff and the defendant in this case, and relied upon by the defendant in disposing of the plaintiff's property, was a "*pactum commissarium*" and unenforceable, and therefore invoking it in this case was incompetent on the part of the defendant.

In supporting her position the plaintiff's counsel referred me to *Chimutanda Motor Spares (Pvt) Ltd v Musare & Anor* 1994 (1) ZLR 310 (H) where C Mtambanengwe J made a fairly detailed analysis of a *pactum commissorium* and why the law reprobates it. The learned judge remarked at 315:

> "I find the agreement as to the consequences of defaulting on the defendant's part is a *pactum commissorium* and as such unenforceable."

It would seem to me that in all the cases where an attempt has been made to D rely on a *paratie executie*, both the defendant and the plaintiff would be in agreement as regards the liability of the latter. Liability was never an issue in those cases as there was unanimity in that regard.

In the case before me there is certainly no unanimity as regards the liability of the plaintiff. This issue occupied the bulk of the proceedings in this case E and, even after the case was concluded, it was not possible to establish the alleged liability of the plaintiff because of the position adopted by the plaintiff and accepted by the court that she was never advised of her liability through her chosen contact address.

It occurs to me that before the defendant sought to dispose of the plaintiff's F property in the manner it did, the plaintiff's liability ought to have been established first through a court process. In this case there was no agreement as regards what was due to the defendant hence the inapplicability of the principle.

Even if one were to assume that *parate executie* was applicable in this case, it is clear to me that in unilaterally deciding that the plaintiff owed it G certain sums of money in a situation where the defendant acted as both the prosecutor and the adjudicator in determining what was allegedly due to it, the defendant acted to the prejudice of the plaintiff. If this is accepted (as it should be, in my view), then, it becomes clear that the situation in this case projects the qualification highlighted in *Osr*y's case s*upra* where the plaintiff H has a justified reason to have recourse to court.

Bere J

The plaintiff's position in this case is that she was never given the opportunity A in court to contest what was allegedly due to the defendant in terms of outstanding payments before the defendant unilaterally decided on the figure, which was followed by the sale of her property by way of public auction. There is persuasion in the argument advanced by the plaintiff's counsel that there was need for the plaintiff to get a court authorization or order to B dispose of the plaintiff's property. Loosely interpreting the contract in the manner suggested by the defendant's counsel would in my view have grave consequences in that that approach would stampede upon the rules of natural justice, which demand that even a murderer must be heard first before drastic or adverse action is taken against him/her.

Allowing the defendant to embark on unilateral action would give the C defendant to act as both the prosecutor and a judge in a matter it has a vested interest in and in my view this would not accord well with public policy. Consumers or those in the plaintiff's position would be most vulnerable to such conduct as exhibited by the defendant in this case. There is need to curtail the conduct of the defendant by ensuring that it does not act to the D prejudice of the consumers of its services.

It is equally disturbing that, contrary to the averments by the defendant, the evidence in this case clearly showed that not all the property that was deposited with the defendant was sold through public auction. Property like the plaintiff's marriage certificate, children's academic and birth certificates could not possibly have been sold and such property was not accounted for. E It was only in a fully fledged adversarial proceedings, which ought to have preceded the disposal of the plaintiff's goods, that such issues should have been ascertained.

I find it even more disturbing that, even after unilaterally selling the plaintiff's property, the defendant did not bother to trace the plaintiff at her chosen F contact address to give her the residue from the sale of her property after taking into account what it deemed was due to it.

One gets the impression that if the plaintiff had not taken it upon herself to take the trouble of going to make enquiries to Glens (the defendant), she would never have known what happened to her property. The conduct G exhibited by the defendant falls far short of the best practice in conducting business in a transparent manner.

Everything said, I am more inclined to accept, as persuasively argued by the plaintiff's counsel, that the condition relied upon by the defendant in selling the plaintiff's property without the knowledge, consent and or approval of the plaintiff was a *pactum commissorium*, which our law reprobates. H

Bere J

A If this position is accepted (as it should be), then it logically follows that the defendant acted wrongfully and unlawfully in facilitating the disposal of the plaintiff's property in the manner it did.

Replacement or compensation of the plaintiff's property

Because of the distortions brought by dollarisation it was never going to be B easy for the plaintiff to try and give an accurate value of her property which was unlawfully sold by the defendant.

The plaintiff must, however, be commended for having taken the trouble of trying to find comparable prices or values of her property. The plaintiff visited some department stores like Meikles and Barbours collating possible C replacement values of her property. In this regard, the plaintiff produced two sets of quotations from Barbours and Meikles department stores whose total value adds up to US$28 454.

Throughout the proceedings, I did not hear the defendant making the slightest attempt to challenge the quotations or values given by the plaintiff. If D anything, the thrust of the defendant's representative was merely to say that his company was justified in selling the plaintiff's property in the manner it did, something which this court finds to have been wrongful, unlawful and distasteful.

The uncontested value of the plaintiff's property adds up to US$28 454 but E in her summons she claimed US$25 000.

I am more inclined to grant to the plaintiff the figure in her summons as a fair estimation of her unlawfully sold property as opposed to the US$28 454 because there was no attempt by her counsel to have her claim amended to accord with her evidence at the close of the proceedings.

F **The claim for damages for pain and suffering**

I have had the privilege of seeing the plaintiff testify in these proceedings.

That the plaintiff was pained by the loss of her property through the conduct of the defendant cannot be doubted by anyone. In her own uncontested testimony the plaintiff said she actually fainted at Glens when she was told G that all her household property deposited with the defendants had been sold.

Even when she gave evidence in this court, it was evident that she had been severely traumatised by the loss of her goods, the pain she was in was unmistakable and was there for everyone to see. This probably explains why the defendant's representative did not make any attempt to challenge H her evidence in this regard.

Bere J

In this regard I consider US$1 500 as fair and reasonable as general damages A for the plaintiff's pain and suffering.

Consequently I order as follows:

(1) that judgment be and is hereby granted in favour of the plaintiff in the sum of US$25 000 being the replacement value of her property wrongfully and unlawfully sold by the defendant

without the plaintiff's knowledge B and or authorization.

(2) that the defendant pays US$1 500 to the plaintiff for damages for pain and suffering occasioned by the unlawful conduct of the defendant.

(3) that both payments attract interest at the prescribed rate from the date of judgment (18 October 2012) to date of payment in full. C

(4) that the defendant pays costs of suit.

Goneso & Associates, plaintiff's legal practitioners

Mtetwa & Nyambirai, defendant's legal practitioners D

© 2015 Juta and Company (Pty) Ltd.

Document 24 of 73

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2013/Volume 1/SUMBURERU v CHINAMORA & ORS 2013 (1) ZLR 165 (H)

SUMBURERU v CHINAMORA & ORS 2013 (1) ZLR 165 (H)

Citation	2013 (1) ZLR 165 (H)
Case No	Judgment No. HH-59-13
Court	High Court, Harare
Judge	Guvava J
Heard	21 September 2012; *CAV*
Judgment	21 February 2013
Counsel	*D Ochieng*, for the applicant *S Hwacha*, for the respondent
Case Type	Civil application
Annotations	No case annotations to date

Flynote

Will – *interpretation – intention of testator – will appointing wife as heiress – parties divorcing and testator remarrying – no new will executed – no intention that first wife should become heir*

Will – *validity – marriage subsequent to execution of will – will not made* D *in contemplation of marriage – will void upon marriage*

Headnote

The applicant married the deceased under customary law in 1977. The marriage was registered in terms of the African Marriages Act [*Chapter 238* of 1974]. Also in 1977 the deceased executed a will appointing the E applicant as the heiress and executrix of his estate. The will was never amended, varied or revoked until his death in 1997.

In 1978, the applicant and the deceased were married in terms of the Marriage Act [*Chapter 37* of 1974]. The marriage lasted until 1986, when the applicant and the deceased divorced. In terms of their consent paper the deceased made a financial settlement on the applicant. The deceased F thereafter married the first respondent in terms of customary law and they lived as husband and wife until he died in 1997. The deceased did not write another will.

The applicant sought an order declaring the will executed in 1977 to be valid, as well as consequent relief.

G *Held*, that it was necessary to determine the intention of the deceased when he made the will in order to ascertain its validity. To do so, it was necessary to look at the wording of the will. A reading of the will left no doubt that when the deceased made the will his intention was to benefit his wife. At the time the will was executed, customary law did not allow a wife to inherit from her husband. The deceased was clearly intent upon H circumventing that aspect of customary law and wanted to be certain

---

that in the event of his death his property would not fall into the hands A of his male relatives to the exclusion of his wife. However, at the time of his death in 1997, the deceased and the applicant had been divorced for more than ten years. Upon divorce the applicant had been awarded a significant settlement. It could not have been the deceased's intention that the applicant would again inherit his estate upon his death since he did not revoke his will. The mischief that he had sought to circumvent B in his will no longer applied to the applicant, as she was no longer his wife. Once she ceased to be his wife the will became invalid, as it was no longer capable of enforcement.

Held, further, that in any event, the deceased's will became void upon his marriage to the applicant in terms of the general law in 1978. Section 2 C of the Deceased Estates Succession Act [*Chapter 302* of 1974], which applied to this will, provided that a will, other than a joint will of an intended husband and wife who thereafter married each other, executed by any person prior to marriage shall become null and void on marriage unless such person endorses on such a will that it is desired that the same shall remain in full force and effect. No such endorsement having been D made, the will became void.

Legislation considered

African Marriages Act [*Chapter 238* of 1974] , s 13

African Wills Act [*Chapter 240* of 1974], ss 6 & 7

Deceased Estates Succession Act [*Chapter 302* of 1974] , s 2 E

Case information

D Ochieng, for the applicant

S Hwacha, for the respondent

Judgment

Guvava J: Do the dead speak from beyond the grave? In my view, that is F the question that this court must answer in order to determine this case. This is a matter which has remained unresolved for the past 15 years. In spite of his leaving a will, the parties have tried, without success, to ascertain the true intention of how the rights and benefits of the estate of the late Amos John Chirunda, who died on 8 December 1997, should devolve. H

The facts of this matter may be summarised as follows.

The applicant is the former wife of the late Amos John Chirunda (the deceased). The first respondent married the deceased in terms of customary law during 1986. The second respondent is the Master of the High Court and is cited in his official capacity. The third respondent is the executor dative of the estate, appointed by the second respondent. H

Guvava J

A It is common cause that on 9 December 1977 the deceased executed a will, appointing applicant as the heiress of his estate. The will was never amended, varied or revoked until his death in 1997. The will in question was a simple one, being just four paragraphs in length. For the sake of completeness I will quote the will in full.

> "I, AMOS JOHN CHIRUNDA, do hereby revoke all past Wills and testamentary B acts and declare this to be my last will.
>
> I appoint my wife MARGARET CHIRUNDA (nee SUMBURERU) to be the Executor and Heiress to my estate.
>
> In the event of my wife Margaret dying at the same time with me, I appoint my nephew HASTINGS CHIRUNDA and my sister ALICE CHIRUNDA to be joint Heir and Heiress to my estate in equal shares.
>
> C I reserve to myself the power from time to time and at all times hereafter to make all such alterations in or additions to this my Will as I may think fit, either by separate act or at the foot hereof, desiring that all such alterations or additions so made under my own signature and duly witnessed according to law, may be held to be as valid and effectual as if the same had been inserted herein.
>
> Given under my hand at SALISBURY on this the 9th day of December, 1977."

D The deceased paid bride price under customary law for the applicant on 11 September 1977, following which the marriage was registered under the African Marriages Act. On 29 October 1978 the applicant and the deceased entered into a civil marriage in terms of the Marriage Act [*Chapter 37* of 1974]. They had three children. On 22 July 1986, after a lengthy and E acrimonious battle, the applicant and the deceased divorced. In terms of their consent paper, the deceased made a financial settlement on the applicant. The deceased thereafter married the first respondent in terms of customary law and they lived as husband and wife until he died in 1997. In February 1998 the applicant was invited to the Master's office to register his estate in terms of his will. The applicant was issued with letters of administration F in terms of the will. On 4 March 1998 the Master wrote to the applicant seeking to revoke the letters of administration on the basis that at the time of his death she was divorced from the deceased. The applicant declined to surrender the letters of administration. The first respondent thereafter instituted proceedings seeking to have applicant's appointment as executor G set aside. The application was dismissed by this court on the basis that the will was valid and the applicant had been properly appointed as executor in terms of the will. On appeal the decision of the court *a quo* was set aside by Cheda JA on the basis that the wrong law had been applied in determining the matter. The Supreme Court held that the court should not have applied s 17 of the Wills Act [*Chapter 6:06*] but that the proper law to be applied H was the African Wills Act [*Chapter 240* of 1974]. Following this decision,

---

Guvava J

on 19 April 2005 the Master decided to appoint an independent executor, A being the third respondent in this matter.

The Master proceeded to appoint the first respondent as the surviving spouse of the deceased's estate. The children of the deceased objected to the appointment and formally lodged an objection with the Master. They argued that the first respondent was not married to the deceased and should not be B appointed as the surviving spouse. In order to get guidance on the matter, the Master requested a magistrate to conduct an inquiry into the matter in terms of s 68(2) of the Administration of Estates Act [*Chapter 6:01*]. The magistrate found that the first respondent had married the deceased in terms of customary law and confirmed her as the surviving spouse. Dissatisfied with the decision, the matter was taken on appeal. This court determined C that the inquiry had been conducted in terms of legislation which had been repealed and set aside the decision of the magistrates court as a nullity.

The applicant has now instituted these proceedings seeking the following relief:

1. ttthat the last will and testament executed by the late Amos John Chirunda on 9 December 1977 be and is hereby declared to be a valid testamentary D instrument.
2. that the Master of the High Court be and is hereby directed to admit the said last will and testament to probate.
3. that the appointment of Wilbert Nyamupfukudza as executor dative by letters of administration issued to him by the Master of the High Court E on 19 April 2005 be and is hereby set aside.
4. that the Master of the High Court be and is hereby directed to re-issue fresh letters of administration to Margret Sumbureru to enable her to administer the estate of the late Amos John Chirunda.

5. that the first defendant (*sic*), being Prisca Chinamora, also known as F Prisca Chirunda, pay the costs of this application."

The applicant outlines in her heads of argument what she perceives as the issues for determination by this court as follows:

"(a) which law should be applied in determining the validity of the provisions of Amos Chirunda's will in relation to the applicant?

(b) what does the law provide for in relation to the validity of the will? G

(c) to what extent does the Administration of Estates Act [*Chapter 6:06*] apply to this estate?

(d) what should be the next course of action in terms of the law?

In my view, the first issue raised should not have been raised as an issue at all, as it was determined by the Supreme Court in case no. 55/02, wherein H

Guvava J

A Cheda JA held that the law to be applied is the African Wills Act [*Chapter 240* of 1974]. The issues as raised in paras (c) and (d) are seeking legal advice and it is not the function of the court to proffer legal advice to parties. This request for legal advice seems to emanate from the various issues and disputes which have been presented in the papers by the applicant. Of particular concern seems to be the issue of whether or not the deceased B married the first respondent under customary law. However, when one has regard to the order sought by the applicant it seems to me that these are not issues for determination in the present proceedings and the sole issue before the court is whether or not the will executed by the late Amos Chirunda on 9 December 1977 is valid.

C In order to determine this issue, the Supreme Court held that regard must be made to the provisions of the African Wills Act. The relevant provisions which relate to the execution of wills under that Act are ss 6 and 7 which provide as follows:

"6. Subject only to the limitations imposed by this Act an African may by will freely dispose of the ownership of immoveable property or any right attaching D thereto.

7. The heir at African law of any deceased African shall succeed in his individual capacity to any immovable property or any rights attaching thereto forming part of the estate of such deceased African and not devised by will."

It is quite apparent from the above provisions that the African Wills Act gave an African capacity to execute a will and to dispose of immoveable property. E An examination of the Act, however, shows that it does not have a provision which is similar in wording to s 17 of the Wills Act [*Chapter 6:06*]. It seems to me, therefore, that this court must determine the intention of the deceased when he made the will in order to ascertain its validity. In making such a determination the court must look at the wording of the will. A reading of F the will shows that there can be no doubt that when the deceased made the will his intention was to benefit his wife. The second sentence of the will which is quoted in full above provides as follows:

"I appoint my wife Margaret Chirunda (nee Sumbureru) to be my executor and heiress to my estate."

It is common cause that the will was made soon after the deceased had G paid customary bride price for the applicant. At the relevant time, when the will was executed, customary law did not allow a wife to inherit from her husband. The deceased was clearly intent upon circumventing that aspect of customary law which was discriminatory of women and particularly wives. That was the mischief that he wanted to avoid in the event of his untimely H death. It is clear to me that the deceased wanted to be certain that in the event

---

Guvava J

of his death his property would not fall into the hands of his male relatives A to the exclusion of his wife. However, at the time of his death in 1997 the deceased and the applicant had divorced. She was thus no longer his wife and they had been so divorced for a period in excess of ten years. It is also common cause that upon divorce the applicant had been awarded a significant settlement. Could it have been the deceased's intention that the applicant B would again inherit his estate upon his death since he did not revoke his will? In my view, this could not have been his intention. The mischief that he had sought to circumvent in his will no longer applied with regard to the applicant

as she was no longer his wife. It seems to me, therefore, that once the applicant ceased to be his wife the will became invalid as it was no longer capable of enforcement. C

On this basis alone, I would find that the will was no longer valid and dismiss the applicant's claim.

Even if I am wrong in making such a finding, based on the fact that the applicant was no longer the deceased's wife, it seems to me that I would still dismiss the application on the basis that the deceased's will became void D upon his marriage to the applicant in terms of the general law in 1978. It is common cause that following the applicant's marriage to the deceased under customary law they subsequently registered their marriage in terms of the Marriage Act [*Chapter 37* of 1974] (now *Chapter 5:11*). Section 13 of the African Marriages Act [*Chapter 238* of 1974] provided that an African who married in terms of the Marriage Act and who disposed of his property in E terms of a will ceased to be governed by African customary law. The relevant provision provides as follows:

> "The solemnization of a marriage between Africans in terms of the Marriage Act shall not affect the property of spouses which shall be held, may be disposed of and, unless disposed of by will, shall devolve according to African law and custom." F

It seems to me that the import of the above provision is that general law became applicable to the deceased. The law which was applicable to wills at the relevant time was the Deceased Estate Succession Act [*Chapter 302* of 1974]. This, explains, in my view, the reason why the African Wills Act did not have a provision that is similar to s 17 of the Wills Act. G

Section 2 of the Deceased Estate Succession Act [*Chapter 302* of 1974] provided as follows:

> "Except in the case of a party to a joint will who has adiated, a will, other than a joint will of an intended husband and wife who thereafter married each other, executed by any person prior to marriage shall become null and void on marriage unless such person endorses on such a will that it is desired that the same shall H

Guvava J

> A remain in full force and effect. Such endorsement shall be duly signed and witnessed in the manner required in the case of a will."

Clearly the above provision nullifies any will other than a joint will which is made by a person before marriage. Although this provision was repealed by s 24 of the Wills Act, the section goes on to state that the section shall continue to apply in respect of wills that were made before 1 January 1988 B to the extent that the Wills Act does not apply to it.

The will by the deceased was executed in 1977 and in my view clearly falls within the provisions which were saved as the Wills Act does not apply to it. The deceased executed the will prior to his marriage to the applicant in terms of the Marriage Act. There is no evidence that the deceased endorsed C the will as required by s 2 of the Deceased Estates Succession Act, thus making the will null and void.

For the reasons stated above I make the following order:

The application is hereby dismissed with costs.

D *Atherstone & Cook,* applicant's legal practitioners

Dube, Manikai & Hwacha, first respondent's legal practitioners

© 2015 Juta and Company (Pty) Ltd.

Document 25 of 73

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2013/Volume 1/GOLD DRIVEN INVESTMENTS (PVT) LTD v TEL·ONE (PVT) LTD & ANOR 2013 (1) ZLR 172 (S)

GOLD DRIVEN INVESTMENTS (PVT) LTD v TEL·ONE (PVT) LTD & ANOR 2013 (1) ZLR 172 (S)

Citation	2013 (1) ZLR 172 (S)
Case No	Judgment No. S-9-13
Court	Supreme Court, Harare
Judge	Malaba DCJ, Ziyambi JA & Omerjee AJA
Heard	9 October 2012; *CAV*
Judgment	25 February 2013
Counsel	*F Girach,* for the appellant *T Mpofu,* for the first respondent
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Arbitration – *point of law – when may be raised – should form part of party's claim or defence – point of law may only be raised by seeking amendment to claim or defence unless parties agree otherwise – when amendment may be refused* D

Practice and procedure – *point of law – when may be raised – may be at any time if prejudice not occasioned to other party – explicit provisions of law regarding raising of point of law – such provisions overriding general principles* E

Headnote

The appellant was a company which carries on the business of tobacco contract farming, merchandising and export. The first respondent, a company which provided telecommunication services in Zimbabwe, entered into an agreement with a foreign company for the manufacture and supply of telecommunication equipment. The first respondent had F local currency but needed foreign currency to buy the equipment. It entered into two agreements with the appellant in order to raise foreign currency from the sale of tobacco. In terms of the first agreement, which related to the 2005/6 tobacco growing season, the first respondent was to provide local currency to enable the appellant to buy tobacco from local growers on its behalf. The appellant's obligation was to sell the G tobacco in foreign currency and send the money to the foreign company to discharge the first respondent's debt. A second, similar, agreement related to the next tobacco season. In respect of both agreements, the first respondent discharged its obligations to the appellant, but the appellant did not reciprocate. It made a partial payment in respect of the first agreement and no payment at all in respect of the second. The H

A first respondent claimed against the appellant for payment of foreign currency owed in terms of the two agreements. The appellant partially admitted the claim but denied that it owed all that the first respondent was claiming.

The parties agreed to have the dispute settled by way of arbitration. The issues referred to the arbitrator all related, in essence, to how much was B owed by the appellant. The arbitrator heard evidence and stood the matter down for judgment. In its heads of argument, the appellant, for the first time, raised the issue of illegality of the contracts. The first respondent objected to the issue being raised at that stage, on the ground that it was not part of the defence and its introduction would be prejudicial to its C case. The first respondent argued that, in the absence of compliance with the procedure for amendment of the statement of defence in terms of art 23(2) of the Model Law (contained in the First Schedule to the Arbitration Act [*Chapter 7:15*]), the

question of the illegality of the contracts could not be determined by the arbitrator. The appellant contended that the principles of the law regarding the raising of questions of law authorised D the arbitrator to act outside the provisions of art 23(2). The arbitrator held that an objection *in limine* should be taken by a defendant before plea, in order to avoid further pleadings and the holding of a trial, and to afford finality to litigation, thereby avoiding the consequential costs. In the absence of an application by the appellant to amend or supplement its statement of defence and having regard to the excessive delay in raising E the illegality defence, it was now inappropriate to permit the appellant to rely on it. He then made his findings on the facts, which findings were substantially in favour of the first respondent.

Having failed in an application for review by the High Court, the appellant appealed to the Supreme Court. It argued that the decision of the F arbitrator was against the public policy of Zimbabwe, on the grounds that the principles of law governing the raising of points of law in judicial proceedings provided authority to the arbitrator to forego the need to insist on compliance by the parties with the procedure provided by art 23(2) of the Model Law.

G *Held,* that the basic principles found in the authorities are that a question of law can be raised at any stage of the proceedings, provided it does not occasion prejudice to the other party. This is, however, subject to the absence of clear provisions governing procedures in particular proceedings. It is particularly applicable where the procedure in question does not provide a sufficient remedy for raising a point of law. The H principles did not, on their own, provide a separate legal basis on which

---

a court can ignore explicit provisions of law designed to deal with the A raising of questions of law. In this case, art 23(2) was comprehensive and clearly took care of the appropriate procedure by which a point of law may be raised in arbitral proceedings. There was no exception to the procedure which would allow the arbitrator to decide the question of the raising of points of law outside art 23(2) on the ground that one B of the parties considered the matter to go to the root of the dispute. Here, the illegality of the contracts should have been part of the defence raised by the appellant against the first respondent's claims. Raising it at the belated stage of the proceedings and in the manner the appellant did would, if accepted, mean that the arbitrator allowed an amendment to the defence in a manner contrary to the procedure provided for the C purpose by art 23(2). Article 23(2) envisaged a situation in which an arbitrator makes a decision to allow or refuse a proposed amendment following submissions by both parties. It was not common cause that the contracts were illegal. The first respondent would have been entitled to resist the proposed amendment of the defence on the basis that the agreements were lawful. D

Cases cited

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

Muskwe v Nyajina & Ors S-17-12

Legislation considered E

Arbitration Act [*Chapter 7:15*], First Schedule, arts 23 and 24

Case information

F Girach, for the appellant

T Mpofu, for the first respondent F

Judgment

Malaba DCJ: This is an appeal against the judgment of the High Court dismissing an application for review of an arbitral award granted by the second respondent ("the arbitrator") in favour of the first respondent.

There are two grounds of appeal. The first is that the court *a quo* misdirected itself in failing to uphold the contention that the arbitrator ought to have G determined the merits of the question of the illegality of the two agreements entered into by the parties as advanced by the appellant in the heads of argument after the hearing of evidence had ended. The contention is that, as the question of the illegality of the contracts is a question of law which goes to the root of the dispute between

the parties, the arbitrator was obliged to depart from the requirements of arte 23(2) of the UNCITRAL Model Law set H

2013 (1) ZLR p175

Malaba DCJ

A out in the First Schedule to the Arbitration Act [*Chapter 7:15*] ("the Model Law"). The second ground of appeal is that the court *a quo* misdirected itself in failing to uphold the contention that the arbitrator exceeded the terms of submission to arbitration when he granted the award.

The facts of the case are as follows. The appellant is a private company registered in accordance with the laws of Zimbabwe. It carries on the business B of tobacco contract farming, merchandising and export. The first respondent is a company incorporated in accordance with the laws of Zimbabwe. It carries on the business of providing telecommunication services in the country. In 2004 the first respondent entered into an agreement with Huawei Technology Investments (Pvt) Ltd ("Huawei"), a company registered in the Republic of C China, for the manufacture and supply of telecommunication equipment. The terms of the contract were that Huawei would manufacture and provide the first respondent with communication equipment.

The first respondent had local currency but needed foreign currency for the purposes of discharging its obligation to Huawei. It entered into two D agreements with the appellant, the purposes of which were to raise foreign currency from the sale of tobacco to pay Huawei. In terms of the first agreement, which related to the 2005/6 tobacco growing season, the first respondent was to provide local currency to enable the appellant to buy tobacco from local growers on its behalf. The appellant's obligation was to sell the tobacco in foreign currency on behalf of the first respondent. The money was to be E transmitted to Huawei to discharge the first respondent's debt. The second agreement relating to the 2006/7 tobacco growing season had similar terms. In respect to 2005/6 the first respondent discharged its obligation in terms of the contract. The appellant bought and sold the tobacco in foreign currency. It then paid the first respondent the sum of US$4 617 167.82. That amount was not enough to discharge the first respondent's indebtedness to Huawei. F No money was paid to the first respondent from the sales of tobacco bought and sold during the 2006/7 growing season.

In 2010 the first respondent made a claim against the appellant for payment of foreign currency owed in terms of the two agreements. The appellant partially admitted the claim but denied that it owed all that the first respondent was G claiming. The parties agreed to have the dispute settled by way of arbitration under the auspices of the Commercial Arbitration Centre in Harare. The terms of reference, which incorporated the terms as finally amended, were as follows:

1. Whether GDI bears the onus to account for all funds availed to it by H Tel·One for the establishment and funding of the outgrower scheme

---

2013 (1) ZLR p176

Malaba DCJ

under the 2006/07 agreement? (It had been formally admitted by GDI A that such a position obtained under the 2005/06 agreement).

2. Whether Tel·One is entitled to be paid a minimum of US$3 459 720.09, and a maximum of US$5 045 170.79 over which GDI allegedly admitted liability in respect of the 2005//06 tobacco agreement?
3. Whether Tel·One is entitled to be paid a minimum of US$5 865 672,33 B (readjusted), and a maximum of US$10 350 000 over which GDI allegedly admitted liability in respect of the 2006/07 tobacco agreement?
4. Whether Tel·One is entitled to claim any amount for which projections were made by GDI at the commencement of the project, but over which admissions of liability were not made at subsequent meeting between the parties; and if so, in what amount? (general damages). C
5. Whether Tel·One is entitled to recover special damages in an amount of US$168 490 446 (reduced from US$250 531 200), being the loss of business profit it sustained?

The parties adduced evidence before the arbitrator who stood the matter down for judgment. In the heads of argument filed on 5 July 2010 the D appellant for the first time raised the issue of illegality of the contracts. The first respondent's legal representative strongly objected to the issue being raised at that stage on the ground that it was not part of the defence and its introduction would be

prejudicial to its case. The first respondent's legal practitioner drew the arbitrator's attention to the provisions of art 23(2) of E the Model law.

It provides:

> "ARTICLE 23
>
> Statement of claim and defence
>
> . . .
>
> (2) Unless otherwise agreed by the parties, either party may amend or supplement F his claim or defence during the course of the arbitral proceedings, unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it."

The first respondent's argument was that without compliance with the procedure for amendment of the statement of defence in terms of art 23(2) G of the Model Law, the question of the illegality of the contracts could not be determined by the arbitrator. The appellant's legal practitioner contended that the principle of the law regarding raising of questions of law authorised the arbitrator to act outside the provisions of art 23(2) of the Model Law. The second respondent, who was the arbitrator, dismissed the claim by the appellant. He said: H

Malaba DCJ

> A "An agreed list of issues was filed by the parties on 13 May 2010. The hearing of evidence commenced on 20 May 2010 and ended on 3 June 2010, with an adjournment to 2 August 2010 for argument.
>
> The realistic inference to draw from this background is that GDI changed its mind when it proceeded to prepare its heads of argument, and decided to introduce the defence that the two agreements were illegal and unenforceable.
>
> B An objection *in limine* should be taken by a defendant before plea. Its object is to avoid further pleadings and the holding of a trial, and to afford finality to litigation, thereby avoiding the consequential costs."

He goes on to say:

> "Having regard to both the absence of an application by GDI to amend or supplement its amended statement of defence, and more importantly, to the C excessive delay in raising the illegality defence, the arbitral tribunal considers it now inappropriate to permit GDI to rely on it."

The arbitrator went on to determine the matter on the merits. He found that the first respondent's witness, Mr Liu, was an unreliable witness because he was argumentative and evasive when answering questions. He also found that Mr Liu had refrained from disclosing documents containing information D on the foreign currency his company had raised from the sale of tobacco during the two periods covered by the agreements. Mr Liu was constrained, under cross-examination, to admit that there was information relating to the transactions concerned which he had not disclosed. As a result he produced schedules which revealed the actual proceeds of the tobacco sold over the E two seasons. The arbitrator found the two witnesses for the first respondent to be good and credible witnesses.

Relying on the evidence contained in the schedules, the arbitrator addressed his attention to the question whether the matters raised by the first issue had been proved. He found, on the evidence of the schedules, that the appellant owed the first respondent a sum of US$5 097 842 in respect of the 2005/6 F agreement. He also found that the appellant owed the first respondent US$11 392 352 in respect of the 2006/7 agreement. He dismissed the first respondent's claims in respect of the other matters. As a result he made an order in the following terms:

> "1. GDI is to pay Tel·One the sum of US$5 097 842 in respect of the 2005/06 G agreement, with interest thereon at the prescribed rate of 5 per cent per annum from the date of demand (11 September 2009) to the date of payment.
>
> 2. GDI is to pay Tel·One the sum of US$11 392 052 in respect of the 2006/07 agreement, with interest at the LIBOR rate calculated on the outstanding daily balance, compounded monthly from the date of demand to the date of payment.
>
> 3. GDI is to pay one fifth of the costs incurred by Tel·One.
>
> 4. Tel·One H is to bear the remainder of its costs.

Malaba DCJ

> 5. GDI is to bear all of its own costs. A

6. Four-fifths of the fee raised by the arbitrator are to be shared equally by the parties, the remaining one-fifth is to be paid by GDI alone."

In September 2010 the appellant made an application to the High Court for an order setting aside the award, on the ground that the decision of the arbitrator to refuse to have the question of the illegality of the contracts determined at B the stage the appellant sought to raise it is contrary to the public policy of Zimbabwe. It also argued that, in making the determination of the amount owed to the first respondent on the basis of the information contained in the schedules, the arbitrator exceeded the terms of submission to arbitration and therefore acted against the public policy of Zimbabwe. The application for review was made in terms of art 34 of the Model Law which provides: C

"ARTICLE 34

Application for setting aside an exclusive recourse against arbitral award

(1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this D article.

(2) An arbitral award may be set aside by the High Court only if –

(a) the party making the application furnishes proof that –

(i) a party to the arbitration agreement referred to in article 7 was under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication on that E question, under the law of Zimbabwe; or

(ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on F matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was G not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Model Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Model Law;

or

(b) the High Court finds that – H

Malaba DCJ

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

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

In a brief judgment the court *a quo* dismissed the application. Whilst the issue of the correctness of the decision by the arbitrator not to entertain the question of the illegality of the contracts without compliance by the appellant B with art 23(2) of the Model law was raised and argued before the court *a quo,* the learned Judge President did not say anything on that issue in the judgment. On the second issue he said:

"The respondent's understanding of the award is that with regard to both the 2005 and 2006 agreements, the applicant had a duty to account to the first respondent for all monies advanced to it. It rendered its account, which the first respondent C accepted, from which account arose the relief sought. The relief sought was not based only on the admissions made by the applicant nor was it confined only to such admissions. It was instead based on the full accounts given by the applicant with regard to funds disbursed to it in terms of both agreements."

The learned Judge President went on to say:

D "A perusal of the record of arbitration vindicates the first respondent's assertions as to how the proceedings were conducted and the basis upon which the award was granted. I find nothing untoward in the manner in which the hearing was conducted both in terms of procedural propriety, evidential analysis and interpretation of the laws governing contractual relationship.

By any stretch of the imagination it cannot be said that the present award constitutes a palpable inequity in the proportions envisaged in the *Delta* E *Corporation* case *supra*. On the contrary, as already indicated I do not find any fault or incorrectness in the arbitration proceedings let alone of the magnitude described by

> the applicant. The award in my view is in accordance with the substantive and procedural laws of Zimbabwe. Both parties were afforded a fair hearing in accordance with the rules of natural justice. In particular, it has not been shown in what way the award is in conflict with the public policy of F Zimbabwe."

On appeal, the appellant raised the issue of the decision of the arbitrator as being against the public policy of Zimbabwe. On the first issue, it is clear that the appellant's case is based on a proposition that the principles of law governing the raising of points of law in judicial proceedings provided authority to the arbitrator to forego the need to insist on compliance by the G parties with the procedure provided by art 23(2) of the Model Law. The principles of law relating to the circumstances in which a question of law may be raised and determined in judicial proceedings are clear. In *Muchakata v Netherburn Mine* 1996 (1) ZLR 153 (S) Korsah JA said at 157A:

> "Provided it is not one which is required by a definitive law to be specially pleaded, H a point of law, which goes to the root of the matter, may be raised at any time,

---

Malaba DCJ

> even for the first time on appeal, if its consideration involves no unfairness A to the party against whom it is directed: *Morobane v Bateman* 1918 AD 460; *Paddock Motors (Pty) Ltd v Igesund* 1976 (3) SA 16 (A) at 23D-G."

In *Muskwe v Nyajina & Others* S-17-12, Ziyambi JA said:

> "Undoubtedly, a point of law can be raised at any time even though not pleaded. However, this is subject to certain considerations, one of which is that the court has to consider whether raising a point of law at this juncture would cause B prejudice to the party against whom it is raised.

In our view there is great prejudice to the appellant who, if the matter is decided against him, stands to lose the appeal without argument."

The theme that runs through the principles is that a question of law can be raised at any stage of the proceedings provided it does not occasion C prejudice to the other party. These principles are subject to the absence of clear provisions governing procedures in particular proceedings. It is particularly applicable where the procedure in question does not provide a sufficient remedy for raising a point of law. The principles do not, on their own, provide a separate legal basis on which a court can ignore explicit provisions of law designed to deal with the raising of questions of law. In D this case art 23(2) is comprehensive and clearly takes care of the appropriate procedure by which a point of law may be raised in arbitral proceedings. There is no exception to the procedure which is provided for by the legislature which would allow the arbitrator to decide the question of raising of points of law outside art 23(2) on the ground that one of the parties considers the E matter to go to the root of the dispute.

In this case, the illegality of the contracts should have been part of the defence raised by the appellant against the first respondent's claims. Raising it at this belated stage of the proceedings and in the manner the appellant did would, if accepted, mean that the arbitrator allowed an amendment to the defence in a manner contrary to the procedure provided for the purpose by art 23(2) of the F Model Law. Article 23(2) envisages a situation in which an arbitrator makes a decision to allow or refuse a proposed amendment following submissions by both parties. It was not common cause that the contracts were illegal. The first respondent would have been entitled to resist the proposed amendment of the defence on the basis that the agreements were lawful. G

On the second issue, the court is of the view that Mr *Girach* pressed the argument of the arbitrator having exceeded his jurisdiction because of an erroneous view of the facts. He candidly admitted, when it was pointed out by the court, that he had believed that the arbitrator had, *mero motu,* called for the evidence contained in the schedules which he then used to determine the outcome. It is, however, clear from the reasons for the award that the H

Malaba DCJ

A arbitrator used the schedules which had been disclosed as a result of the cross-examination of the appellant's witness. Cross-examination has always been known, in the adversarial system, to be the best ever invented means of seeking truth in legal proceedings.

A reading of the award and the reasons therefor against the issues presented to the arbitrator shows that he dealt with the matter within the ambit of issue B number one. The appellant, for some

reason, ignores this fact and seeks to measure the legality of the award in terms of the matters covered by issue number two. The arbitrator was, however, not bound to consider the evidence in respect of issue number two. All issues were before him and he determined the issue as borne out by the evidence. That cannot be said to be an award C against the public policy of Zimbabwe.

The appeal is dismissed with costs.

ZIYAMBI JA and OMERJEE AJA concurred.

D *Gill, Godlonton & Gerrans*, appellant's legal practitioners

Dube, Manikai & Hwacha, first respondent's legal practitioners

© 2015 Juta and Company (Pty) Ltd.

Document 26 of 73

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2013/Volume 1/MABVURAMITI v ALTFIN INSURANCE COMPANY 2013 (1) ZLR 182 (H)

MABVURAMITI v ALTFIN INSURANCE COMPANY 2013 (1) ZLR 182 (H)

Citation	2013 (1) ZLR 182 (H)
Case No	Judgment No. HH-63-13
Court	High Court, Harare
Judge	Mafusire J
Heard	26 February 2013
Judgment	26 February 2013
Counsel	Details not supplied
Case Type	Civil application
Annotations	No case annotations to date

Flynote

Insurance – *premium – failure to pay premium – major breach going to the root thereof – insurer entitled to repudiate liability – no requirement for insurer to demand payment of premium to place insured in mora– insurer not obliged to go to law to protect his right*

Headnote

An insured is entitled to an indemnity if the risk he insured against has D occurred, but the indemnity is predicated on the premium having been paid. The failure by the insured to pay the premium is a major breach which goes to the root of the contract and is the very foundation thereof. The insurer is entitled to repudiate liability if the premium is not paid. *Interpellatio* or demand on the insured to pay his instalments is not E necessary to place him *in mora ex persona*. If a party to a contract has committed a major breach of the contract, the aggrieved party does not always have to go to the law. The aggrieved party is entitled to disregard the contract, wait for the

defaulting party to sue and set up the default as a defence. The contract is ended and no question of quasi-mutual F assent can be said to arise.

Where the time for performance of a contract has not agreed upon by the parties thereto, the performance is due on the conclusion thereof or as soon thereafter as is reasonably possible. It is not necessary to place the defaulting party *in mora* so as to compel performance because the defaulting party must be taken to know of his obligation to perform. G

Cases cited

Asharia v Patel & Ors 1991 (2) ZLR 276 (S)

Mersey Steel and Iron Co Ltd v Naylor Benzon and Co (1894) 9 AC 434 (HL); [1881-85] All ER Rep 365

Savanhu v Marere NO and Ors 2009 (1) ZLR 320 (S) H

Judgment

A **Mafusire J:** (1) This is an application for a default judgment. My brother Bhunu and I raised a query. We felt the claim did not disclose a cause of action. The plaintiff is in effect claiming specific performance yet, by his own admission, he was in breach of his side of the contract.

(2) In his summons and declaration the plaintiff claims from the defendant B payment of the sum of USD 4 500, less USD50.

(3) The defendant is an insurance company. At the relevant time it was the plaintiff's insurer in respect of his motor vehicle. The plaintiff's claim is for an indemnity, his vehicle having been involved in an accident and having been declared a write off.

(4) In his declaration the plaintiff avers that when he submitted his claim, C the defendant declined to pay on the ground that the last premium had not been paid. The plaintiff concedes that indeed the last premium had not been paid. He however suggests in his prayer that the defendant should deduct the last premium from the amount allegedly due to him. This is surprising.

(5) When the above query was brought to their attention the plaintiff's legal D practitioners persisted with the claim. By letter dated the 15 August 2012 they argued that in accordance with condition 8 of the policy document none of the parties had cancelled the contract and that therefore the contract was still valid. Although they seem to have wanted to attach the policy document nothing was attached.

(6) The plaintiff's legal practitioners also argued that the plaintiff's breach E was not material; that he had not refused to honour his obligations; that his case called for the relaxation of the rules and the exercise of justice between the parties; that it would be improper for plaintiff to go "*empty handed*" but that it should be found that there was *quasi mutual* assent by the defendant in that after the accident the defendant had sent an assessor to assess the F damage to the vehicle and that it had continued to send him statements.

(7) The plaintiff's arguments are untenable. Even though the plaintiff did not attach the policy document, nothing turns on that. I have considered the plaintiff's claim as set out in his pleadings. He is trying to enforce a contract of insurance. An insured is entitled to an indemnity if the risk he or she insured against has occurred. But the indemnity is predicated on the G premium having been paid. The plaintiff states as much in his declaration. In para 2 of his declaration the averment is that the parties entered into a contract whereby defendant would provide him with insurance cover "*upon payment of premiums*".

(8) An insurance company is entitled to repudiate liability if the premium H is not paid. The plaintiff concedes that he had not paid the last premium.

Mafusire J

He also concedes that indeed the defendant had refused to indemnify him, A citing the non-payment of the last instalment. The plaintiff's solution, that the defendant should deduct the amount of the

outstanding instalment from the indemnity, is to require the court to order the innocent party in a breach situation to purge the default of the party in breach. That is wrong.

(9) It is trite law that where a plaintiff claims specific performance of a B contract he himself must have performed his side of the bargain, or is able to do so. In *Savanhu v Marere NO & Ors* 2009 (1) ZLR 320 (S) the Supreme Court, *per* Malaba DCJ, stated at 325A-C:

> "The right to claim specific performance of a contract by the other party is premised on the principle that the appellant must first show that he has performed all his obligations under the contract or that he is ready, able and willing to perform C his own side of the bargain. Wessels *The Law of Contract in South Africa* vol 11 para 3135 states that:
>
> > 'The court will not decree specific performance where the plaintiff has himself broken the contract unless he can show that he has performed his part or is ready to do so, and therefore he cannot ask for specific performance unless he has either performed his part of the contract or unless he has been D prevented from doing so by the defendant.'
>
> See also *Wolpert v Steenkamp* 1917 AD 493 at p 499."

(10) The plaintiff's argument in the letter from his legal practitioners seems to be confusing the issues of *interpellatio* and *mora ex persona*. Even though he accepts that he did not pay the last premium, the plaintiff insists on the contract being treated as having remained alive because, according to para 7 E of the declaration, he "*did not receive any correspondence from the defendant to inform him of the cancellation of the contract*".

(11) In *Asharia v Patel & Ors* 1991 (2) ZLR 276 (S) the Supreme Court held that where the performance of a contract has not been agreed upon between the parties, performance is due on conclusion or so soon thereafter F as is reasonably possible. But in that situation the debtor does not *ipso facto* fall into *mora*. He must know he has to perform. This is known as *mora ex persona*. It only arises after *interpellatio* or demand.

(12) In this case *interpellatio* or demand on the plaintiff to pay his instalments was not necessary to place him *in mora ex persona*. By his own admission, G the payment of the premium by him was the key to unlock the indemnity due by the defendant. The time for payment or performance had expressly been agreed upon.

(13) That the defendant may not have sent him correspondence about the cancellation of the contract does not change the legal position. If a party to a contract has committed a major breach of the contract, the aggrieved party H

Mafusire J

A does not always have to go to the law. See Kerr *The Principles of the Law of Contract* 3 ed at p 377. The aggrieved party is entitled to disregard the contract, wait for the defaulting party to sue and set up the default as a defence.

(14) The above position is aptly summarised in a passage on pp 377 to 378 of Kerr *op cit*. It reads:

> B "If a party to a contract finds that the other party has committed a major breach of the contract he does not necessarily have to go to the law. If he is clearly in the right and does not desire to take any action at all he is entitled to disregard the contract. In such a case if he is sued on the contract by the other party that party's default is a complete defence. Thus in *Goldstein and Wolff v Maison Blanc (Pty)* 1948 (4) SA 446 (C) defendant company in Cape Town placed an order for certain ladies' frocks to be dispatched to them from Johannesburg during C the months of January or February 1945. They were in fact railed on 16 April 1945 and when the parcel was tendered to defendant in Cape Town it refused to accept it. The plaintiff then instituted action for the purchase price and tendered delivery. Herbstein J found that time was of the essence of the contract [the goods being fashion goods which both parties knew were purchased for resale during a season limited in time] and that dispatch six or seven weeks late was D not in compliance with the contract. He found too that;
>
> > 'There was no obligation on the defendant, as alleged in the replication, to intimate at the end of February that it no longer required the goods. It was entitled to wait until delivery and then to repudiate (*Federal Tobacco Works v Barron & Co* 1904 TS 483; *Strachan & Co Ltd v Natal Milling Co (Pty) Ltd* 1936 NPD 376).'
>
> E This is in accordance with the rule enunciated many years ago by Lord Blackburn in *Mersey Steel and Iron Co Ltd v Naylor Benzon & Co* (1894) 9 AC 434 (HL) and adopted in our law:
>
> > "'The rule of law . . . is that where there is a contract in which there are two parties, each side having to do something . . . if you see that the failure to perform one part of it goes to the root of

the contract, goes to the foundation F of the whole, it is a good defence to say, "I am not going to perform my part of it when that which is the root of the whole and the substantial consideration for my performance is defeated by your misconduct."

(15) In an insurance contract, the failure to pay a premium goes to the root and is the very foundation of the contract. Contrary to the assertion by the plaintiff's legal practitioners, the breach was quite material. There was no G question of *quasi mutual* assent. The defendant had repudiated liability.

(16) The plaintiff's argument seems to suggest that it would be iniquitous if he is left empty handed. That implies a claim for damages. However, plaintiff's current claim is one based in contract. If his position is that he had paid his instalments faithfully except for the last premium, then he ought H to set out such a claim properly. A damages claim is an illiquid claim. His

Mafusire J

current action is premised on a liquid claim. But as I have indicated in this A judgment, the cause of action has not been properly disclosed.

(17) In the circumstances, the default judgement is hereby refused.

Mabuye Zvarevashe, plaintiff's legal practitioners B

© 2015 Juta and Company (Pty) Ltd.

Document 27 of 73

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2013/Volume 1/ZIMBABWE EDUCATIONAL, SCIENTIFIC, SOCIAL AND CULTURAL WORKERS' UNION v WELFARE EDUCATIONAL INSTITUTIONS' EMPLOYERS' ASSOCIATION 2013 (1) ZLR 187 (S)

ZIMBABWE EDUCATIONAL, SCIENTIFIC, SOCIAL AND CULTURAL WORKERS' UNION v WELFARE EDUCATIONAL INSTITUTIONS' EMPLOYERS' ASSOCIATION 2013 (1) ZLR 187 (S)

Citation	2013 (1) ZLR 187 (S)
Case No	S-11-13
Court	Supreme Court, Harare
Judge	Malaba DCJ, Zimyambi JA & Gowora JA
Heard	5 June 2012; *CAV*
Judgment	26 February 2013
Counsel	*T Mpofu,* for the applicant *F Nyakabau,* for the respondent
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

D **Arbitration** – *appeal – voluntary submission to arbitration – no appeal possible – limited grounds on which award may be set aside by High Court*

Headnote

Section 89(1) of the Labour Act [*Chapter 20:28*] gives the Labour Court the power to hear and determine applications and appeals "in terms of this Act or any other enactment". The quoted words limit the powers of the E exercise of the functions of hearing and determining to grounds raised in an application and appeal made or noted in the exercise of a right given under the Act or any other enactment. There should therefore be a provision in the Act or other enactment giving the party the right to make the application or note the appeal to the Labour Court before it can exercise any power to hear and determine the matter as an application F or appeal. For the court to exercise the right to review a decision of an arbitrator as provided by s 89(1)(d1), there has to be a valid application for review in terms of the Act or other enactment, as provided by s 89(1). Thus, the court has the power to hear and determine an appeal from a compulsory arbitration award because the appeal would have been noted in accordance with the right of appeal given by s 98(10) of the G Act. Voluntary arbitration proceedings are not subject to either appeal or review under the Labour Act.

Voluntary arbitration proceedings are governed by the Arbitration Act [*Chapter 7:15*]. Where parties make submissions to arbitration on the terms that they choose their own arbitrator, formulate their own terms of reference H to bind the arbitrator and agree that the award will be final and binding

---

on them, the courts will proceed on the basis that the parties have chosen A their own procedure and that there should not be any interference with the results. Even in cases of misconduct of proceedings by the arbitrator, the court would be reluctant to interfere, save in certain limited instances in which an award is against public policy. The Arbitration Act is clear that the only court that has jurisdiction in those limited circumstances B is the High Court, not the Labour Court.

Cases cited

McKelvey v Abrahams & Anor 1989 (2) ZLR 251 (S)

McKenzie NO v Basha 1951 (3) SA 783 (N)

Monticello (Pvt) Ltd v Edgerton (1) 1981 ZLR 292 (G) C

NRZ v Zimbabwe Railway Artisans' Union & Ors 2005 (1) ZLR 341 (S)

Ropa v Reosmart Invstms (Pvt) Ltd & Anor 2006 (2) ZLR 283 (S)

Zesa v Maposa 1999 (2) ZLR 452 (S)

Legislation considered

Arbitration Act [*Chapter 7:15*], Schedule 1 art 34 D

Labour Act [*Chapter 20:28*], ss 89(1), 89(1)(d1), 98(1)(a) and (10)

Case information

T Mpofu, for the applicant

F Nyakabau, for the respondent

Judgment

Malaba DCJ: At the end of hearing argument for both parties the court E allowed the appeal with costs. It was indicated at the time that reasons for the decision would follow in due course. These are they.

On 29 September 2010, the Labour Court allowed an appeal by the respondent from a voluntary arbitration award on the ground that the arbitrators had seriously misdirected themselves. F

The appellant and the respondent are in the welfare and educational industry. They are members of the National Employment Council for Welfare and Educational Institutions. The appellant is the registered trade union representing the interests of workers whilst the respondent represents the interests of the employer institutions. The parties were unable to reach an G agreement in a collective bargaining over minimum wages and allowances payable to employees in the undertaking for the period 1 May to 31 August 2009. They agreed to submit the dispute to arbitration. An arbitration agreement signed by the parties included clause 8 which provides that:

> "8. The award issued by the Arbitrator(s) shall be final and binding on the parties and shall form an integral part of the Collective Bargaining Agreement for H

Malaba DCJ

> A the Welfare and Educational Institutions – except Independent Hospitals and International and Local Humanitarian NGOs".

According to the arbitration agreement the arbitrators were to be chosen by the parties. The two arbitrators were appointed. They inquired into the matter of dispute between the parties and on 19 June 2009 handed down their award. The respondent was dissatisfied with the award. It noted an B appeal on 30 June 2009. On 10 July an application for review of the award was made to the same court. The respondent applied for an interim order suspending the implementation of the arbitral award pending the outcome of the appeal. The application was granted.

The appellant raised a point *in limine* to the effect that voluntary arbitration C proceedings are not appealable. The learned President of the Labour Court held that the court *a quo* had jurisdiction to hear the application for review and the appeal. Taking the view that the matter could not be decided on technicalities, she allowed the appeal. It is against that decision that the appellant has appealed to this court.

D The particulars of the grounds of appeal were stated as follows:

> "1. The judgment appealed is grossly irregular to the extent that whilst the parties were heard *in limine* and the court retired to consider the points *in limine,* the judgment grants substantive relief on the issues and sets no basis for such relief.
>
> 2. The court *a quo* further erred in assuming jurisdiction in respect of a matter E which was a subject of voluntary arbitration proceedings and so erred in exercising a power which it does not have under the Labour Act.
>
> 3. The court *a quo* further erred in entertaining a matter in respect of which the agreement referring it to arbitration indicated that the award by the arbitrators would be final and binding and would not be appealable. It so erred in dealing with such a matter notwithstanding absence of proof that F the arbitrators had departed from the strict standard of honour in making their award."

There is no doubt that the procedure adopted by the respondent in the court *a quo* was irregular. Neither the Labour Act [*Chapter 20:28*] or the Arbitration Act [*Chapter 7:15*] has any provision granting a litigant in voluntary arbitration proceedings a right of appeal against an arbitral award granted in G those proceedings. Neither statute provides for the remedy of an application for review of such an arbitral award to the Labour Court. The respondent sought to rely on ss 89 (1) and 89(1) (d1) of the Labour Act [*Chapter 20:28*].

Section 89(1) of the Labour Act provides:

> "89 Functions, powers and jurisdiction of Labour Court:
>
> (1) The H Labour Court shall exercise the following functions –

Malaba DCJ

> (a) hearing and determining applications and appeals in terms of this Act or A 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; B
>
> (d) appointing an arbitrator from the panel of arbitrators referred to in subsection (6) of section *ninety-eight* to hear and determine an application;
>
> (d1) exercise the same powers of review as would be exercisable 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 C other enactment."

There was confusion on whether the court dealt with an appeal or review. Mrs *Nyakabau* for the respondent believed it was an appeal. The confusion arose from the fact that the judgment of the court *a quo* at one point refers to the same person as the appellant and the applicant. In the end the judgment says that "the appeal therefore succeeds". One is left wondering whether the D court is dealing with an appeal or an application for review.

The question for determination is therefore whether s 89 provides for the hearing of an appeal from a voluntary arbitration award. The words "in terms of this Act or any other enactment" limit the powers of the exercise of the functions of hearing and determining to grounds raised in an application E and appeal made or noted in the exercise of a right given under the Act or any other enactment. There should be a provision in the Act or any other enactment giving the party the right to make the application or note the appeal to the Labour Court before it can exercise the power to hear and determine the matter as an application or appeal.

The Labour Court has the power to hear and determine an appeal from a F compulsory arbitration award because the appeal would have been noted in accordance with the right of appeal given by s 98(10) of the Act. The Labour Court would be exercising the power of hearing and determining an appeal validly placed before it in the exercise of a right of appeal given by the Act. A right to appeal is a statutory right which must be created by the statute by G which a court is established or by any other enactment.

In *NRZ v Zimbabwe Railway Artisans' Union & Ors* 2005 (1) ZLR 341 (S) at 346F-347D Ziyambi JA said:

> "There is, I think, judging from the cases which have come before us, a misconception generally held by the Labour Court, namely, that it is, in terms of s 89 of the Act, endowed with jurisdiction to entertain all applications brought H

Malaba DCJ

> A before it . . . Thus before an application can be entertained by the Labour Court, it must be satisfied that such an application is an application "in terms of this Act or any other enactment. This necessarily means that the Act or other enactment must specifically provide for applications to the Labour Court, of the type that the applicant seeks to bring: see *PTC v Chizema* S-108-04 . . . thus the application and the remedies obtainable thereby must be authorised in the Act . . . nowhere in the Act is the power granted to the Labour Court to grant an order of the nature B sought by the respondents in the court *a quo* . . ."

The observation made in respect of applications having to have been made in terms of rights given by the Act or any other enactment applies to appeals. An application or appeal to a court or tribunal is a remedy which exists because there is a statutory right to use it to seek relief. For the court to exercise the C right to review a decision of the arbitrator as provided by s 89(1)(d1) there has to be a valid application for review in terms of the Act or any other enactment as provided by s 89(1).

Consistent with the meaning of s 98(1)(a) of the Act, s 98(10) provides that an appeal on a question of law shall lie to the Labour Court from any decision D of an arbitrator appointed to hear and determine a dispute referred to him or her for compulsory arbitration. The fact that s 98(10) of the Act gives a limited right to appeal on a question of law underscores the fact that a right of appeal is a statutory creation and its ambit will depend on the terms of the statute creating it.

If the words "in terms of this Act . . ." as used in s 89(1)(a) of the Act did not E mean an appeal noted in the exercise of a right of appeal under the provisions of the Act, s 98(10) would have no bearing on the question of the validity of the exercise of the power to hear and determine an appeal from a decision of an arbitrator in compulsory arbitration proceedings. The provisions of s 98(10) become relevant in the determination of the question of the validity of the hearing and determination of the appeal because in terms of the provision F there is no right of appeal against a decision of an arbitrator in compulsory arbitration proceedings on a question of fact.

Voluntary arbitration proceedings cannot thus be subjected to either an appeal or review under the Labour Act. Voluntary arbitration proceedings are governed by the Arbitration Act. In *McKelvey v Abrahams & Anor* 1989 (2) ZLR 251 (S) G at 264C-D Gubbay CJ said:

> "The object of arbitration, as expressed in para 13 of the Schedule to the Act, is to arrive at an award that is final and binding on the parties. Thus an award is not subject to appeal. It may be set aside on any of the four grounds. First, that it does not fall under para 13 as not being 'made in terms of the Submission'.

Second, if the arbitrator has misconducted the proceedings, as envisaged in s 12 H (2) of the Act. Third, where it has been improperly procured (*vide* the same

---

Malaba DCJ

subsection). Fourth, where the arbitrator's mistake is so gross and manifest that A it could not have been made without some degree of misconduct. See generally *McKenzie NO v Basha* 1951 (3) SA 783 (N) at 786A-B."

The parties agreed that the award would be final. The award would not be final if any of the parties had a right to appeal. In *Ropa v Reosmart Investments (Pvt) Ltd & Anor* 2006 (2) ZLR 283 (S) at 286B-C Gwaunza JA said:

"In addition to this, I found to be persuasive the submission made for the respondent, B that the effect of an arbitral award is to bring to finality the dispute between the parties. The respondent relied for this submission on the following passage set out in Butler and Finsen *Arbitration in South Africa Law & Practice* at p 271:

'The most important legal consequence of a valid final award is that it brings the dispute between the parties to an irrevocable end: the arbitrator's decision is final and there is no appeal to the courts. For better or worse, the parties C must live with the award, unless the arbitration agreement provides for a right of appeal to another arbitral tribunal. The issues determined by the arbitrator become *res judicata* and neither party may reopen those issues in a fresh arbitration or court action.'

This position applies with equal force in Zimbabwe."

See also *Monticello (Pvt) Ltd v Edgerton* (1) 1981 ZLR 292 (G). D

It is trite that where parties make submissions to arbitration on the terms that they choose their own arbitrator(s), formulate their own terms of reference to bind the arbitrator and agree that the award will be final and binding on them, the court of law will proceed on the basis that the parties have E chosen their own procedure and that there should not be any interference with the results. See *ZESA v Maposa* 1999 (2) ZLR 452 (S). Even in cases of misconduct of proceedings by the arbitrator, the court would be reluctant to interfere, save in certain limited instances in which an award is against public policy. The standard is high.

What public policy entails has been subject to judicial comment. In *ZESA* F *v Maposa supra* at 453B-D it was held that:

"An award would be contrary to public policy if –

(a) it was induced by fraud or corruption;

(b) a breach of natural justice occurred.

The substantive effect of an award may also make it contrary to public policy, if, for example, it endorsed the break up of a marriage or some criminal act." G

It was held, further, that –

" the approach to be adopted is to construe the public policy defence, as being applicable to either a foreign or domestic award, 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. An award will not be contrary to public policy merely H

Malaba DCJ

A because the reasoning or conclusions of the arbitrator are wrong in fact or in law. 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. The same consequences apply where the B arbitrator has not applied his mind to the question or has totally misunderstood the issue, and the resultant injustice reaches the point mentioned."

The Arbitration Act is clear that the only court that has jurisdiction in those limited circumstances is the High Court, not the Labour Court, and expressly grants jurisdiction to the High Court. Article 34 of the Model Law provides C recourse against voluntary arbitration awards. It provides as follows:

"(1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article.

(2) An arbitral award may be set aside by the *High Court* only if –

(a) The party making the application furnishes proof that –

(i) a D party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication on that question, under the law of *Zimbabwe*; or

(ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was E otherwise unable to present his case; or

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award F which contains decisions on matters not submitted to arbitration may be set aside; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Model Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Model Law; or

(b) The G *High Court* finds, that –

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

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

(3)An application for setting aside may not be made after three months have H elapsed from the date on which the party making that application had received

---

Malaba DCJ

the award or, if a request had been made under article 33, from the date on which A that request had been disposed of by the arbitral tribunal.

(4)The *High Court*, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside. B

(5) For the avoidance of doubt, and without limiting the generality of paragraph

(2)(b)(ii) of this article, it is declared that an award is in conflict with the public policy of Zimbabwe if –

(a) the making of the award was induced or effected by fraud or corruption; or

(b) *a breach of the rules of natural justice occurred in connection with the making of the award*." C

It is clear that the court *a quo* did not have jurisdiction to entertain the appeal and application for review of the award made in voluntary arbitration proceedings.

For these reasons the appeal was allowed and the following order given:

1. The appeal succeeds with costs. D
2. The judgment of the court *a quo* is set aside and substituted with the following order.
3. "Both the appeal and application for review are dismissed with costs."

ZIYAMBI JA and GOWORA JA concurred E

Gonese & Majome, appellant's legal practitioners

Gill, Godlonton & Gerrans, respondent's legal practitioners

© 2015 Juta and Company (Pty) Ltd.

Document 28 of 73

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2013/Volume 1/KHAN v MUCHENJE & ANOR 2013 (1) ZLR 195 (H)

KHAN v MUCHENJE & ANOR 2013 (1) ZLR 195 (H)

Citation	2013 (1) ZLR 195 (H)
Case No	Judgment No HH-126-13
Court	High Court, Harare
Judge	Makoni J
Heard	23 February 2012; *CAV*
Judgment	27 February 2013
Counsel	*L Uriri,* for the applicant *A P de Bourbon SC,* for the respondents
Case Type	Opposed matter
Annotations	No case annotations to date

Flynote

Practice and procedure – *exception – set-down – no indication that exception is opposed – matter may be treated as unopposed – not necessary to set down for hearing as opposed matter*

Practice and procedure – *summary judgment – application – opposition* D *to – failure to file notice of opposition – not fatal if opposing affidavit filed – plaintiff's course of action*

Headnote

The applicant instituted action proceedings against the respondents claiming payment of a sum of money. The defendants filed a special plea and E exception. There was no response from the applicant. The respondents proceeded to set the matter down on the unopposed roll. The special plea and exception were upheld and the applicant's claim was dismissed. The first respondent then instituted action against the applicant claiming delivery of the original deed of transfer. The applicant entered appearance to defend. The first respondent filed an application for summary judgment. F The applicant then filed an opposing affidavit. The first respondent proceeded to have the matter set down on the unopposed roll, seeking to have the opposing affidavit struck off record and an order for summary judgment. The order was granted. The applicant then approached the court seeking that the two default judgments be set aside and also seeking condonation of the late filing of the application for rescission of the first G default judgment.

Held, that, in respect of an exception, a litigant is obliged to indicate to the court and to the other party whether or not he opposes the exception, although there is no rule of court which specifically provides for that. Where there is no indication that the exception is opposed, there would H be no error in treating the matter as unopposed. It is only where an

exception is opposed that it is necessary to set it down for hearing in A terms of r 223(2) of the High Court Rules.

Held, further, that in summary judgment proceedings, it would not be a fatal irregularity for the defendant not to file a notice of opposition if he filed an opposing affidavit timeously. That would constitute substantial compliance with r 233(1). The plaintiff's course of action is then either B to inform the court (or the judge) of the relevant irregularity and give reasons as to why the court's discretion should be exercised in favour of the plaintiff or, preferably, to make an application, on notice, to strike out, co-joined with a prayer for default judgment.

Cases cited C

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

Founders Building Society v Dalib (Pvt) Ltd & Ors 1998 (1) ZLR 526 (H)

Grantully (Pvt) Ltd v UDC Ltd 2000 (1) ZLR 361 (S)

Matambanadzo v Goven 2004 (1) ZLR 399 (S)

Nxasana v Min of Justice & Anor 1976 (3) SA 748 (D)

Scottish Rhodesian Ltd v Honiball 1973 (1) RLR 138 (G); D 1973 (2) SA 747 (R)

Theron NO v United Democratic Front & Ors 1984 (2) SA 532 (C)

Tiriboyi v Jani & Anor 2004 (1) ZLR 470 (H)

Legislation considered E

High Court Rules 1971 (RGN 1047 of 171), rr 4C, 63, 138, 223, 238 and 449

Case information

L Uriri, for the applicant

A P de Bourbon SC, for the respondents F

Judgment

Makoni J: On 29 April 2010 the applicant instituted action proceedings against the respondents claiming the sum of GBP39 848, interest on that amount at the prescribed rate from date of summons to date of payment in full and costs of suit on a legal practitioner and client scale and collection commission. The defendants filed a special plea and exception. There was G no response to the special plea and exception. The defendants proceeded to have the matter set down on the unopposed roll. On 11 August 2010 the special plea and exception were upheld and the plaintiff's claim was dismissed with costs.

On 12 October 2010 the first respondent instituted action proceedings against the applicant claiming delivery of the original Deed of Transfer No. 12197/01 H

Makoni J

A and costs of suit. The applicant entered appearance to defend. On 2 February 2011 the first respondent filed a court application for summary judgment. On 16 February 2011 the applicant filed a respondent's opposing affidavit. On the same date the first respondent's legal practitioners, in response to a letter from the applicant's legal practitioners, advised the applicant's legal practitioners on the procedural problems in relation to the summary judgment B proceedings. There was no response from the applicant's legal practitioners. The first respondent proceeded to have the matter set down on the unopposed roll, seeking an order to have the respondent's opposing affidavit struck off the record and an order for summary judgment. The order was granted on 9 March 2011.

C On 23 March 2011, the applicant then approached this court, seeking that the two default judgments be set aside and that the respondents, jointly and severally, pay the costs of suit. The main basis for the application is that his erstwhile legal practitioners, Chigwanda Legal Practitioners, had not been served with notices of set down of the hearing of both matters. In the same application, the applicant seeks condonation of the late filing of the D application for rescission of judgment. His basis is that, immediately upon learning about the judgment, he instructed his erstwhile legal practitioners to file an application for rescission of judgment. He made several follow ups with his legal practitioners without success. He then sought the assistance of his present legal practitioners. There were further delays as he could not E give full instructions to them. They later managed to get some papers from the applicant's legal practitioners. When these were furnished, his legal practitioner, Mr Bull, had to go on a short leave. He only managed to file the application after his return.

On the merits, the applicant avers that he has a sound claim for reimbursement F of the money on an agreed sum of GB39 584. He was given title deeds and keys to the first respondent's immovable

property in Marlborough as security. He further avers that the summary judgment be rescinded if the court sees it fit to reinstate his money claim. That is because the subject matter of the summary judgment, namely the claim for the return of title deeds, is prescribed. There is a supporting affidavit by Mr Bull where he outlines G procedural deficiencies in the money claim which, in his view, entitles the applicant's claims to be reinstated. These are:

(i) in terms of r 138, the exception and special plea is to be set down for hearing in accordance with the provisions of r 223(2);

(ii) r 223(2) specifically provides that, *inter alia*, exceptions, applications H to strike out and other applications which are *opposed* (his emphasis)

Makoni J

shall be set down for hearing in Harare (or Bulawayo), on a business A day agreed to with the registrar, by filing a notice of set down with the registrar not less than six business days before the day of set down.

In respect of the summary judgment order, Mr Bull avers that the founding affidavit does not correctly state all facts as to how the first respondent acquired possession of his title deed. B

Secondly, he avers that the first respondent does not deny owing the entire amount and therefore it will be unfair for the court to oblige the applicant to release the title deed held as security. Thirdly, the claim for the title deed has expired. Lastly the notice of set down should have been served on the applicant's legal practitioners as the applicant intended to oppose the matter because he filed what is entitled "Respondent's Opposing Affidavit". C

The application is opposed mainly on two grounds. Firstly, it is averred that the applicant was in default and he has failed to file an explanation from his erstwhile legal practitioners as to why he did not respond to the special plea and exception and as to why they did not file an application for rescission when instructed to do so. Secondly, on the merits, the first respondent does D not owe the applicant any money but he is owed by third parties.

Mr Moyo filed a supporting affidavit in which he responded to the procedural aspects raised by Mr Bull. He avers that there is nowhere in the rules where it is prescribed to set down on the unopposed roll a special plea and exception. As regards the summary judgment order, he avers that the applicant's erstwhile E legal practitioners did not file an explanation as to why they did not file a proper notice of opposition. Further, they did not respond to the letter from him pointing out the irregularity.

At the hearing of the matter, Mr *de Bourbon* took issue, *in limine*, with the manner the applicant's legal practitioners handled the issue of his heads of F argument. He submitted that the applicant's heads of argument were filed on 20 September 2011 and were only served on 29 September. There is no explanation at all regarding the delay. This is an applicant who is seeking the court's indulgence.

In response, Mr *Uriri* submitted that a bar does not take effect because of non-service of the heads. There was no prejudice suffered by the respondents G as they filed supplementary heads.

The respondents filed their heads of argument on 6 September 2011 and they were served on the same day. They prepared the record and applied for set down. The applicant filed his heads of argument on 20 September 2011. These were only served on 29 September 2011 on the respondents' legal H

Makoni J

A practitioners. The respondents' legal practitioners then filed supplementary heads of argument on 24 November 2011.

The issue being taken by Mr *de Bourbon* is that once heads of argument are filed, they should immediately be served on the other side and, failing an explanation, the other party would be barred. In terms of r 238, it is B imperative on a party filing heads of argument to deliver a copy of the heads of argument to every other party immediately and to file with the Registrar proof of such delivery. The rule is silent on what happens when the heads are not served immediately after being filed. In my view, where a party does not immediately serve heads of argument and it is put in

issue, it must give an explanation as to why it failed to serve heads of argument as soon as is C reasonably possible in the circumstances. Where the delay does not cause prejudice to the other party that should be the end of the matter. Where there is prejudice then the defaulting party must be visited with costs. *In casu*, the respondents did not suffer any prejudice as they were able to file supplementary heads of argument before the hearing of the matter. I will therefore dismiss the point *in limine.*

D Mr *Uriri* for the applicant submitted that, although the founding affidavit made out a case for rescission of judgment in terms of r 63, the undisputed facts of the matter brings the application squarely within the provisions of r 449. The orders in question were wrongfully sought and granted in error in the absence of the applicant. In the money claim, the respondents set down the exception as unopposed, in the erroneous view that the party upon whom E an exception is served must oppose the exception in the same way as an application is opposed under the rules. In the summary judgment proceedings, the applicant filed an opposing affidavit but did not do so under cover of a notice of opposition. The respondents then had the matter set down on the unopposed roll and argued that there was no notice of opposition.

F Mr *de Bourbon* submitted that the change of direction from r 63 to r 449 comes out in the heads of argument and not in the founding affidavit. There is no mention of error in the founding affidavit. The change is mainly because the applicant had no arguable case on the merits. He further submitted that an application in terms of r 449 must be brought expeditiously. In this matter, G there were inordinate delays caused by the applicant. The respondents had to arrange for the set down of the matter. The public policy rule of finality to litigation should be applied in order to decline to grant the relief that the applicant seeks. He further submitted that both orders were properly granted. Regarding the money claim, the applicant restricted his arguments to the exception. There is no mention of the special plea of prescription. Therefore H the applicant concedes that there was no error. As regards the exception, the

---

applicant did not indicate whether it opposed the exception. There was no A error when the judge dealt with the matter as unopposed. In the summary judgment proceedings, there was no opposition filed in terms of the rules. There was no need to give notice of set down to the applicant. No error was committed in granting the order.

Change of direction B

I agree with the submissions made by Mr *de Bourbon* on this point. The applicant belatedly sought to change the whole thrust not only of the application itself but of the argument thereon from r 63 and r 449. Rule 449 is mentioned for the first time in the heads of argument. There is no mention of error in the founding papers. In effect, the applicant painstakingly sought C to address the requirements of r 63 *viz.* condonation for the late filing of the application for rescission, the explanation for the default and the merits of his claim in the money claim and his defence in the summary judgment proceedings. Even Mr *Uriri* floundered when asked by the court the basis for r 449 in the founding papers. He, however, pointed the court to para 5 of the founding affidavit and para 4 of the supporting affidavit. However, he D could not explain the averments by the applicant in paras 8 and 19. My view is that the applicant decided, midstream, to resort to r 449 so that he could avoid dealing with the prospects of success. It is trite that an application stand or falls on its founding papers. The applicant did not make out a case for setting aside of the orders in terms of r 449. E

Assuming I am wrong, I will proceed to consider whether the orders were erroneously sought or granted and in the absence of the affected party. Rule 449 allows this court, either *mero motu* or upon the application of any party affected, to correct, rescind or vary any judgment or order, *inter alia*, that was erroneously sought or erroneously granted in the absence of a party affected thereby. The purpose of the rule was dealt with by Sandura JA in F *Matambanadzo v Goven* 2004 (1) ZLR 399 (S) at 404 A-C where he referred to the South African equivalent of the rule as described in *Theron NO v United Democratic Front & Ors* 1984 (2) SA 532 (C) at 536D-F, where it is stated:

> "Rule 42(1) entitles any party affected by a judgment or order erroneously sought or granted in his absence, to apply to have it rescinded. It is a procedural step designed to correct an irregularity and to

restore the parties to the position they G were before the order was granted. The court's concern at this stage is with the existence of an order or judgment granted in error in the applicant's absence and, in my view, it certainly cannot be said that the question whether such an order should be allowed to stand is of academic interest only."

Makarau JP (as she then was) in *Tiriboyi v Jani & Anor* 2004 (1) ZLR 470 (H) at 472D-E makes the same point but puts it differently: H

Makoni J

A "The purpose of r 449 appears to me to be to enable the court to revisit its orders and judgments to correct or set aside its orders or judgments given in error and where to allow such to stand on the excuse that the court is *functus officio* would result in an injustice and will destroy the very basis upon which the justice system rests. It is an exception to the general rule and must be resorted to only for the purposes of correcting an injustice that cannot be corrected in any one way.

B The rule goes beyond the ambit of mere formal, technical and clerical errors and may include the substance of the order or judgment. See *Grantully (Pvt) Ltd v UDC Ltd* 2000 (1) ZLR 361 (S)."

It is now settled in our law that the requirements for the grant of an order for rescission under r 449 are that:

(i) the C judgment was erroneously sought or granted;
(ii) the judgment was granted in the absence of the applicant; and
(iii) the applicant's rights or interests are affected by the judgment.

See the *Tiriboyi* case s*upra* at 473B-C.

Once these requirements are met, the applicant is entitled to succeed and D the court should not inquire into the merits of the matter to find good cause upon which to set aside the order or judgment. See *Tiriboyi* s*upra* at 473C.

The money claim

The applicant contends that the exception was set down as unopposed because of the erroneous view that a party upon whom an exception is served must E oppose the application in the same way as an application is opposed under the rules. There is no rule for opposition to an exception. Once an exception is filed it must be set down in terms of r 138(a) and (b).

The underlying requirement of r 138(a) is the consent of both parties and that of r 138(b) is the filing of heads of argument and a request for set down within a further four days in terms of r 223 (2) of failing to secure consent.

F The respondents challenge the applicant's contention from two fronts. Firstly, that the applicant, in his heads of argument is only attacking the set down of the exception. He is not challenging the set down of the special plea. Secondly, that the special plea and exception were not opposed and were therefore properly set down on the unopposed roll.

G The observation by Mr *de Bourbon* is correct. The applicant, in his heads of argument, attacked the set down of the exception. There is no mention whatsoever of the special plea of prescription. There was an obligation on the applicant to oppose the special plea as he bore the onus to defeat the claim of prescription. It appears the applicant is conceding that there was no error H in dismissing the claim on the ground of prescription. If that is the position,

---

Makoni J

then the claim was properly dismissed. There was no error in granting the A order as the claim had prescribed.

In respect of the exception, a litigant is obligated to indicate to the court and the other party whether or not he opposes the exception despite the fact that there is no rule which specifically provides for that. Where there is no indication that the exception is opposed there would be no error to treat the B matter as unopposed. In order to bring an exception within r 223 (3) for set down on the opposed roll, the matter must be opposed. Rule 223 (2) provides:

"*Set down of other matters on notice*

(2) Subject to subrules (3), (4), (5) and rule 238, exceptions, applications to strike out and other applications *which are opposed shall be* set down for hearing . . ." C

(my own emphasis).

The rule uses the words "which are opposed". This can only be known to the Registrar and the other party if intimation of such opposition has been given. These words also suggest that matters which are not opposed are set down in terms of a different rule altogether. My view is that the drafters of the rules could not have intended that every exception be set down in D terms of r 138 as an opposed matter. This would lead to an absurdity which would adversely interfere with the administration of justice. The rules have provided for an avenue or mechanism to allow matters that are unopposed to be speedily dealt with. Such matters can be set down in terms of r 223 (1) as unopposed applications. The respondents were therefore correct in E having the matter set down on the unopposed roll.

It must be appreciated that rules are practical ones for the proper administration of the courts and a court must never be a slave of its own rules. See *Scottish Rhodesian Ltd v Honiball* 1973 (1) RLR 138 (G); 1973 (2) SA 747 (R) where Beck J (as he then was) said at 748:

"The Rules of court are not laws of the Medes and Persians and in suitable cases F the court will not suffer sensible arrangements between the parties to be sacrificed on the alter of slavish obedience to the letter of the Rules."

See also *Nxasana v Minister of Justice & Anor* 1976 (3) SA 748 (D) at 781 where Didcott J stated:

"The rules, after all, are the court's tools, fashioned for its own use. They are G more flexible and more easily adapted to meet particular needs, than a statute can ever be."

Sentiments to the same effect were expressed by Winsen AJA (as he then was) in *Federated Trust Ltd v Botha* 1978 (3) SA 645 (A) at 654 where he said:

"The court does not encourage formalism in the application of the rules. These rules are not an end in themselves to be observed for their own sake. They are H

Makoni J

A provided to secure the inexpensive and expeditious completion of litigation before the courts."

The above remarks apply to r 138. Rule 223(1) "provides to secure the inexpensive and expeditious completion of litigation before the courts.."

Summary judgment proceedings

B It is common cause that the applicant filed his opposing affidavit timeously. He did not file a notice of opposition. The respondents' legal practitioners, by letter dated 16 February 2011, advised the applicant's erstwhile legal practitioners of the procedural problems relating to the matter. There was no response. The second respondent applied to have the opposing affidavit C struck off the record and for default judgment. He proceeded to have the matter set down on the unopposed roll. He did not serve the applicant with the application.

Mr *Uriri* submitted that failure to attach a notice of opposition is not fatal to the application. It is not peremptory, as suggested by the respondents. There was substantial compliance with r 233(1) and the court could have D condoned the technical non-compliance in terms of r 4C. He also referred to *Founders Building Society v Dalib (Pvt) Ltd & Ors* 1998 (1) ZLR 526 (H) for the proposition that the correct procedure would have been to file a motion to strike out the irregular pleading on notice to the other party.

Rule 233(1) reads:

E "The respondent shall be entitled, within the time given in the application in accordance with r 232 to file a notice of opposition in Form 29 A, together with one or more opposing affidavits."

The use of the word "shall" relates to the entitlement to oppose an application and not to the filing of the notice of opposition. The purpose of filing a F notice of opposition is to notify the other party that the application is being opposed. The opposing affidavit then sets out the basis upon which the application is challenged. I agree with Mr *Uriri*'s position that failure to attach an opposing affidavit to the notice of opposition is not fatal and is not a bar to the respondent to the grant of its relief. There was an irregular G pleading before the court.

I however do not agree with his interpretation of what Gillespie J said in the case of *Founders Building Society* s*upra*. At p 534D he stated:

> "If he opts for the former course then he must, in his application, and in fulfilment of the well recognised duty of full disclosure in *ex parte* proceedings, inform the court (or the judge) of the relevant irregularity and give reasons as to why the H court's discretion should be exercised in favour of the plaintiff. The fuller, and

> the more preferable course is an application, on notice, to strike out co-joined A with a prayer for default judgment."

My view is that the plaintiff is being given a choice between the two as Gillespie J used the term "preferable course". The first one is to advise the defendant of the irregularity and then make an application for default judgment. In the application for default judgment he must inform the court B or judge of the irregularity and why the court should grant him the relief that he seeks. The second one is an application, on notice, to strike out coupled with a prayer for default judgment. *In casu*, the second respondent's legal practitioner informed the applicant's legal practitioner of the irregularity and there was no response. He then made an application to have the irregular proceeding struck out, giving a basis why it should be struck out and why C he should get the relief that he sought. The application was not on notice and that is not fatal.

My view is therefore that there was no error in granting the order for summary judgment. The court was aware that there was an irregular pleading before it and went on to grant the application to strike it out, based on the application D filed by the second respondent.

Delay

An application under r 449 must be brought expeditiously. See *Grantully (Pvt) Ltd Anor v UDC Ltd* 2000 (1) ZLR 361 (S) at 366, where Gubbay CJ stated:

> "After all, r 449 is 'a procedural step designed to correct expeditiously an obviously E wrong judgment or order': *per* Erasmus J in *Bakoven*'s case s*upra* at 471E-F."

Judgment in the money claim was given in August 2010. The applicant filed the present application on 23 March 2011. The notice of opposition and opposing affidavits were filed on 6 April 2011. These were commissioned in Australia. The answering affidavit was filed on 5 July 2011. The respondents F then filed its heads of argument on 6 September 2011 and arranged for the matter to be set down. The applicant filed his heads of argument on 20 September 2011. The above narration indicates that the applicant was not in a hurry to have the application expeditiously dealt with. It took him thirteen weeks to file an answering affidavit yet the first respondent, who was in G Australia, filed his notice of opposition within the ten days stipulated in the court application. After a further period of eight weeks, the respondents then filed their heads of argument and arranged for the matter to be set down. It took the applicant two weeks to file his heads of argument and these were only served on the respondents some nine days after they were filed. There has to be finality to litigation and even if the applicant had brought himself H

A within r 449, I would have used my discretion to decline to grant the relief sought due to the delays.

In the result I therefore dismiss the application with costs.

Atherstone & Cook, applicant's legal practitioners

B *Gill Godlonton & Gerrans*, respondents' legal practitioners

© 2015 Juta and Company (Pty) Ltd.

Document 29 of 73

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2013/Volume 1/S v CHIKANDIWA & ORS 2013 (1) ZLR 206 (H)

S v CHIKANDIWA & ORS 2013 (1) ZLR 206 (H)

Citation	2013 (1) ZLR 206 (H)
Case No	Judgment No. HH-57-13
Court	High Court, Harare
Judge	Mathonsi J
Heard	27 February 2013
Judgment	27 February 2013
Counsel	Details not supplied
Case Type	Criminal review
Annotations	No case annotations to date

Flynote

Criminal procedure (sentence) – *forfeiture – of vehicle used for conveyance of article by means of which offence committed – when forfeiture should be ordered – value of vehicle in relation to value of other article – relevance of*

Headnote

The accused were all convicted under s 78(1)(a) of the Forest Act [*Chapter19:05*] after they were apprehended at road blocks with vehicles filled with firewood they had taken from various farms. In addition to the suspended prison sentences to which they were sentenced, the magistrate ordered the forfeiture of the firewood and the vehicles. Although the Forest Act does not provide for forfeiture, the magistrate relied on s 62(1) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] as justifying the forfeiture order.

Held, that the penalties for contravening s 78(1)(a) of the Forest Act are set out in the Act. They do not include the forfeiture of the instruments used in the commission of the offence, be it the machete used to cut the firewood or the means of conveyance by which the firewood was carried. It was a misdirection for the magistrate to rely on s 62(1) of the Criminal Procedure and Evidence Act.

Held, further, that in any event, care must always be taken, in deciding whether to order forfeiture or not, to ensure that such order does not result in the imposition of a penalty which is disproportionate to the gravity of the offence committed. Factors to consider include:

1. the nature of the article;
2. its role in the commission of the offence;
3. whether there is a possibility of the article being used again in the commission of similar offences;
4. the effect of the forfeiture on the accused person;

---

5. whether, A in view of the value of the article, its forfeiture will give rise to the imposition of a penalty disproportionate to the gravity of the offence;
6. where the article is of considerable value, like a motor vehicle, whether it has been used previously to commit a similar offence.

B Firewood is generally of negligible value. This, measured against the considerable value of motor vehicles, meant that the unsolicited order for forfeiture was not only inequitable but clearly led to the imposition of a disproportionate penalty not matched by the gravity of the offence.

Editor's note: s 62(1) of the Criminal Procedure and Evidence Act provides C that –

"A court convicting any person of *any* offence may, without notice to any other person, declare forfeited to the State –

(a) any weapon, instrument or other article by means whereof the offence in question was committed or which was used in the commission of such offence; or

(b) if D the conviction is in respect of an offence specified in the Second Schedule, any vehicle, container or other article which was used for the purpose of or in connection with the commission of the offence in question or, in the case of a conviction relating to the theft of any goods, for the conveyance or removal of the stolen property . . ." (emphasis supplied).

The use of the words "any offence" would indicate that it is not necessary E for a particular enactment specifically to provide for forfeiture in the event of conviction. The offences listed in the Second Schedule are:

1. Any offence under any enactment relating to the unlawful possession, conveyance or supply of habit-forming drugs or harmful liquids.
2. Any offence under any enactment relating to the unlawful possession of, or dealing in, precious metals or precious stones.
3. Theft, F either at common law or as defined by any enactment.
4. Breaking and entering any premises with intent to commit an offence, either at common law or in contravention of any enactment.

It would seem, therefore, that the forfeiture of the firewood could be and was lawfully ordered under s 62(1) but the forfeiture of the vehicles could not, contravening the Forest Act not being a Second Schedule offence.

Cases referred to G

R v Barclay 1975 (2) RLR 87 (A)

S v Kurimwi 1985 (2) ZLR 63 (S)

S v Mahomed 1977 (2) RLR 207 (G)

H *S v Ndhlovu (1)* 1980 ZLR 96 (G)

2013 (1) ZLR p208

Mathonsi J

R v Poswell & Anor 1969 (4) SA 194 (RA) A

Legislation considered

Criminal Procedure and Evidence Act [*Chapter 9:07*], s 62

Forest Act [*Chapter 19:05*], s 78(1)(a)

Judgment

Mathonsi J: In these three matters the accused persons were intercepted B at roadblocks mounted by the police in Beatrice on 19 and 20 October 2012, while carrying firewood they had fetched at farms in the area. In the first case of Juliet Chikandiwa and two others, they had loaded three cords of firewood onto a truck. In the second case, of Muranganwa Zinyana and two others, they had loaded seven cords onto an eight tonne truck, while in the C third case, Brodrick Tasukwa and another, they were carrying firewood in a 2.5 tonne truck.

They were arraigned before a provincial magistrate at Chitungwiza on a charge of contravening s 78(1)(a) of the Forest Act [*Chapter 19:05*]. They pleaded guilty to the charge and, upon conviction, were each sentenced to 15 months' imprisonment, of which five months were suspended for five D

years on condition of future good behaviour. The remaining 10 months were suspended on condition they complete 350 hours of community service at Budiriro, Featherstone and Wilkins Police stations.

In addition to those sentences, the firewood and motor vehicles used to ferry it were forfeited to the state.

The matters came before me for automatic review in terms of s 57(1) of the Magistrates Court Act [*Chapter 7:10*]. I immediately drew the trial magistrate's attention to the penal provision of s 78(1)(a) of the Forest Act, under which the accused persons were charged. This provision does not provide for forfeiture of the motor vehicles. That section provides:

> "Any person who, without authority, in or on a state forest or private forest cuts, injures, destroys, collects, takes or removes any tree, timber or other forest produce shall be guilty of an offence and liable –
>
> (i) where damage has been wilfully caused, to a fine not exceeding level 8 or to imprisonment for a period not exceeding two years or to both such fine and such imprisonment;
>
> (ii) in any other case, to a fine not exceeding level six or to imprisonment for a period not exceeding one year or to both such fine and such imprisonment."

The magistrate's response only came three months after I had queried the forfeiture of the vehicles. It reads in relevant part thus:

> "It is respectfully conceded that s 78(1)(a) which the accused persons stand convicted (*sic*) does not provide for the forfeiture of the motor vehicles. I was

Mathonsi J

> guided by s 62 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] to forfeit the said motor vehicle(s). Section 62(1)(a) provides that a court convicting any person of any offence may, without notice to any other person, declare forfeit to the State any weapon, instrument or other article by means whereof the offence in question was committed or which was used in the commission of such offence. On all the three records it was established that the said motor vehicles were used in the commission of an offence, hence the vehicles were forfeited to the State."

On 19 October 2012, Juliet Chikandiwa, Xavier Muwalo and John Kutsira, all of whom are not employed, drove to Mara Farm, Beatrice, in a Mazda T35 truck. Whilst there, they without authority harvested firewood which they loaded onto the vehicle. They were making their back to Harare at about 0045 hours when they were intercepted at a police road block at the 20 km peg along the Harare-Masvingo road, leading to their arrest as they had no permit to remove the firewood.

The value of the firewood was not ascertained. When they were brought before the magistrate they pleaded guilty and sentenced aforesaid, although the value of the truck was not established. On the same date, Brodrick Tasukwa, Lovemore Chimhungwe and three others (who pleaded not guilty), drove a 2.5 tonne truck to plot 52 Charter Estate, Featherstone, where they loaded firewood. They were on their way back to Harare along the Harare-Masvingo road when they were intercepted at a police road block mounted at the 54 km peg. On being found without a permit, they were duly arrested.

Again the value of the firewood was not established, neither was the value of the truck but they were convicted on their own pleas of guilty and sentence as already stated.

On 20 October 2012 Muranganwa Zinyana, Caleb Rupere and Chombe January, who had earlier driven in an eight tonne truck to Featherstone and loaded firewood onto the truck, were also intercepted at 0130 hours at a police road block mounted at the 20 km peg along the Harare-Masvingo road. When they failed to produce a permit to remove firewood, they were arrested. Although the values of both the firewood and vehicle were not ascertained, they were convicted on their pleas of guilty and sentenced as stated above.

Now the penalty for contravening s 78(1)(a) is set out in the Act. That penalty does not include the forfeiture of the instruments used in the commission of the offence, be it the machete used to cut the firewood, a wheelbarrow, scotch cart or indeed motor vehicle used to carry the firewood. If the legislature intended to provide for the forfeiture of those items, it would have certainly said so in the penal section. It did not.

Mathonsi J

In my view, it was not the business of the sentencing court to go beyond the A penal provision and import further penalty provisions from another law when the law giver had specifically provided for the punishment to be imposed against the offender. In doing so, the trial court fell into grave error.

The offence committed is a statutory one provided for in the Forest Act. It is undesirable to go further than the statute criminalising the conduct of the B accused persons in search of further sentencing power when such power is specifically given in the Act. Doing so leads to imposition of a penalty not envisaged by the law giver and certainly leads to undue punishment.

The magistrate says he had to go to s 62(1) of the Criminal Procedure and Evidence Act in order to find jurisdiction and authority to forfeit the vehicle. He does not explain why he found it necessary to do so. This was C as unnecessary, as it was a misdirection.

In any event, care must always be taken in deciding whether to order forfeiture or not, that such order does not result in the imposition of a penalty which is disproportionate to the gravity of the offence committed. Factors to be taken into account in deciding whether to order forfeiture were set out in *S* D *v Ndhlovu (1)* 1980 ZLR 96 (G) and they are:

(1) the nature of the article.

(2) its role in the commission of the offence.

(3) whether there is a possibility of the article being used again in the commission of similar offences. E

(4) the effect of the forfeiture on the accused person.

(5) in view of the value of the article, whether its forfeiture will give rise to the imposition of a penalty disproportionate to the gravity of the offence.

(6) where the article is of considerable value like a motor vehicle, whether it has been used previously to commit a similar offence. F

The point is made in *S v Kurimwi* 1985 (2) ZLR 63 (S) at 65D and 67F that the value of the motor vehicle must be considered *vis-à-vis* the value of the goods smuggled. By parity of reasoning, the value of the vehicle must be weighed against the value of the firewood in the present case. Indeed, as stated by Pittman J in *S v Mahomed* 1977 (2) RLR 207 (G) at 211E, the G decision on a forfeiture order first requires an inquiry whether the forfeiture would be equitable. See also *R v Poswell & Anor* 1969 (4) SA 194 (RA) and *R v Barclay* 1975 (2) RLR 87 (A).

In casu, the trial court proceeded, virtually headlong, without inquiring into the value of the firewood forming the subject of the offence or the value of the vehicles ordered forfeit and clearly was not alive to the importance of H

A the value of the forfeited vehicles as against the offence. Indeed, none of the guidelines set out in *Ndhlovu supra* was ever taken into consideration in deciding the forfeiture.

It occurs to me that firewood is generally of negligible value. This, measured against the considerable value of motor vehicles, means that the unsolicited order for forfeiture was not only inequitable but clearly led to the imposition B of a disproportionate penalty not matched by the gravity of the offence.

Accordingly, while the conviction of the accused persons was proper and the sentence imposed fell within the sentencing discretion of the magistrate, the orders for forfeiture of the three motor vehicles cannot stand.

In the result it is ordered that:

1. The C convictions of the accused persons in CRB B377-9/2012, CRB B 380-2/2012 and CRB B383-7/2012 are hereby confirmed.
2. The sentences imposed on the accused persons in CRB B377-9/2012, CRB B380-2/2012 and CRB B383-7/2012, excluding the forfeiture orders, are hereby confirmed.
3. The D order for the forfeiture of the Mazda T35 registration number AAP6474, the 8 tonne truck registration number ABY6641 and the 2.5 tonne truck registration number ACL 4240 are hereby set aside with the result that the said motor vehicles should forthwith be returned to the accused persons.

4. The E order for the forfeiture of the firewood in all the 3 cases is hereby confirmed.

Mawadze J agrees.

© 2015 Juta and Company (Pty) Ltd.

Document 30 of 73

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2013/Volume 1/NATIONAL CONSTITUTIONAL ASSEMBLY & ANOR v THE PRESIDENT & ANOR 2013 (1) ZLR 212 (H)

NATIONAL CONSTITUTIONAL ASSEMBLY & ANOR v THE PRESIDENT & ANOR 2013 (1) ZLR 212 (H)

Citation	2013 (1) ZLR 212 (H)
Case No	HH-58-13
Court	High Court, Harare
Judge	Chiweshe JP
Heard	25 February 2013; *CAV*
Judgment	28 February 2013
Counsel	*A Muchadehama* with *L Madhuku* & *M Chivasa* & *Makunike*, for the applicants *P Machaya* (Deputy A-G), *N Mutsonziwa* and Ms *T Mashiri*, for the first respondent Ms *K L Murefu*, Ms *C Saruwaka*, Ms *C T Mahuni* and *G Mashava*, for the second respondent
Case Type	Civil application
Annotations	No case annotations to date

Flynote

Constitutional law – *Constitution of Zimbabwe 1980 – President – executive powers of – when exercise of such powers subject to review by the courts*

Headnote

Acting in terms of s 3 of the Referendums Act [*Chapter 20:10*], the President D issued a proclamation on 15 February 2013, in terms of which a referendum was to be held on 16 March 2013, to enable the voters of Zimbabwe to determine whether or not to accept a draft new Constitution for Zimbabwe. The applicant organization and its chairman sought an E order setting aside the proclamation, on the grounds that the time period was grossly inadequate in light of the importance and complexity of the opinion being sought from voters. In particular, they averred that at the time of setting of the date no official copy of the draft constitution or translated or simplified versions of the same had been published. They further averred that by setting the date of 16 March 2013 the President F acted arbitrarily, irrationally, grossly unreasonably and *ultra vires* the Act. By acting in this way, they argued that he had denied citizens adequate time to study and debate the draft so as to participate in the referendum from an informed position.

The President opposed the application solely on the ground that his conduct G in publishing the Proclamation was not subject to review by the judiciary. He relied on s 31K(1) of the Constitution, which, it was argued, ousts the jurisdiction of the courts in relation to all executive acts of the President where he has acted on his own deliberative judgment, and precludes the court from inquiring into the manner in which he exercised his discretion. In deciding to call for a referendum and fixing the day and time for the H

A holding of the referendum, he acted on his own deliberate judgment in terms of the Referendums Act.

Held, that the provisions of s 31K were clear and unambiguous. The powers given to the President by s 3 of the Act, being wide, discretionary and unfettered, fall into the category of those powers envisaged under s 31K(1), wherein the President is required or permitted to act on his B own deliberate judgment. That being the case, his conduct in setting the date of the referendum and the time within which voters may cast their vote was not subject to review by a court. Only where a prerogative or executive power has been exercised unlawfully or outside the law might the courts be entitled to interfere.

C Editor's note: at an appeal against this ruling, heard on 13 March, the Supreme Court held that the proclamation of the referendum date was reviewable by a court, but on the merits of the application ruled that the NCA's evidence did not prove its complaint that the time allowed by the proclamation was inadequate.

Cases cited D

PF-ZAPU v Min of Justice 1985 (1) ZLR 305 (S)

ZLHR & Anor v President, Republic of Zimbabwe 2000 (1) ZLR 274 (S)

Legislation considered

Constitution of Zimbabwe 1980, s 31K(1)(a), (b), (c) & (d) E

Referendums Act [*Chapter 2:10*], s 3

Case information

A Muchadehama with *L Madhuku* & *M Chivasa* & *Makunike*, for the applicants

P Machaya (Deputy A-G), *N Mutsonziwa* and Ms *T Mashiri*, for the first respondent

F Ms *K L Murefu*, Ms *C Saruwaka*, Ms *C T Mahuni* and *G Mashava*, for the second respondent

Judgment

Chiweshe JP: In this urgent chamber application the applicants seek a provisional order in the following terms:

G "FINAL ORDER SOUGHT

That the respondents show cause why a final order should not be granted in the following terms:

1. It is declared that Proclamation No 1 of 2013 issued by the first respondent and gazetted on 15 February 2013 as Statutory Instrument 19/2013 be and is hereby declared to be unlawful and *ultra vires* section 3 of the Referendum H Act [*Chapter 2:10*].

Chiweshe JP

2. It is ordered that Proclamation No 1 of 2013 issued by the first respondent A and gazetted on the 15th of February 2013 as Statutory Instrument 19 of 2013 be and is hereby set aside.
3. Second respondent and all those acting through him/her be and are hereby interdicted from acting on SI 19 of 2013 and/or conducting a referendum on 16 March 2013.
4. Respondents shall pay the costs of this application. B

INTERIM ORDER GRANTED

Pending confirmation or discharge of the Provisional Order, the following interim relief is granted.

1. Proclamation No 1 of 2013 issued by the first respondent and gazetted on 15 February 2013 as Statutory Instrument 19 of 2013 be and is hereby C provisionally set aside.
2. The Registrar of the High Court be and is hereby directed to set the matter down for final determination on an urgent basis, and in any event before 16 March 2013."

The background facts to this application are briefly as follows. The first applicant, a common law *universitas*, was formed in 1997. Its stated mission D is to push for a new, democratic and people-driven constitution in Zimbabwe. The second applicant is the first applicant's National Chairman. He deposed to the founding affidavit. He did so on behalf of the first applicant and also on his own behalf in his capacity as an ordinary voter.

On 12 April 2009, Parliament set up a committee generally referred to as E COPAC. Its mandate was to collect the people's views on a new constitution and, on that basis, come up with a people-driven draft constitution. After three and a half years of engagement in this process, a draft was finally agreed on 17 January 2013. The draft constitution was subsequently adopted by Parliament. It now awaits approval by the electorate in a referendum.

The first respondent proceeded to publish in the *Government Gazette* dated F 15 February 2013 a proclamation in terms of which a referendum was to be held on 16 March 2013. In doing so, the first respondent acted in terms of s 3 of the Referendums Act [*Chapter 2:10*] which reads:

"Referendum Proclamation

Whenever the President considers it desirable to ascertain the view of voters on G any question or issue, he may by proclamation in the *Gazette* –

(a) declare that a referendum is to be held in order to ascertain the view of voters on that question or issue; and

(b) appoint a day or days for the holding of the referendum; and

(c) state the hours at which voting for the purposes of the referendum will H commence and will close; . . ."

Chiweshe JP

A It is the applicants' view that the time set by the first respondent is "grossly inadequate in light of the importance and complexity of the opinion being sought from voters". In particular, it is averred that at the time of setting of the date no official copy of the draft constitution or translated or simplified versions of the same had been published. It is further averred that by setting the date of 16 March 2013 the first respondent acted arbitrarily, irrationally, B grossly unreasonably and *ultra vires* the enabling Act. By acting in this way, it is argued that the first respondent has denied citizens adequate time to study and debate the draft so as to participate in the referendum from an informed position. For these reasons it is further argued that the resultant Proclamation is subject to review by the courts. The present application seeks C therefore that this court sets aside the date of 16 March 2013 and orders the first respondent to give voters no less than two months to read and analyse the draft constitution. The applicant intends to campaign for a "No" vote. To that end, it will need to distribute its objections to all potential voters, organise meetings, debates and other forms of interaction with the electorate and stakeholders. It avers that it cannot mount an effective campaign in the D time given.

The first respondent has opposed the application solely on the basis of a preliminary issue, namely that the conduct of the applicant in publishing the Proclamation is not subject to review by the judiciary. It relies in this regard on the provisions of s 31K(1) of the Constitution "which ousts the jurisdiction of the courts in relation to all executive acts of the President E where he has acted on his own deliberative judgment." It is argued that in deciding to call for a referendum on the draft constitution and fixing the day and time for the holding of such a referendum, the first respondent acted "on his own deliberate judgment" in terms of the Referendums Act. His conduct in this regard is the sort of conduct covered by the provisions of s 31K (1) F of the Constitution.

Section 31K(1) of the Constitution provides:

"31K Extent to which exercise of President's functions justiciable

(1) Where the President is required or permitted by this Constitution or any other law to act on his own deliberate judgment, a court shall not, in any case, G inquire into any of the following questions or matters –

(a) whether any advice or recommendation was tendered to the President or acted on by him; or

(b) whether any consultation took place in connection with the performance of the act; or

(c) the nature of any advice or recommendation tendered to the President; or

(d) the H manner in which the President has exercised his discretion."

2013 (1) ZLR p216

Chiweshe JP

These provisions are clear and unambiguous. I am convinced that the powers A given to the first respondent by s 3 of the Referendums Act, being wide, discretionary and unfettered, fall into the category of those powers envisaged under s 31K(1), wherein the first respondent is required or permitted to act on his own deliberate judgment. That being the case, I conclude that the conduct of the first respondent, in setting the date of the referendum and B the time within which voters may cast their vote, is not subject to review by a court. Indeed this is the position that was taken by the Supreme Court in the case of *Zimbabwe Lawyers for Human Rights & Anor v President, Republic of Zimbabwe* 2000 (1) ZLR 274 (S).

In that case Gubbay CJ had occasion to make reference to the import of s 31K of the Constitution with regards Presidential immunity. At p 278D-E C he stated thus:

> "The section specifies a number of situations in which a court is not permitted to inquire into the actions of the President. In all other matters, no fetter is placed upon the court and no immunity is accorded the office of the President."

While the first respondent relied on the above case to support its interpretation D of s 31K(1) of the Constitution, the applicants preferred the position taken by Dumbutshena CJ in *PF-ZAPU v Min of Justice* 1985 (1) ZLR 305 (S). In that case the learned Chief Justice dealt with similar challenges, mainly, whether the exercise of executive powers by the first respondent is subject to review by the courts. He concluded at 316 E that there are some functions performed by the President in terms of the Constitution which are not reviewable. E However, should such prerogatives "be exercised under unlawful conditions or performed outside the law, the courts . . . have a duty to find out whether the facts upon which the prerogative power was exercised were lawful".

I do not think that much reliance can be placed upon the conclusion in that case. It appears to me that Dumbutshena CJ was addressing situations in F which a prerogative or executive power had been exercised unlawfully or outside the law. That is not the position in the present case because the first respondent is clearly empowered by the Referendums Act to decide the date upon which he may wish to hold a referendum. Unlawfulness is therefore not a factor in the instant case.

Secondly the *PF-ZAPU* case *supra* was decided before the enactment of G the present s 31K of the Constitution. The court could not therefore have had the opportunity to interpret the present constitutional provision. Mr *Machaya* for the respondents submits that s 31K was brought in precisely because the Legislature wished to ensure that certain executive powers were not justiciable, more so in light of the decision in the *PF-ZAPU* case *supra*. H

2013 (1) ZLR p217

Chiweshe JP

A That seems to be the position, more so in light of the fact that the applicants did not challenge that submission.

Paragraph (d) of subs (1) of s 31K is particularly relevant, in that what the applicants wish this court to do is to review the manner in which the first respondent has exercised its discretion in fixing 16 March 2013 as the date of the referendum. The provisions of that paragraph preclude the court B from doing so. Mr *Muchadehama*, for the applicants, no doubt realising that the wording of that paragraph cannot be interpreted in any other way, sought to persuade this court that that paragraph should not be interpreted in isolation, but that it should instead be read together or in conjunction with the preceding paragraphs (a), (b) and (c). I agree with Mr *Machaya* that it C would be improper to do so. Firstly the use of the word "or" instead of "and" suggests that each of these paragraphs is a stand-alone entity. Secondly the subject matter specifically covered by each of the other paragraphs has nothing in common with the subject matter covered under paragraph (d). But in any event, even if the four paragraphs were to be read together, the end product would still be the same – namely that the Legislature has expressly and in D clear and unambiguous language ousted the jurisdiction of any court with regards the matters spelt out under s 31K(1) of the Constitution.

The applicants have argued that the executive decision complained of is reviewable where it can be shown that "the private rights, interests and legitimate expectations of citizens" have been affected. In my view the E provisions of s 31K do not, on account of their clear and unequivocal import, permit of such considerations.

For these reasons the preliminary issue must be decided in favour of the first respondent. The second respondent has not opposed this application. It will abide by the decision of the court.

F Accordingly, it is ordered as follows:

1. It is declared that by virtue of the provisions of s 31K(1) of the Constitution of Zimbabwe the powers conferred upon the first respondent in terms of s 3 of the Referendums Act [*Chapter 2:10*] are not justiciable.
2. Consequently it is ordered that the application be and is hereby dismissed in its entirety.
3. The G first and second applicants shall jointly and severally, the one paying the other to be absolved, pay the costs of this application.

Mbidzo Muchadehama & Makoni, applicants' legal practitioners

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

© 2015 Juta and Company (Pty) Ltd.

Document 31 of 73

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2013/Volume 1/S v NONGERAI & ORS 2013 (1) ZLR 218 (H)

S v NONGERAI & ORS 2013 (1) ZLR 218 (H)

Citation	2013 (1) ZLR 218 (H)
Case No	Judgment No. HB-43-13
Court	High Court, Bulawayo
Judge	Cheda J
Heard	28 February 2013
Judgment	28 February 2013
Counsel	Details not supplied
Case Type	Criminal review
Annotations	No case annotations to date

Flynote

Criminal procedure (sentence) – *forfeiture – of article used in commission of offence – motor vehicle used in kidnapping – accused sentenced to lengthy term of imprisonment for kidnapping – careful consideration required before forfeiture is ordered – factors to consider*

Headnote

The three accused were convicted of assault and kidnapping. They had D assaulted the complainant with an assortment of weapons, demanding money which they alleged was owed to them by her mother. She suffered injuries in the process and was medically attended to. She was then forced into a car which belonged to one of the accused and driven to another E town. Throughout this period, they continued assaulting her. They were sentenced to five years' imprisonment and the car was ordered to be forfeited. The magistrate considered the car to be the means by which the offence was committed.

Held, that in dealing with the question of forfeiture in terms of s 62 of the F Criminal Procedure and Evidence Act [*Chapter 9:07*], judicial officers should at all times approach it carefully in the light of the serious consequences which may flow from such a forfeiture order. The order of forfeiture is purely discretionary, which discretion, of course should be judicially exercised. In that determination the courts should be guided G by the following factors:

1. the nature of the article;
2. its role in the commission of the offence;
3. whether there is a possibility of the article being used again in the commission of similar offences;
4. the effect of the forfeiture on the accused person; H

Cheda J

5. whether, A in view of the value of the article, its forfeiture will give rise to the imposition of a penalty disproportionate to the gravity of the offence; and
6. where the article is of considerable value, like a motor vehicle, whether it has been used previously to commit a similar offence.

B The motor vehicle was indeed used in the commission of the offence and it was a necessary connection between it and the offence. However, that factor must be taken together with other factors, such as the effect of the forfeiture on the owner of the motor vehicle. The vehicle was of considerable value, especially when regard was given to the fact that the accused was already serving a five year term of imprisonment. In C the circumstances, forfeiture was inequitable.

Cases cited

R v Ndhlovu 1980 ZLR 96

S v Mohamed 1977 (2) RLR 207 (G)

Legislation considered D

Criminal Procedure and Evidence Act [*Chapter 9:07*], s 62

Judgment

Cheda J: This is a review wherein my brother Ndou raised a query with regards to sentence.

E The accused were charged with one count of assault with intent to cause bodily harm and also of kidnapping.

The background of this matter is that all the three accused live in Gweru while the complainant lives in Shurugwi. On 27 August 2012 at around 1340 hours, all the three accused proceeded by car to Wallcose A2 mine F at Tongogara Farm, Shurugwi, which is owned by complainant's mother. Upon arrival they found the complainant's brother, one Norest Javangwe, who was in a shaft underground. They enquired about the whereabouts of her mother and she advised them that she was not around.

The accused then called her into their car whereupon they started assaulting G her with an assortment of weapons demanding money, which they alleged was owed to them by her mother. She suffered injuries in the process and was medically attended to.

During that process the accused grabbed her and forcibly took her into their car and drove to a place called Ascot Shopping Centre, and later to Irvine H shops, which places are in Gweru. Throughout this period, they continued

Cheda J

assaulting her. They further proceeded to Mkoba 9 and 6 in Gweru, where A they locked her in their car as they began drinking beer.

A report was made to the police and the accused were subsequently arrested. During complainant's ordeal, they were using one of the accused's vehicles, being a green Isuzu Bellet registration AAT 1637.

They were convicted on both counts and were sentenced as follows: B

> "5 years imprisonment. In addition the vehicle Isuzu Bellet AAT 1637 is hereby forfeited to the state."

The conviction on both counts is proper, but, it is the sentence which needs a thorough examination. The motor vehicle which they were using was forfeited to the State.

When the magistrate was asked by my brother Ndou why the motor vehicle C was forfeited to the State, his response was:

> "Ad para 2
>
> The vehicle was forfeited because it was used for the commission of the crime. It was driven to the mine where they kidnapped the complainant and drove it to all places where they assaulted the complainant. They kept the complainant D in the vehicle for 8 hours until she was rescued by the police. She messed up herself in the vehicle. It facilitated the commission of the crime.
>
> If they had no vehicle the commission of the crime was going to be difficult or impossible.
>
> I acknowledge the observations and have since rectified the anomaly. I sincerely apologise for the errors noted by the judge and undertake not in future to make E the same errors.
>
> (signed)
>
> MATURA E (MRS)
>
> PROVINCIAL MAGISTRATE- SHURUGWI."

The question of forfeiture is dealt with under Part VI of the Criminal Procedure and Evidence Act [*Chapter 9:07*]; in particular s 62 which reads thus: F

> "Forfeiture of article to State
>
> (1) A court convicting any person of any offence may, without notice to any other person, declare forfeited to the State –
>
> (a) any weapon, instrument or other article by means whereof the offence in question was committed or which was used in the commission of such offence; or G
>
> (b) if the conviction is in respect of an offence specified in the Second Schedule, any vehicle, container or other article which was used for the purpose of or in connection with the commission of the offence in question or, in the case of a conviction relating to the theft of any goods, for the conveyance or removal of the stolen property;
>
> and which was seized in terms of this Part: H

Cheda J

> A Provided that such forfeiture shall not affect any right referred to in paragraph (a) or (b) of subsection (4) if it is proved that the person who claims such right did not know that the weapon, instrument, vehicle, container or other article was being used or would be used for the purpose of or in connection with the commission of the offence in question or, as the case may be, for the conveyance or removal of the stolen property in question, or that he could not prevent such B use, and that he may lawfully possess such weapon, instrument, vehicle, container or other article, as the case may be.
>
> (2) A court convicting any person or which finds an accused not guilty of any offence shall declare forfeited to the State any article seized under this Part which is forged or counterfeit or which cannot lawfully be possessed by any person."

The order of forfeiture is purely discretionary, which discretion, of course, C should be judicially exercised. In that determination the courts should be guided by the following factors:

> "(1) the nature of the article
>
> (2) the role played by it in the commission of the offence and whether there is a necessary connection between it and the offence;
>
> (3) the possibility that it will be used again in the commission of the offence;

(4) the D effect of forfeiture on the person(s) affected thereby;

(5) whether by virtue of the value the forfeiture of the article would be disproportionate to the gravity of the offence,

(6) in the case of an article of considerable value, such as a motor vehicle, whether or not it has been used on other occasions for a similar criminal E purpose".

See *Criminal Procedure in Zimbabwe* John Reid Rowland (Legal Resources Foundation 1997) and also *R v Ndlovu (1)* 1980 ZLR 96 at 103-104.

The provisions of Part VI of the Criminal Procedure and Evidence Act, in my view, do not cover the vehicle used in the commission of this offence. I F hold this view in light of the factors listed s*upra*, that is whether the article, being the motor vehicle, may be used again in the commission of the offence and whether it has been used in the commission of other offences.

The motor vehicle was indeed used in the commission of the offence and it was a necessary connection between it and the offence. However, in my opinion, that factor must be taken together with other factors such as the G effect of the forfeiture on the owner of the motor vehicle. The vehicle is in my opinion of great considerable value especially when heed is taken that accused is already serving a 5 year imprisonment term.

The guidelines with regards to the factors to be taken into account were also clearly stated in *S v Mohamed* 1977 (2) RLR 207 (G) at 211E-G where

H Pittman J said:

2013 (1) ZLR p222

Cheda J

"The decision of a forfeiture order requires first an inquiry whether a forfeiture A order would be equitable. Relevant matters would include:

(1) the real value of the goods to the accused (*S v Elms* GS-66-76 and *S v Smith* 1974 (1) SA 607 (R));

(2) the purpose for which they were being imported (*S v Lennon* 1972 (2) RLR 259 (A)); B

(3) the importance to the accused of being allowed to retain them:

(4) whether it would be difficult for him to replace them;

(5) whether it will benefit or harm the community if he is allowed to retain them (*S v Coetzee* AD-185-76); and

(6) whether the accused will be able to pay an adequate monetary penalty for his offence, if imprisonment is not regarded as a suitable punishment." C

It is trite law, therefore, that judicial officers should at all times approach the question of forfeiture with care in light of the serious consequences which may flow from the said order.

In light of that, the value of the motor vehicle is disappropriate to the gravity of the offence to an extent that forfeiture of the motor vehicle will be against D public policy and an acceptable sense of justice.

The magistrate had a discretion to order forfeiture, but, as the courts have always stated, such a discretion should be exercised judicially (see *R v Ndlovu supra*. The magistrate's reason that she ordered forfeiture because, without the vehicle, the offence would not have been committed is indeed correct, but although it is a factor to be taken into account it is not the only E determining factor as shown above.

I am therefore not favourably persuaded that forfeiture was justified.

In conclusion, I confirm the conviction and sentence, but the forfeiture order is set aside. F

Makonese J agrees.

© 2015 Juta and Company (Pty) Ltd.

Document 32 of 73

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2013/Volume 1/S v MATSETU 2013 (1) ZLR 223 (H)

S v MATSETU 2013 (1) ZLR 223 (H)

Citation	2013 (1) ZLR 223 (H)
Case No	Judgment No. HH-84-13
Court	High Court, Harare
Judge	Uchena J and Bere J
Heard	4 March 2013
Judgment	4 March 2013
Counsel	Details not supplied
Case Type	Criminal review
Annotations	No case annotations to date

Flynote

Criminal procedure – *plea – guilty – when should be altered to one of not guilty – apparent defence being offered – only valid defence should result in alteration of plea*

Criminal procedure – *plea – guilty – explanation of charge and essential elements – questioning by magistrate in terms of s 271(2)(b) of Criminal* D *Procedure and Evidence Act [Chapter 9:07] – manner in which questions should be asked – need to ensure that accused not admitting things he does not understand – need to ensure accused is admitting or denying relevant facts*

Criminal procedure – *scrutiny – by regional magistrate of criminal matter* E *heard in lower court – meaning of "scrutiny"*

Headnote

The accused pleaded guilty to a charge of culpable homicide arising out of traffic accident which occurred at night. The magistrate then proceeded in terms of 271(2)(b) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] to question the accused to canvass the essential elements of the F offence. In answer to one question, the accused said he did not mean to cause the accident. The magistrate then proceeded to ask the accused a series of further questions, relating to the speed at which he was driving, the distance at which he was from the deceased when he first saw the deceased, the state of the lights on the accused's vehicle, and so on.

G The scrutinising regional magistrate was of the view that the accused was raising a triable issue and the plea should have been changed to one of not guilty. The trial magistrate explained that his approach had been to ascertain the facts from the accused, and then decide if negligence could be inferred from them. This approach necessarily entailed asking the accused several questions. He would not ask the accused person directly H to admit negligence.

Held, that judicial officers, when proceeding in terms of s 271(2)(b), are A free to ask the accused whatever questions they deem fit to ascertain the accused's guilt or innocence. There is no exhaustive list of questions, nor any limit to the ways in which the questions should be put. It is therefore permissible to ask indirect questions and infer from them the B accused's guilt or innocence. An indirect question usually brings out the truth, as it does not warn the accused of the effect his answer may have. It overcomes the problem of an accused person's appreciation of

legal concepts. It brings about real justice, as it seeks facts without clothing the question in legal jargon. This approach is preferable because legal concepts are not easy to master. In the case of unrepresented accused C persons, the explanations of the charge and its elements should not be expected to fully inform them of the offence to the extent of expecting them to correctly and from an informed position answer direct questions based on legal concepts. Judicial officers should therefore always be careful, when canvassing essential elements, to avoid being satisfied by an accused's admission or denial of facts couched in legal jargon. They D should ensure, through careful probing, that the accused is admitting or denying such facts. If an accused person is asked whether he admits that he was negligent, and he answers "yes", that answer does not mean that he was indeed negligent. The magistrate who fully appreciates what negligence means must ask questions which will enable him to establish E whether or not the accused was negligent.

Held, further, that a judicial officer is expected to know the law applicable to the offence charged. That will enable him to avoid being distracted by answers not relevant to the issues before him. In fact, s 271(2)(b) requires a judicial officer to have such knowledge as it requires him to explain the charge and its essential elements to the accused and to be satisfied, F by the facts he gathers during the canvassing of essential elements, of the accused's guilt. Here, the offence charged was culpable homicide. The magistrate therefore correctly carried on with the canvassing of essential elements, because the accused's answer was not a valid defence to the offence charged. G

Held, further, that scrutinising regional magistrates must also have a good grasp of the law applicable to the case under scrutiny. If one is not sure, it is important to check before referring a case for review. Section 58(3)(b) of the Magistrates Court Act [*Chapter 7:10*] provides for a referral of a case under scrutiny to a judge for review "if it appears to him that doubt exists whether the proceedings are in accordance with real and H

A substantial justice". A doubt which justifies a referral to a judge for review must be one which lingers on after the regional magistrate has fully played his part. "Scrutinising" means looking, deeply and closely, into a matter. It is not a cursory examination of the record without applying one's knowledge of the law into what the trial magistrate did.

B *Held*, further, that the provisions of s 272 of the Criminal Procedure and Evidence Act, on the basis of which a judicial officer alters a guilty plea to one of not guilty, are triggered by:

(a) a judicious doubt as to whether the accused is in law guilty of the offence to which he has pleaded guilty. The doubt must be grounded in the law. In this case, the law on culpable homicide justified the trial C magistrate's proceeding with the canvassing of essential elements;

(b) the judicial officer not being satisfied that the accused has admitted or correctly admitted all the essential elements of the offence charged or all the facts or omissions which prove the offence charged. Here, the trial magistrate was correctly satisfied that the convicted person was correctly admitting the elements of culpable homicide;

(c) the D judicial officer not being satisfied that the accused does not have a valid defence. It is not every seeming defence which justifies the alteration of a plea of guilty to one of not guilty. If the judicial officer is not satisfied that the accused does not have a valid defence, he should alter the plea to one of not guilty. If he is, however, satisfied that what seems to be a defence is not a valid defence at law, he E should not alter the plea to one of not guilty.

Cases referred to

S v Dube & Anor 1988 (2) ZLR 385 (S)

S v Ferreira 1992 (1) ZLR 93 (S); 1992 (2) SACR 425 (ZS)

F *S v Kawareware* 2011 (2) ZLR 281 (H)

S v Mandwe 1993 (2) ZLR 233 (S)

S v Makuvatsine 2004 (1) ZLR 459 (H)

S v Nyambo 1997 (2) ZLR 333 (H)

S v Tachiona & Anor 1994 (2) ZLR 402 (H)

Legislation considered G

Criminal Procedure and Evidence Act [*Chapter 9:07*], s 271(2)(b) & 272

Magistrates Court Act [*Chapter 7:10*], s 58(3)(b)

Judgment

Uchena J: Maxim Matsetu, whom I will in this judgment call "the convicted H person", appeared before a senior magistrate at Mbare magistrates court

---

Uchena J

charged with contravening s 49(1)(a) of the Criminal Law (Codification and A Reform) Act [*Chapter 9:23*] (culpable homicide). He pleaded guilty and was convicted on his own plea. He was sentenced to six months' imprisonment, of which two months were suspended on conditions of good behaviour.

The record of proceedings was forwarded to an acting regional magistrate for scrutiny. The acting regional magistrate raised issues on the propriety of B the procedure followed by the trial magistrate, and ultimately the conviction. Her letter to the trial magistrate reads as follows:

> "It is the propriety of the procedure and ultimately the conviction which I am concerned with. The trial magistrate proceeded in terms of s 271(2)(b) [of the Criminal Procedure and Evidence Act] and, in terms of that law, [the] accused's responses should amount to an irrevocable admission of the essential elements C of the offence and that where there is doubt and where the accused raises a defence the plea should be altered to not guilty.
>
> The cases of *S v Ndlovu and Anor* HB-30-02 and *S v Makuvatsine* 2004 (1) ZLR 459 (H) are relevant.
>
> In canvassing the essential elements the following exchange took place between the magistrate and the accused person: D
>
> Q. Any variations to make?
>
> A. I did not intend to cause the accident. I did not do it deliberately.
>
> Despite the fact that [the] accused said he did not intend to cause the accident and thereby raised a defence at law which should have led to the alteration of the plea to not guilty, the trial magistrate still proceeded with 'canvassing E essential elements'.
>
> Q. Why did you fail to stop your car before hitting the pedestrians?
>
> A. I saw him when he was only about 3 metres away, I could not stop in time.
>
> Q. Why did you not see him in time?
>
> A. I had dipped my lights. There was another kombi that had stopped, it was coming from the opposite direction and its lights were flashing into my F eyes, I could not see properly.
>
> The following further exchange clearly shows that the trial magistrate had serious doubts. Instead of canvassing essential elements I cannot be faulted to conclude that this was now cross-examination of the accused by the trial magistrate.
>
> Q. Why did you not stop?
>
> A. There were other vehicles behind me. G
>
> Q. What did you do after seeing the kombi that had stopped?
>
> A. I reduced my speed to about 60 km/h.
>
> Q. Why did you reduce your speed?
>
> A. As a person who had seen that there was a kombi that had stopped I did not know if it was picking or dropping a passenger. H

Uchena J

> Q. Do A you admit that Crispen Mukize died as a result of the accident in which your vehicle hit him?
>
> A. Yes I had 18 passengers on board.
>
> Q. Did you have a right to drive in the manner you did, not keeping a proper lookout on the road, not stopping when you were not seeing properly etc?
>
> A. No.
>
> Q. Any B defence to offer?
>
> A. No".

The accused was nevertheless convicted despite raising what I believe were triable issues. After convicting the accused person, the trial magistrate then decided to explain himself, which is not normally done if the proper C procedure in s 271(2)(b) is followed or adopted which I concluded was now his reasons for the judgment.

If the trial magistrate can comment

Was the proper procedure followed, was the accused not raising triable issues which can only be resolved in a trial, was the accused therefore properly D convicted and sentenced?

The trial magistrate, courteously, boldly and confidently, responded as follows;

"I must start by apologizing for responding to your query late. What happened is that I received the query on 2 November 2012, which was a Friday. Then I went to Mutoko on Sunday 4 November 2012 and was there until 9 November 2012 E doing part heard cases. Any inconveniences caused by the delay are sincerely regretted.

You raised issue with the propriety of the procedure, and ultimately the conviction, in the above matter. My response to the issue you raised is found hereunder.

I will begin by an exposition of my understanding of the offence of culpable homicide. This offence consists in causing the death of a human being through negligence. Where negligence is an element, as is the case in culpable homicide F cases, it is not what the accused person intended that is relevant, but what a reasonable person would say about what the accused person did. So, an accused person might not intend to cause an accident, yet he drives his motor vehicle at an excessive speed in the circumstances. If he hits and kills a person, he will be guilty of culpable homicide, even though he never intended to cause the accident. A person does not plan to be negligent. All that happens is that his actions, as G he is going about his business, fail to measure up to the reasonable expectations of others. If those actions cause the death of a person, then the accused will be guilty of culpable homicide.

Another important aspect of negligence is that it is not factual, but is inferred. It all depends on the circumstances. I would thus not expect an accused person to be asked, 'Do you admit that you were negligent?' in canvassing essential elements H of culpable homicide. Such a question would not be clear because negligence is

---

relative. Indeed, if an accused person is asked if he was negligent and he says A 'Yes', we should be worried, because his 'Yes' might well be inappropriate, regard being had to the circumstances of the case.

It follows therefore that a court must ask an accused to admit the facts, and then infer negligence from the admitted facts, in a case of culpable homicide. Instead of asking, 'Do you admit that you were traveling at an excessive speed in the circumstances?' I would rather ask, 'What speed were you traveling at? B What time of the day was it? How was visibility? How busy was the road at the time?' etc, and then infer from the answers given if the accused's speed was excessive in the circumstances.

I will deal with the issues you raised:

(a) That the accused person was raising a defence when he said 'I did not intend to cause the accident. I did not do it deliberately'. With all due respect, I do C not think this was a defence. Indeed accused would not have been charged with culpable homicide, but murder, if he had intended to cause the accident and caused it deliberately. Like I explained above, it is not what the accused intends to do that is relevant, but what a reasonable man would say about what the accused has done. It is therefore not a defence for the accused to say he did not intend to cause the accident, because specific intent is not D an element in a case of culpable homicide.

(b) Instead of canvassing essential elements, I cannot be faulted to conclude that this was now cross-examination of the accused by the trial magistrate."

As I explained above, I do not believe in asking an accused to admit negligence directly, because such an admission would be very doubtful. The approach that I adopt is to ascertain the facts from the accused, and then E decide if negligence can be inferred from them. This approach necessarily entails asking the accused several questions. So for example I asked, 'Why did you fail to stop your vehicle before hitting the pedestrian?' The answer the accused gave, 'I saw him when he was only 3 metres away, I could not stop in time', would suggest that he had not been keeping a proper lookout on the road. A person who only sees a pedestrian when he is only 3 metres F away must have been inattentive. But I would not ask the accused, 'Do you admit that you had not been keeping a proper lookout on the road?'

Now having ascertained the facts, I would then need to state the inferences I would have made.

(c) 'After convicting the accused person, the trial magistrate then decided to explain himself" G

> Like I said above, the approach I adopt is that I would not ask the accused person to admit negligence directly. It follows therefore that after getting the facts, I must then state the conclusions I draw from the facts. I do not know if that would amount to explaining myself.
>
> In conclusion, I believe that I properly convicted the accused person. I would also suggest that you assist me in formulating the questions (just as an illustration) H

Uchena J

> A that you would consider proper and the answers to those questions you would also consider proper for a conviction on a charge of culpable homicide."

On receipt of this response, the acting regional magistrate remained of the view that the accused person's plea should have been altered to one of not guilty. She forwarded the record of proceedings for review by a judge of this B court with a request that she and the trial magistrate be guided on whether or not the convicted person was correctly convicted and sentenced. The lot fell on me. I have to determine whether or not the trial magistrate followed the correct procedure and correctly convicted the accused.

The trial magistrate courteously and confidently defended his work. He did not merely reply "I stand guided", as most magistrates do. His response is C well reasoned and explains why he conducted the proceedings in the manner he did. He clearly and respectfully responded to the issues raised by the acting regional magistrate.

I fully quoted the correspondence between the scrutinising acting regional magistrate and the trial magistrate to lay the basis for this judgment. There D is a lot to be learnt from their exchange of ideas on how to conduct a plea in general and particularly on a charge of culpable homicide.

Canvassing of essential elements in general

The acting regional magistrate seems to suggest that the trial magistrate should have asked direct questions and altered the plea to one of not guilty E when the convicted person's answers seemed to raise triable issues. The trial magistrate said that he uses indirect questions and infers from them the guilt of an accused person. He said he does so to get the facts from which he can infer the accused's guilt or innocence. He assesses the accused's answers to determine whether or not they raise real triable issues. I agree with the trial F magistrate that it is permissible to ask indirect questions and infer from them the accused's guilt or innocence. An indirect question usually brings out the truth, as it does not warn the accused of the effect his answer may have. It overcomes the problem of an accused person's appreciation of legal concepts. It brings out real justice as it seeks facts without clothing the question in legal jargon. This approach is preferable, because legal concepts are not easy to G master. In cases of unrepresented accused persons, the explanations of the charge and its elements should not be expected to fully inform them of the offence to the extent of expecting them to correctly and from an informed position answer direct questions based on legal concepts. In *S v Nyambo* 1997 (2) ZLR 333 (H) at 336D Smith J, commenting on how to deal with H difficult legal concepts, said:

Uchena J

> "The accused was not represented. He is hardly likely to have appreciated the A significance of the word 'prepared' in this context . . . I agree with the opinion expressed by the Attorney-General that 'preparation' envisages some process or activity which is intended to ensure that the dagga is ready for smoking".

Judicial officers should therefore always be careful, when canvassing essential elements, to avoid being satisfied by an accused's admission or denial of C facts couched in legal jargon. They should ensure, through careful probing, that the accused is admitting or denying such facts.

In *S v Tachiona & Anor* 1994 (2) ZLR 402 (H) at 403B Chatikobo J said:

> "If the magistrate thinks that the accused's denial of foresight might be the result of a lack of appreciation of the import of the question, he should probe further. There is no exhaustive list of questions, nor any limit to the ways in which the C questions should be put."

It is not therefore helpful for the acting regional magistrate and trial magistrate to dispute over how questions should have been put to the convicted person. The trial magistrate explained why he does not ask direct questions. He is of the view that if an accused person is asked whether he admits that

he was D negligent, and he answers "yes", that answer does not mean that he was indeed negligent. The magistrate, who fully appreciates what negligence means, must ask questions which will enable him to establish whether or not the accused was negligent. In *S v Dube & Anor* 1988 (2) ZLR 385 (S) at 389H-390A-B the Full Court (Dumbutshena CJ, Gubbay JA and McNally JA) said: E

> "There have been a number of recent judgments in which it has been pointed out how careful a judicial officer must be when faced with a plea of guilty. Not every fact should be regarded as proved simply because it is admitted. Thus an admission of 'being in a prohibited area' should not be blindly accepted. The court should require proof that the area was indeed a prohibited area: *S v Deka* & *Anor* S-199-88. The same is true of an admission of 'possession'. *The court* F *must be careful to establish what it is that the accused is admitting, because possession is a difficult legal concept*: *Attorney-General v Chimwadze* 1982 (2) ZLR 218 (S); *S v Zvinyenge & Anor supra*; *S v Hoareau* S-143-88; *S v Dyer* S-204-88. And see generally the remarks of Reynolds J in *S v Chirodzero* HH-14-88" (emphasis added)

In this case the trial magistrate convincingly explained his approach in dealing G with pleas to a charge of culpable homicide. His explanation is logical and well grounded in a desire to dispense real and substantial justice. It cannot be faulted. It should in fact be encouraged.

Accident not intended and not deliberate

The acting regional magistrate said that H

2013 (1) ZLR p231

Uchena J

> A "Despite the fact that accused said he did not intend to cause the accident and thereby raised a defence at law which should have led to the alteration of the plea to [one of] not guilty"

the trial magistrate proceeded with the canvassing of essential elements. She thus reasoned that when the convicted person said that he did not intent to cause the accident and that his actions were not deliberate, the trial magistrate B should have altered the plea to one of not guilty. The trial magistrate's response was an explanation of the difference between murder and culpable homicide. He concluded that what the acting regional magistrate suggested would have been correct if the convicted person was facing a murder charge. He was again correct, even though a plea of guilty cannot be accepted on a C charge of murder. He was merely pointing out that, if the convicted person had deliberately intended to cause the accident, he should have been charged with the crime of murder.

A judicial officer is expected to know the law applicable to the offence charged. That will enable him to avoid being distracted by answers not relevant to the issues before him. In fact, s 271(2)(b) of the Criminal Procedure and D Evidence Act requires a judicial officer to have such knowledge, as it requires him to explain the charge and its essential elements to the accused and to be satisfied by the facts he gathers during the canvassing of essential elements of the accused's guilty. It provides as follows:

> "(2) Where a person arraigned before a magistrates court on any charge pleads E guilty to the offence charged or to any other offence of which he might be found guilty on that charge and the prosecutor accepts that plea –
>
> (a) . . .
>
> (b) the court shall, if it is of the opinion that the offence merits any punishment referred to in subparagraph (i) or (ii) of paragraph (a) or if requested thereto by the prosecutor –
>
> (i) *explain* F *the charge and the essential elements of the offence to the accused* and to that end require the prosecutor to state, in so far as the acts or omissions on which the charge is based are not apparent from the charge, on what acts or omissions the charge is based; and
>
> (ii) inquire from the accused whether he understands the charge and the essential elements of the offence and whether his plea of guilty is an G admission of the elements of the offence and of the acts or omissions stated in the charge or by the prosecutor; *and may, if satisfied that the accused understands the charge and the essential elements of the offence and that he admits the elements of the offence and the acts or omissions on which the charge is based as stated in the charge or by the prosecutor, convict the accused of the offence to which he* H *has pleaded guilty on his plea of guilty* and impose any competent

---

2013 (1) ZLR p232

Uchena J

sentence or deal with the accused otherwise in accordance with the A law" (emphasis added).

The trial magistrate's approach to the convicted person's answer indicates that he knew the elements of culpable homicide, hence his proceeding with the canvassing of essential elements in spite of the convicted person's abovementioned response. B

Scrutinising regional magistrates must also have a good grasp of the law applicable to the case under scrutiny. If one is not sure, it is important to check before referring a case for review. Section 58(3)(b) of the Magistrate's Court Act [*Chapter 7:10*] provides for a referral of a case under scrutiny to a judge for review "if it appears to him that doubt exists whether the C proceedings are in accordance with real and substantial justice". A doubt which justifies a referral to a judge for review must be one which lingers on after the regional magistrate has fully played his part. "Scrutinising" means looking, deeply and closely, into a matter. It is not a cursory examination of the record without applying one's knowledge of the law into what the trial magistrate did. D

The offence which was before the trial magistrate was one of culpable homicide. He therefore correctly carried on with the canvassing of essential elements, because the accused's answer was not a valid defence to the offence charged.

Section 272 of the Criminal Procedure and Evidence Act, on the basis of which E a judicial officer alters a guilty plea to one of not guilty, provides as follows:

> "If the court, at any stage of the proceedings in terms of section *two hundred and seventy-one* and before sentence is passed –
>
> (a) *is in doubt whether the accused is in law guilty* of the offence to which he has pleaded guilty; or
>
> (b) is not satisfied that the accused has admitted or correctly admitted all the F essential elements of the offence or all the acts or omissions on which the charge is based; or
>
> (c) is not satisfied that the accused has no valid defence to the charge;
>
> the court shall record a plea of not guilty and require the prosecution to proceed with the trial" (emphasis added). G

The provisions of this section are triggered by:

(a) a judicious doubt as to whether the accused is in law guilty of the offence to which he has pleaded guilty. The doubt must be grounded in the law. In this case, the law on culpable homicide justified the trial magistrate's proceeding with the canvassing of essential elements. H

Uchena J

(b) Lack A of the judicial officer's satisfaction that the accused has admitted or correctly admitted all the essential elements of the offence charged or all the facts or omissions which prove the offence charged. In this case the trial magistrate was correctly satisfied that the convicted person was correctly admitting the elements of culpable homicide.

(c) Lack B of the judicial officer's satisfaction that the accused does not have a valid defence. It is not every seeming defence which justifies the alteration of a plea of guilty to one of not guilty. If the judicial officer is not satisfied that the accused does not have a valid defence, he should alter the plea to one of not guilty. If he is, however, satisfied that what seems to be a defence is not a valid defence at law, he should not alter C the plea to one of not guilty.

The whole exercise therefore depends on the judicial officer's knowledge of the law. Where the judicial officer is not in doubt, as the trial magistrate was, and he was satisfied as he said he was, there was no need to alter the plea to one of not guilty. In *S v Makuvatsine* 2004 (1) ZLR 459 (H) at 462A, D referred to by the acting regional magistrate I said:

> "Magistrates must be alert to the provisions of s 272 to enable them to guard against the conviction of persons whose answers to questions raise doubt, or do not satisfy them of the accused's guilt or whose answers reveal that the accused may have a defence."

In this case, the accused's answer did not raise any doubt in law as regards E culpable homicide. It satisfied the trial magistrate of its irrelevance to culpable homicide. It did not reveal a valid defence to culpable homicide.

Dazzled by the lights of an on coming motor vehicle

The acting regional magistrate also believed the trial magistrate should have altered the plea to not guilty as the accused seemed to be raising a defence of F sudden emergency. Again, one's knowledge of the law is an aid to knowing when to alter an accused's plea to one of not guilty.

The convicted person told the magistrate that he reduced his speed to 60 km/h. He thus proceeded into the accident at 60 km/h, unable to see ahead. That is the maximum speed one should travel at in an urban area. He was driving along Simon Mazorodze Road in Waterfalls, Harare. Travelling at G such a speed on a busy urban road, when he could not see what was happening on the road ahead, was therefore clearly negligent. His own words justified the trial magistrate's continuing with the canvassing of essential elements. The trial magistrate asked the convicted person if he had a right to drive in the manner he did, "not keeping a proper lookout on the road, not stopping H when he was not seeing properly". The convicted person's response was

that he did not have such a right. A reasonable driver would have slowed A down and stopped. Driving on blindly at 60 km/h, as the convicted person did, had the effect of endangering the lives of his 18 passengers. There was no need to alter his plea to one of not guilty.

The law on being dazzled by the lights of on coming traffic was settled in *S v Mandwe* 1993 (2) ZLR 233 (S) at 241B-F where Korsah JA, dealing with B a sudden emergency as a result of the appellant's eyes having been dazzled by the lights of an oncoming motor vehicle, said:

> "And when the appellant found himself dazzled by approaching headlights, he should at once have stopped or slowed down to a very slow pace in case there should be someone, such as the deceased, or something in his path, so that he could stop or take evasive action. As Gubbay ACJ (as he then was) remarked C in *S v Ruzario* 1990 (1) ZLR 359 (S) at 366E-F:
>
> > '. . .if at that stage he found that his vision was somewhat impaired, his duty was to instantly pull up and wait until he could see properly before proceeding further, or reduce his speed so as to be able to stop within the range of his vision'.
>
> The appellant contended that he had slowed down. The fact is, he was proceeding D without a clear vision of what was in front of him and was unable to stop within the range of his vision. As McNALLY JA observed in *S v Duri* 1989 (3) ZLR 111 (S):
>
> > '. . .slowing down is merely a preparatory step – it is a step which makes it possible to take evasive action if need arises.'"

The same view was expressed by Gubbay CJ in *S v Ferreira* 1992 (1) ZLR 93 (S) E at 97; 1992 (2) SACR 425 at 428g-h (ZS) when he said:

> ". . .in not significantly slowing down, the appellant incapacitated himself from taking effective evasive action."

In view of these authorities from the Supreme Court, the trial magistrate proceeded with his canvassing of essential elements, undeterred by the F convicted person's purported defence, guided by the law which he seems to have a good grasp of. He proceeded correctly. He did not offend the provisions of s 272 s*upra*. He is in fact supported by a plethora of authorities in the form of precedents from the highest court of the land.

Cross examination

In view of my finding that the trial magistrate correctly continued with his G canvassing of essential elements, he cannot be said to have cross-examined the convicted person. Judicial officers, when proceeding in terms of s 271(2)(b), are free to ask the questions they deem fit to ascertain the guilt or innocence of an accused person. See *S v Tachiona & Anor* s*upra* at 403B where Chatikobo J said: H

> A "If the magistrate thinks that the accused's denial of foresight might be the result of a lack of appreciation of the import of the question, he should probe further. There is no exhaustive list of questions, nor any limit to the ways in which the questions should be put."

Explanation

The acting regional magistrate is of the view that the trial magistrate was B aware that he had crossed the red line, hence his unnecessary explanation of the reasons why he convicted the accused. If I had found that the trial magistrate erred in continuing with his canvassing of essential elements, the conclusion reached by the acting regional magistrate would have been justified. In this case, one can only say the giving of an explanation for the C conviction was unnecessary, but does not offend against the sense of justice. The reasons for the conviction were apparent from the answers the convicted person gave during the canvassing of essential elements. The trial magistrate must have acted out of an abundance of caution, which his approach to the canvassing of essential elements reveals he has.

Real and substantial justice

D I must conclude by saying scrutinising and reviewing judicial officers must be guided by the attainment of the standard of "real and substantial justice" by the work they will be scrutinising or reviewing. That is what determines whether he should confirm the proceedings or refuse to certify them as being in accordance with real and substantial justice or take such other remedial E action permitted by the law.

The attainment of "real and substantial justice" is ascertainable by checking for the things mentioned in *S v Kawareware* 2011 (2) ZLR 281 (H) at 289, where I said:

> "The crucial question should always be has the accused been correctly convicted and sentenced. If he has the proceedings should be confirmed. If not the certificate F should be withheld.
>
> The main features to look out for in scrutinising or reviewing proceedings are therefore:
>
> (1) The correctness of the charge preferred;
> (2) The agreed facts or State and defence outlines;
> (3) Compliance with statutory requirements in taking a plea of guilty or in G conducting a trial where the accused pleads not guilty;
> (4) The acceptance or proof of the facts on which the charge is based;
> (5) The assessment of evidence i.e. matching of the law and the accepted or proved facts;
> (6) The trial court's reasons for judgment;
> (7) The correctness or otherwise of the conviction: and
> (8) The H justifiability of the charge or sentence as discussed in *Chidodo supra*

Uchena J

> Since the codification of our criminal law, all sentences are provided for in the code, or the statute which creates the crime charged. All the reviewing or scrutinising judicial officer should do is check if the sentence suits the offence and the offender within the range of sentences provided for in the code or other statutes."

The trial magistrate's handling of this case has satisfied me that these proceedings are in accordance with real and substantial justice. I therefore duly confirm them.

BERE J: I have had the privilege of reading my brother Uchena's thoughtful and well-reasoned judgment. The exposition of the law and the legal principles applicable is beyond reproach.

I comment the interactive process between the trial magistrate and the acting regional magistrate. It is such seemingly insignificant exercises that enrich or nourishes the development of our jurisprudence.

I wish to emphasize, as correctly pointed out by the trial magistrate and reinforced by my brother, that "an intention to cause an accident" is never an issue in a culpable homicide case, as liability stems from an inference of negligence deriving from proven or established facts.

As aptly observed by Cooper[1],

> "The court assumes the role of the reasonable man –
>
> > '. . . and decides what the reasonable man would regard as just on the facts of the case. The hypothetical "reasonable man" is personified by the court itself. It is the court which decides[2].'"

It should be noted that the test of negligence in criminal cases is the same in civil cases, hence in a criminal matter reference can be made to a civil matter, and *vice versa*.

With these few remarks I record my concurrence with my brother Uchena.

1 *Motor Law, Volume Two*, *Principles of Liability* p 50
1 *Motor Law, Volume Two*, *Principles of Liability* p 50

2 Fibrose Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd [1943] AC 32 at 70
2 Fibrose Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd [1943] AC 32 at 70

© 2015 Juta and Company (Pty) Ltd.

Document 33 of 73

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2013/Volume 1/S v S (A JUVENILE) 2013 (1) ZLR 237 (H)

S v S (A JUVENILE) 2013 (1) ZLR 237 (H)

Citation	2013 (1) ZLR 237 (H)
Case No	Judgment No. HH-105-13
Court	High Court, Harare
Judge	Bhunu J
Heard	6 March 2013
Judgment	6 March 2013
Counsel	Details not supplied
Case Type	Criminal review
Annotations	No case annotations to date

Flynote

C **Criminal procedure** – *plea – guilty – explanation of charge and essential elements – questioning by magistrate in terms of s 271(2)(b) of Criminal Procedure and Evidence Act [Chapter 9:07] – accused admitting facts but denying requisite mens rea – court's duty to alter plea to one of not guilty and to proceed to trial*

Headnote

D Before an accused person can be found guilty on his own plea of guilty the court must satisfy itself that his plea of guilty is an unequivocal admission of his guilt. The purpose of canvassing the essential elements of the offence is for the court to satisfy itself that the accused is tendering a genuine plea of guilty from an informed position of his liability at law. E Where the accused person pleads guilty but goes on to deny an essential element of the offence charged, the court is duty bound to alter the plea to one of not guilty and proceed to trial in the normal way. It is not

the duty of the presiding magistrate to browbeat the accused into submission in order to convict the accused on his own plea of guilty.

F The accused, a youth of 17, was charged with having consensual sexual intercourse with a juvenile girl in contravention of s 70(1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. He pleaded guilty, but in answer to questions from the magistrate, denied being aware that the girl was aged under 16 years.

G *Held,* that an act does not constitute guilt unless done with a guilty frame of mind. Here, it was not enough for the accused to admit that he had sexual intercourse with a minor child below the age of consent. He had also to admit the mental aspect of the offence, namely, that he intentionally had sexual intercourse with the minor child, well knowing that she was below the age of 16 years. Once he had stated that he did not appreciate H that the complainant was below the age of 16 years at the material time,

he was proffering a valid defence to the charge. At that juncture, the trial A magistrate was obliged to alter the plea to one of not guilty, instead of embarking on a lengthy cross-examination of the accused, apparently calculated to extort a confession from him so as to avoid the rigours of a fully fledged trial.

Cases cited B

S v Ndlovu S-223-91

Legislation considered

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

Criminal Procedure and Evidence Act [*Chapter 9:07*], s 271 C

Judgment

Bhunu J: This is perhaps a classical case of how not to conduct a trial based on a plea of guilty in terms of s 271(2)(b) of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. In this case, the accused a 17-year-old juvenile, had consensual sexual intercourse with a fellow juvenile in contravention of s 70(1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. D The complainant's age was assessed by a medical practitioner to be between 14 ½ and 15 ½. He appeared before the trial magistrate at Rusape magistrates court on a plea of guilty. Section 271(2)(b) requires the trial magistrate to canvass the essential elements of the offence charged and to satisfy himself that the plea of guilty is an unequivocal admission of the accused's guilt. E The section is designed to avoid the conviction of an unrepresented accused person through ignorance or inadvertence. It reads as follows:

> "271 Procedure on plea of guilty.
>
> (2) When a person arraigned before a magistrates court on any charge pleads guilty to the offence charged or to any other offence of which he might be found guilty on that charge and the prosecutor accepts that plea – F
>
> (a) . . .
>
> (b) the court *shall*, if it is of the opinion that the offence merits any punishment referred in subparagraph (i) of paragraph (a) or if requested thereto by the prosecutor –
>
> (i) explain the charge and the essential elements of the offence to the accused G and to that end require the prosecutor to state, in so far as the acts or omissions on which the charge is based are not apparent from the charge, on what acts or omissions the charge is based; and
>
> (ii) enquire from the accused whether he understands the charge and the essential elements of the offence and whether his plea of guilty is an admission of the elements of the offence and of the acts or omissions stated in the charge or by the prosecutor; H

> A and may, if satisfied that the accused understands the charge and the essential elements of the offence and the acts or omissions the charge is based as stated in the charge or by the prosecutor, convict the accused of the offence to which he has pleaded guilty on his plea of guilty and impose any competent sentence or deal with the accused otherwise in accordance with the law."

In short, a trial magistrate is obliged to observe strictly the above laid down B procedures before convicting an accused person on his own plea of guilty. The procedure to be followed was amply summarised by Gubbay CJ in *S v Ndlovu* S-223-91. In that case the learned Chief Justice made it clear that the section enjoins the trial court before convicting an accused person on his own plea of guilty, to:

(a) explain C the charge and the essential elements of the offence to the accused; and

(b) ask the accused person if he understands the charge and whether his plea is an admission of all the elements of the offence; and

(c) record the explanation of the charge, the essential elements and any explanation the accused may give.

D Unlike in the *Ndlovu* case s*upra* the trial magistrate, to his credit, substantially complied with the need to maintain a full and comprehensive record of the proceedings. In canvassing the essential elements of the offence he however misdirected himself and went overboard, resulting in a serious miscarriage of justice. The relevant portion of the record of proceedings reads as follows:

"E/E E

Q. Correct on 26/08/11 you unlawfully had extra marital sexual intercourse with a girl under the age of 16?

A. Yes.

Q. *You knew very well she was below the age of 16?*

A. I was not aware.

Q. Does F she go to school?

A. No.

Q. What is she doing for a leaving?

A. She is a vendor.

Q. *But you could see that she was a young girl?*

A. No.

Q. Did G you pay lobola for her?

A. No.

Q. So you knew very well what you were doing was unlawful?

A. No Yes.

Q. Any right to behave in that manner?

A. H No.

2013 (1) ZLR p240

Bhunu J

Q. Any defence to offer? A

A. No.

Guilty as charged

PP. I intend to tender a medical report.

Q. Were you served with a medical affidavit?

A. Yes. B

Q. *Did you read it?*

A. *I did not read it.*

Q. *Why?*

A. I did not have the time to read.

Q. When were you served?

A. June last year. C

Q. It's almost a year now?

A. I was only shown once."

Without much ado the affidavit was then read to the accused, tendered in evidence as an exhibit and he was then found guilty, purportedly on his own plea of guilty. It is needless to say that before an accused person can be found D guilty on his own plea of guilty the court must satisfy itself that his plea of guilty is an unequivocal admission of his guilt.

The purpose of canvassing essential elements of the offence is for the court to satisfy itself that the accused is tendering a genuine plea of guilty from an informed position of his liability at law. Where an accused person pleads guilty but goes on to deny an essential element of the offence charged, the E court is duty bound to alter the plea to one of not guilty and proceed to trial in the normal way. It is not the duty of the presiding magistrate to browbeat the accused into submission in order to convict the accused on his own plea of guilty, as happened in this case.

It is trite that an act does not constitute guilt unless done with a guilty frame F of mind. Thus, in this case, it was not enough for the accused to admit that he had sexual intercourse with the minor child below the age of consent. He had also to admit the mental aspect of the offence in the sense that he intentionally had sexual intercourse with the minor child, well knowing that she was below the age of 16 years.

To this end, s 70(3) provides that "*It shall be a defence to a charge under* G *subsection (1) for the accused person to satisfy the court that he or she had reasonable cause to believe that the young person concerned was of or above the age of sixteen years at the time of the alleged offence*" (my emphasis).

It follows, therefore, as a matter of logic and common sense, that once the accused had stated that he did not appreciate that the complainant was below H

2013 (1) ZLR p241

Bhunu J

A the age of sixteen years at the material time, he was proffering a valid defence to the charge. In legal parlance, he was denying that he had the requisite *mens rea,* that is to say, the necessary intention to commit the crime. At that juncture, the trial magistrate was duty bound to alter the plea of guilty to one of not guilty, instead of embarking on a lengthy cross-examination of the accused, apparently calculated to extort a confession from him so as to B avoid the rigours of a fully fledged trial.

For that reason alone, I come to the conclusion that it was a serious misdirection and fatal miscarriage of justice for the trial magistrate to convict the accused person on a plea of guilty in circumstances where he was tendering a valid defence to the charge. That being the case, the conviction and sentence C cannot stand. It is accordingly ordered:

1. That the conviction and sentence be and are hereby quashed and set aside.
2. That the decision as to whether or not to prosecute the accused person on the same charge be left entirely to the discretion of the Attorney-General.
3. In D the event that the accused is again prosecuted and convicted on the above charge the sentencing court must take into account the period of community service already served by the accused.

E Mangota J agrees.

© 2015 Juta and Company (Pty) Ltd.

Document 34 of 73

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2013/Volume 1/MAGAYA v MAGAYA 2013 (1) ZLR 242 (H)

MAGAYA v MAGAYA 2013 (1) ZLR 242 (H)

2013 (1) ZLR p242

Citation 2013 (1) ZLR 242 (H)

Case No HH-67-13

Court High Court, Harare

Judge	Uchena J
Heard	28 November 2012; 29 November 2012; 3 December 2012; 10 December 2012; 14 December 2012; 20 December 2012; *CAV*
Judgment	7 March 2013
Counsel	Ms *B K Mupawaenda,* for the plaintiff *N Chikomo,* for the defendant
Case Type	Divorce action
Annotations	No case annotations to date

Flynote

Family law – *husband and wife – divorce – postponement of proceedings to attempt reconciliation – when postponement may be granted – need for both parties to desire to attempt reconciliation*

Headnote

In an action for divorce, if it appears to the court that there is a reasonable D possibility that the parties may become reconciled through marriage counselling, treatment or reflection, the court may, in terms of s 5(3) of the Matrimonial Causes Act [*Chapter 5:13*], postpone the proceedings to enable the parties to attempt a reconciliation. The use of the words "reasonable possibility" limits such postponements to cases where there E is a real chance of parties reconciling. The provision cannot be used in cases where one of the spouses is refusing to accept the reality of the state of his or her marriage to a spouse who is resolutely seeking a decree of divorce. There must be a real or reasonable chance that the marriage can be saved. Love cannot blossom if it is not reciprocated. Reconciliation can only be possible if both parties are willing to engage each other to F sort out their marital problems. The courts cannot sustain a marriage without the co-operation of both spouses. Irretrievable breakdown of marriage can therefore take place even when one of the spouses still loves the other. G

Cases cited

Kumirai v Kumirai 2006 (1) ZLR 134 (H)

Marimba v Marimba 1999 (1) ZLR 87 (H)

Legislation considered

Matrimonial Causes Act [*Chapter 5:13*], s 5(3) H

2013 (1) ZLR p243

Uchena J

Case information

A Ms *B K Mupawaenda,* for the plaintiff

N Chikomo, for the defendant

Judgment

Uchena J: The plaintiff and the defendant were customarily married to each other in 1976. On 5 February 1993 they upgraded their marriage to B a civil one in terms of the Marriage Act [*Chapter 37*], now *Chapter 5:11*. Their marriage was blessed with six children who have all attained the age of majority. The plaintiff left the matrimonial home on 11 January 2009 to go and live with a

girlfriend in Masvingo. He later issued summons suing the defendant for a decree of divorce and ancillary orders.

The defendant opposed the plaintiff's claim, arguing that there was still C hope for their marriage and disagreed with the plaintiff's distribution of their matrimonial property. They attended a pretrial conference at which they settled on other issues and agreed to refer the following issues to trial:

1. How should the matrimonial home be apportioned?
2. What are the items of movable property of the parties and how should D they be shared?
3. Who should bear the costs of suit?

At the pretrial conference the defendant, who in her plea had disputed the breakdown of their marriage, conceded that it had irretrievably broken down. The parties further agreed that:

1. The E current maintenance order in M 163/09 should remain in place subject to variation depending on circumstances.
2. The custody of the then minor child be awarded to the defendant, subject to the plaintiff's reasonable rights of access.

The parties' then minor child has since attained the age of majority. The F issue of custody and maintenance in respect of the then minor child therefore fell away.

The disputes between the parties were narrowed down during the trial. They agreed on the identity of their movable property and how it was to be distributed. Issues on the Manyame residential stands registered in the names G of their two sons were resolved. The parties agreed that they become the property of their sons in whose names they are registered. The parties agreed that the communal home and the movables in it, be awarded to the plaintiff.

Irretrievable breakdown of marriage

In spite of this issue having been settled at the pretrial conference the H defendant tried to revive it at various stages of the trial. In her evidence and

---

under cross-examination she said a decree of divorce should not be granted A because she believed her husband might come back to her. It is however common cause that the plaintiff left the matrimonial home in January 2009. Since that departure he did not come back to the matrimonial home nor did he communicate with the defendant. Over the four year period leading to the hearing of this case he has consistently refused to answer the defendant's B calls whenever she sought to communicate with him by phone. As expected, they met at family gatherings and funerals, but the plaintiff showed her no love or signs of acceptance. He would always be in the company of his new love, the girlfriend he left the defendant for. The defendant conceded that the plaintiff has not shown any indications that he might want to reconcile with her. It is inconceivable that the defendant in these circumstances C hopes to win back the plaintiff's love. It seems to me that the plaintiff has irretrievably lost love and affection for the defendant. The circumstances indicate irretrievable breakdown of marriage.

There is no doubt in my mind that the defendant still loves the plaintiff. She said she is willing to welcome him back any time he decides to come back D to her. If there were reasonable hope of a reconciliation taking place, this would have justified a postponement in terms of s 5(3) of the Matrimonial Causes Act [*Chapter 5:13*]. Section 5(3) provides as follows;

> "(3) If it appears to an appropriate court that there is a reasonable possibility that the parties may become reconciled through marriage counsel, treatment or reflection, the court may postpone the proceedings to enable the parties to E attempt a reconciliation."

The intention of the legislature in enacting s 5(3) was clearly to enable courts to postpone cases for purposes of giving parties opportunities to save their marriage. The courts should therefore utilize that provision in deserving cases. The use of the words "reasonable possibility" limits such postponements to cases where there is a real chance of parties reconciling. F The provision can not be used in cases where one of the spouses is refusing to accept the reality of the state of his or her marriage to a spouse who is resolutely seeking a decree of divorce. There must be a real or reasonable chance that the marriage can be saved.

Love cannot blossom if it is not reciprocated. Reconciliation can only be G possible if both parties are willing to engage each other to sort out their marital problems. The courts cannot sustain a marriage without the co-operation of the other spouse. Irretrievable breakdown of marriage can therefore take place even when one of the spouses still loves the other. In spite of the defendant's confessions of love for the plaintiff there is nothing to indicate to this court that there is a reasonable possibility that the parties may become H

Uchena J

A reconciled. There was therefore no justification for a postponement for that purpose. In *Kumirai v Kumirai* 2006 (1) ZLR 134 (H) at 136B-D Makarau J (as she then was) said:

> "In view of the fact that the breakdown of a marriage irretrievably, is objectively assessed by the court, invariably where the plaintiff insists on the day of the trial that he or she is no longer desirous of continuing in the relationship, the B court cannot order the parties to remain married even if the defendant still holds some affection for the plaintiff. Evidence by the plaintiff that he or she no longer wishes to be bound by the marriage oath, having lost all love and affection for the defendant, has been accepted by this court as evidence of breakdown of the relationship since the promulgation of the Matrimonial Causes Act in 1985. So trite has the position become that one hardly finds authority for it.
>
> C *To satisfy the court that the marriage still has some life in it, one has to adduce evidence to the effect that after the filing of the summons, the parties have reconciled and are living after the manner of husband and wife*. In my view, evidence that on one occasion after the service of summons, the parties took a holiday together and afforded each other conjugal rights, as was led in this trial, is insufficient on its own to show that the marriage has prospects of mending. If anything, it goes to show that despite attempts to rekindle the fires, the parties D failed to reconcile" (emphasis added).

In this case there is evidence from the defendant that the plaintiff turned his back on her with resolve for a continuous period of four years. He did not only leave her, but he never came back to her or the matrimonial home. He refused to even answer her calls and talk to her on the phone. In spite of the E defendant's continuing love for the plaintiff there is no basis for refusing to grant a decree of divorce. She tried to win back his love for four years without success. The irretrievable breakdown of their marriage has been established. A decree of divorce has to be granted because the plaintiff has resolved to end an unhappy marriage he said he endured for many years for the sake of their then minor children.

F **Ditribution of the movables**

In his evidence-in-chief the plaintiff agreed to give the Mazda B2200 to the defendant and take the Nissan Sentra for himself as had been suggested by the defendant. He also agreed to sell the Toyota Hiace and share the proceeds equally as suggested by the defendant. He said they have three head of cattle G which he suggested be shared equally after giving one to the person who is looking after them.

The defendant in her plea suggested that the plaintiff be awarded all the movable property at their rural home plus two head of cattle. The defendant also said the plaintiff should be awarded the following from their Budiriro H matrimonial home:

Uchena J

1.1 x Deep Freezer A

2.1 x 24 inch Telefunken

3.1 x DBVD Player

4.1 x Double Bed

5.1 x wardrobe

6.1 x Decorder. B

She said the rest of the movable property at their Budiriro matrimonial home should be awarded to her. In her evidence she agreed with the plaintiff's distribution in paragraph 9.5 of his declaration. She said she had no interest in the three head of cattle, which she said should be awarded to the plaintiff. She told the court that she sold all the goats and used the proceeds to sustain the family. The concessions are reasonable in view of her admission under cross C -examination that the

plaintiff bought all the movables. The only remaining dispute is on the water pump the defendant said the plaintiff took away and the wardrobe the defendant said she has given to one of their children. The plaintiff admitted that he took the water pump and gave it to his son from a previous marriage. The court will solve that dispute by removing the water D pump and wardrobe from the list of property to be distributed. The parties have demonstrated that they have no problem with their assets being given to their children. They agreed to let their two sons have the Manyame stands. It seems to me that there would be no justification for recovering these less valuable properties from the children they have been given to by the respective parents. E

The matrimonial home

The parties disputed over the sharing of the matrimonial home. The plaintiff initially wanted 70 per cent of the matrimonial home, but during his evidence finally settled for 50 per cent for him and 50 per cent for the defendant. In her plea the defendant wanted a 50 per cent share of the matrimonial home F as she was a joint owner. She at one stage wanted the house to be given to their two youngest children. She later firmed up on the matrimonial home being awarded to her because the plaintiff had left with US$40 000, when he left the matrimonial home in January 2009. She alleged that the plaintiff used that money to buy a house in Masvingo. She argued that that entitled her to an award of the matrimonial home. The plaintiff vehemently denied G ever having such an amount of money.

The defendant's evidence on the existence of a Masvingo property is not convincing. She said the plaintiff gave her US$40 000 to keep which he took on leaving the matrimonial home, on the pretext that he was going to deposit it in a bank account in South Africa. She said she went to Masvingo H

A where she inquired from people whose identity she did not disclose, about a house which was built by a haulage truck driver in a very short time and was shown a certain house. She did not go into that house to confirm that it was her husband who had built it and was staying there. Her husband is not the only haulage truck driver. She did not seek written confirmation from the local authority that the house in question belonged to the plaintiff. She B further speculated that the house could have been registered in the plaintiff's girlfriend's name. If that was her speculation, how did she hope to have that house - if it exists - distributed between her and the plaintiff without joining the alleged registered owner into these proceedings? The defendant's evidence on the alleged Masvingo house is neither convincing nor conclusive.

C The plaintiff denied ever having had US$ 40 000 which he gave to the defendant for safe keeping. He said if he had such money they would have completed the construction of their Budiriro house which he left uncompleted. I find the plaintiff's denial stronger than the defendant's unsubstantiated allegation which comes in the middle of several options she gave for the distribution of the matrimonial home. The giving of several options, some D of which are not consistent with the plaintiff having left with US$40 000, betrayed her lack of confidence in her own story. One wonders if the plaintiff had left with US$ 40 000 why the defendant would start by claiming her 50 percent share of the jointly owned matrimonial home. It seems to me this allegation is motivated by her desire to be awarded the matrimonial home. E The plaintiff's concession to equally share the matrimonial home is fair. It is justified by his having bought the stand on his own and having contributed more in the construction of the matrimonial home.

I accept that the defendant supervised the construction and contributed through income from her poultry selling and peanut butter projects. The plaintiff admitted that she made some direct contributions from income she raised F from those projects. The defendant at one stage tried to mislead the court that she contributed 70 percent towards the construction of the matrimonial home. This was however a lie as she had earlier on told the court that the plaintiff bought the stand on his own and that she had contributed half of what the plaintiff contributed towards the construction expenses. The defendant G had the following exchange with the plaintiff's counsel:

"Q Income you were raising?

A Cannot recall but was raising a lot of money.

Q Compared to plaintiff's earnings?

A I was raising about 50% of plaintiff's earnings.

Q So H raised half of plaintiff's earnings?.

Uchena J

A Yes correct. Most times he found I would have materials and promised to A refund me but did not do so.

Q Towards development saying contributed half of what plaintiff contributed?

A That is correct."

This means her contributions are less than half of the purchase price of and construction expenses of the matrimonial home. The plaintiff also made B generous concessions and agreed to let the defendant have most of their movable assets from the matrimonial home even though he purchased them without any contributions from the defendant. There is no justification for awarding the defendant more than 50 percent of the value of the matrimonial home.

It is apparent the defendant needs the matrimonial home more than the C plaintiff who has not been staying in it for four years. He is staying with a girlfriend in Masvingo. It is unlikely that he may relocate to Harare. In the circumstances it will be fair and just to allow the defendant to buy his share of the matrimonial home. The defendant is involved in three projects which can help her raise money to buy out the plaintiff's share. I am aware she said D she is no longer running those projects since last year because of the operation she had when she gave birth to their last two children. That sounds untruthful. How could the operations incapacitate her now when they had not done so for over 17 to 18 years after the birth of those children? The defendant did not produce any medical reports about her alleged incapacity. I am satisfied she said so to persuade the court to grant her the cost of suit she wanted from E the plaintiff. She will therefore be able to buy the plaintiff's share if she is given a reasonable opportunity to do so. In my view, a period of 18 months is a reasonable period within which she can buy out the plaintiff's share.

Costs

The defendant prayed for an order of costs against the plaintiff. She claimed F Z inability to raise her own costs of suit. Under cross-examination she bared her heart and said the plaintiff should pay the costs of suit because he is the one who wants the divorce which she is resisting. I have already found against her alleged inability to raise money for costs of suit. However, she seems to be on stronger ground when she said he should fund the divorce G he seeks because he left her for another woman. In *Marimba v Marimba* 1999 (1) ZLR 87 (G) at 94D Gillespie J said;

"The final issue to which fault might be relevant is that of costs. The relevance is obvious."

While I agree that fault can in deserving cases justify an order of costs against the party guilty of marital misconduct, care must be taken to avoid H

Uchena J

A penalizing a party who is escaping an unhappy marriage. In this case the plaintiff admits that he left the matrimonial home to go and live with a girlfriend in Masvingo. It is highly probable that he left the defendant for the girlfriend and sought a decree of divorce to achieve that goal. He must, in my view, pay the defendant's costs.

B In the result it is ordered that:

1. A decree of divorce be and is hereby granted
2. That the parties' movable property be and is hereby distributed as follows;

FOR THE PLAINTIFF	FOR THE DEFENDANT
1x Deep Freezer	2x 3 plate stove
C 1x 24 inch Telefunken television	3x2 door fridge
1 x DBVD Player	1x kitchen unit

1 x Double Bed	1x 4 chair kitchen table
1 x Decorder.	1x4 piece of sofas
3head of cattle	all kitchen utensils
D All the movables at the Wedza rural home	1x coffee table
	1x Room divider
	2x Display cabinets
	1x decoder
	1x Radio
	1x Fan
	E 2x Decoders
	1x DVD player
	1xRadio
	1x bedroom suite
	3x double beds
	F 1x6 dining table chair
	1 x DVD player

2.1 The Toyota Hiace 16 seater kombi be sold and the proceeds be shared equally between the parties.

2.2 The plaintiff shall retain the Nissan Sentra as his sole and exclusive G property whilst the defendant is awarded the Mazda B2200 pickup.

3. The plaintiff is hereby awarded the rural homestead in Wedza as his sole and exclusive property

4. The plaintiff and the defendant are each awarded a 50 percent share of the immovable property known as stand number 9406 Budiriro Township H of stand 11265 Budiriro Township.

2013 (1) ZLR p250

Uchena J

4.1 The parties shall agree on and appoint a valuer within 14 days from the A date of this order to value the property, failing which the Registrar of The High Court shall within 14 days of such failure appoint a Valuer from the Master's list of Valuers

4.2 The valuer shall evaluate the property within 14 days of his appointment. B

4.3 The parties shall equally share the cost of evaluation.

4.4 The defendant shall pay the plaintiff the value of his half share of the property within eighteen months from the date of receipt of the valuation report.

4.5 Should the defendant fail to pay off the plaintiff within eighteen C months the parties shall, within 14 days of the defendant's failure, appoint an estate agent, who shall sell the property to best advantage, failing which the Registrar of the High Court shall, within 14 days of such failure, appoint the Estate Agent

4.6 The parties shall equally contribute towards the estate agent's commission. D

4.7 The parties shall equally share the net proceeds thereof as per their respective shares in the property.

5. The two Manyame stands shall remain in the names of their two adult children as if donated by the spouses to the children.

6. The plaintiff shall pay the defendant's costs of suit. E

Mabuye Zvarevashe, plaintiff's legal practitioners

Mhiribidi Ngarava & Moyo, defendant's legal practitioners F

© 2015 Juta and Company (Pty) Ltd.

Document 35 of 73

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2013/Volume 1/COMMISSIONER GENERAL OF POLICE v NYAPOKOTO 2013 (1) ZLR 251 (H)

COMMISSIONER GENERAL OF POLICE v NYAPOKOTO 2013 (1) ZLR 251 (H)

Citation	2013 (1) ZLR 251 (H)
Case No	Judgment No. HB-59-13
Court	High Court, Bulawayo
Judge	Makonese J
Heard	5 March 2013; *CAV*
Judgment	14 March 2013
Counsel	*R M Basera,* for the applicant *T M Maganyi*, for the respondent
Case Type	Civil application
Annotations	No case annotations to date

Flynote

Costs – *higher scale – litigant in contempt of a court order – deliberate and knowing defiance of court orders by police officers – costs on the higher scale awarded*

Practice and procedure – *parties – party in contempt of court – relief not to* D *be granted to a litigant with dirty hands – need to purge such contempt – court must not be seen to assist a litigant in defying court order*

Headnote

"The court will not grant relief to a litigant with a dirty hands in the absence of good cause shown or until such defiance or contempt has been purged." E (dicta per Chidyausiku CJ in Associated

Newspapers of Zimbabwe (Pvt) Ltd *v* Minister of Information& Ors 2004 (1) ZLR 538 (S) followed).

In seeking a stay of execution of judgment on behalf of police officers under his control and command, the applicant sought an urgent chamber application pending the finalization of a further application for rescission of judgment. The evidence on the papers, however, disclosed that police F officers, for whose actions the applicant claimed to be vicariously liable, were in contempt of court. A court order had been violated by the police officers, actively encouraged and aided by the applicant himself. The application itself was out of time and no condonation therefor had been sought.

G *Held,* not only was the application fatally defective but it was also clear that the applicant was approaching the court with dirty hands and, as such, it would be wrong to assist him in defying the court order.

Held, further, that in the circumstances the application must be dismissed with costs on the higher scale

Cases cited H

Makonese J

ANZ (Pvt) Ltd v Min for Information & Ors 2004 (1) ZLR 538 (S) A

Deputy Sheriff, Harare v Mahleza & Anor 1997 (2) ZLR 425 (H)

Samudzimu v Ngwenya 2008 (2) ZLR 228 (H)

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

Case information

R M Basera, for the applicant

T M Maganyi, for the respondent B

Judgment

Makonese J: On 26 February 2013 the applicant filed an urgent application seeking the following relief:

"(a) TERMS OF FINAL ORDER SOUGHT

That you should show cause to this Honourable Court why a final order should C not be made in the following terms:

(i) Execution of judgment handed down in case No. HC 851/11 be and is hereby stayed until finalisation of the application for rescission which is still pending under case number HC 851/11.

(b) INTERIM RELIEF GRANTED

(i) Pending finalisation of this matter, the writ of execution granted, dated 21 D December 2011 be and is hereby rescinded."

I heard argument in this matter in chambers and dismissed the application with costs on an attorney and scale. I indicated that my full reasons would follow. These are my reasons.

Background E

It is essential to briefly outline the background of this matter before dealing with the issues raised in the urgent chamber application. On 16 June 2011 the respondent obtained default judgment against nine defendants under case number HC 851/11. In that matter the first and second defendants are the Co-Ministers of Home Affairs, the third defendant is the Commissioner F General of Police, the fourth defendant is Superintendent Pilate Moyo (Officer Commanding Camps, Bulawayo), the fifth defendant is Chief Superintendent Nkomo (Criminal Investigation Department, Bulawayo), the sixth defendant is Detective Inspector Jefias Sibanda, the seventh defendant is Detective Assistant Inspector Sibanda, the eighth defendant is Detective Constable G Mugabe and the ninth defendant is cited as Constable Shoko.

The basis of the respondent's claims against the nine defendants arose out of incident which occurred around 10 March 2010 at CID Homicide, Bulawayo. The respondent's version of events, as set out in his declaration, is that on or about 10 March 2010 he and other police officers acting on the instructions of their superiors, were instructed to cover up a murder H

Makonese J

A case involving a suspect which occurred at CID Homicide. The respondent states that they were instructed to go and stage manage a shoot out of two suspected armed robbers who had died in police custody. As a result of the death of the suspects, an inquest was opened. On 9 July 2010 and at Tredgold Building in the Bulawayo magistrates court, the respondent testified during the inquest and gave details regarding the stage-managed shoot out. Soon B after giving evidence, the respondent was approached by five police officers, including the eighth and ninth defendants referred to above, who assaulted him in public before handcuffing him. The respondent was taken into police custody from 9 to 12 July 2010, and charges of perjury were laid against him. The respondent was released on bail on 14 July 2010. The respondent was then immediately evicted from his police living quarters. The respondent C was discharged from the police force.

It is common cause that the defendants did not enter an appearance to defend the respondent's claims and judgment was accordingly granted by Kamocha J on 16 June 2011, in the following terms:

> "IT IS ORDERED THAT:
>
> (a) Payment D of US$6400 being legal costs incurred in trying to find justice in his matters.
>
> (b) payment of US$50 000, being general damages for pain, shock and suffering and *contumelia*, depreciation of liberty, mental trauma, assault and humiliation plaintiff suffered as a result of the malicious arrest, detention, prosecution and unlawful eviction.
>
> (c) interest E at the prescribed rate from date of issue of summons to date of final payment.
>
> (d) costs of suit."

In a bid to enforce the default judgment and recover the sums of money awarded to him, the respondent issued a writ of execution against the F immovable property on 21 December 2011. It is the enforcement of this writ of execution which has resulted in what can only be described as a cat-and-mouse game between the respondent and the applicant and his officers.

On 29 November 2011, almost five months after the default judgment was granted, the applicant filed an application for rescission of judgment under case No. HC 3527/11. The application was opposed on the basis that it was G filed way out of time and there was no application for condonation for the late filing of the application for rescission of judgment. It would seem that the applicant has still not pursued the application for rescission of judgment for reasons that are not entirely clear.

On 8 May 2012 the respondent filed an application seeking an order for H contempt of court. In his founding affidavit, the respondent avers that on 10

Makonese J

January 2012 the Deputy Sheriff had proceeded to 208 L Takawira Avenue, A being the residence of Supt Pilate Moyo, where he had placed under judicial attachment several of his movables in terms of the writ of execution. The date of removal was set for 13 January 2012. On 15 February 2012 the Deputy Sheriff's assistants returned to Moyo's residence to remove the attached property. The removal was abortive and Moyo threatened to kill B the Deputy Sheriff's assistants. The respondent complained in his founding affidavit that the conduct of Supt Moyo and the other defendants was a flagrant disregard of a court order and contemptuous of this court. Further attempts to execute the court order against the other defendants cited on the writ of execution were also met with resistance and there was violent obstruction of the Deputy Sheriff and his assistants in the execution of his C duties. The respondent therefore, sought an order declaring, the defendants to be in contempt of court and that they be lodged at the nearest prison for a period not exceeding 90 days or until such time as they purge their contempt.

On 7 February 2013 Cheda J issued the following order:

> "IT IS ORDERED THAT D
>
> 1. first respondent be and is hereby declared to be in contempt of court.

2. The Deputy Sheriff be and is hereby authorised and directed to apprehend the first respondent, Superintendent Pilate Moyo with the assistance of Senior Assistant Commissioner Mutamba, the officer Commanding, Bulawayo Province or his Assistant and lodge him to the nearest prison and this shall be your warrant E
3. The officer-in-charge of the Prison shall detain the first respondent for a period not exceeding (90) ninety days on until such time they purge their contempt and this shall be his warrant.
4. The first respondent pay costs of this application on an attorney and client scale." F

Armed with this court order dated 7 February for contempt of court, the respondent made an attempt to enforce the it. What transpired thereafter is best summarised by a letter from The respondent's legal practitioners, dated 22 February 2013 and addressed to Senior Assistant Commissioner Mutamba. The contents of the letter are as follows: G

"The Senior Assistant Commissioner S Mutamba

Officer Commanding Bulawayo Province

Provincial Headquarters

Bulawayo

Dear Sirs,

RE: COMPLAINT: DENIAL OF THE DEPUTY SHERIFF AND OURSELVES FROM ENTRY INTO ROSE CAMP PROVINCIAL HEADQUARTERS H

2013 (1) ZLR p255

Makonese J

A On Tuesday 19 February 2013 the Deputy Sheriff called at your office in a bid to serve you with a court order. The said court order has directed you or your assistant to assist in the apprehension of Superintendent Pilate Moyo for contempt of court. You were said not to be in the office. The Deputy Sheriff was told to call back later.

The Deputy Sheriff could not come back on this day. We accompanied the Deputy B Sheriff and got to your office some few minutes after eight in the morning of the 20th of February 2013. The chief clerk, who identified himself as Inspector Charles Machingura, advised that you were out and had gone to Harare on duty.

We requested to see your Assistant, Assistant Commissioner Gora, who was present. We were advised by the same chief clerk that he was in a briefing which was to take about an hour. We waited, to the chief clerk's full knowledge. C We noted that we had been ignored as none was informing us of what was happening. We then checked with the chief clerk who this time told us that Assistant Commissioner Gora finished briefing and had gone for sports and that we were not going to see him. The Deputy Sheriff and ourselves could not understand it. The chief clerk simply told us to come back at 1400 hours. The Deputy Sheriff requested if he could go and see him from the grounds next to your offices. He was told that that was not possible.

D This is the time our Mr Bukuta called you on your cellphone for assistance. For sure, there was slight movement. After talking to you the chief clerk emerged from his office to which he repeated that Assistant Commissioner Gora was still not in but had requested that he (the chief clerk) read the contents of the court order to him (the Assistant Commissioner) over the phone. Though the Deputy Sheriff and ourselves suspected that the Assistant Commissioner was simply E trying to avoid us, the Deputy Sheriff gave the chief clerk a copy of the court record. He came back later saying Assistant Commissioner Gora insisted we should see him at 1400 hours. We all knew that the chief clerk only wanted to take photocopies from the record. This is not an issue as the court order even without taking a photocopy from the Deputy Sheriff, is in the public domain. The court record from which we uplifted a copy from the High Court is a public record.

F Whilst we were still waiting at your office we actually saw Superintendent Pilate Moyo driving in a not so good looking official Mazda pickup truck. He emerged from his office, drove down into the residential area, round the flats, to the road on the eastern side of your driving school yard out of the gate and turned left into Basch Street. As he was avoiding us by the main parking.

We were back at your office at 1400 hours to see Assistant Commissioner Gora G as he had promised. To our surprise he together with the chief clerk were said to be away on sports. Though we queried as to why Assistant Commissioner Gora, with full knowledge that we were coming with the Deputy Sheriff decided to go away. We drove out briefly and our Mr. Muganyi phoned and spoke to Assistant Commissioner Gora on his cellphone. Assistant Commissioner Gora promised to phone back shortly. We decided to wait for Assistant Commissioner H Gora's call at his office.

2013 (1) ZLR p256

Makonese J

This is the time when all hell broke loose. Our efforts to drive back to your A office to see Assistant Commissioner Gora was thwarted by Sergeant Major Zhou, who seemingly was waiting for us. He told us that we were not allowed into your offices, Provincial Headquarters, Bulawayo Province. No satisfactory explanation was given.

There we were. The Deputy Sheriff and ourselves got stuck and had to leave. B We could not force our way through the gate.

The court order, as you are now fully aware, copy attached, is for you or your Assistant to assist the Deputy Sheriff to apprehend Superintendent Pilate Moyo for contempt of court. The Deputy Sheriff was refused entrance or access to your offices. We view this as a flagrant and brazen disregard of a court order and an obstruction of the Deputy Sheriff from carrying out his lawful duties as C mandated by the High Court of Zimbabwe.

This is therefore our official complaint to you as the most Senior Police officer who is commanding Bulawayo Province. You are required to assist not only as the most senior officer, but as directed by the Honourable Court.

On this note we ask for an immediate appointment to see you in connection with this matter. In the event that we do not manage to met you by close of business D on Monday 25 February 2013 then it is our client's conclusion that no help is going to come from your office. Our client will be left with no choice but to approach your superiors and/or approach the Honourable Court on an urgent basis for an appropriate order against whoever we think is denying him justice, and whoever is harbouring Superintendent Pilate Moyo, Officer Commanding Camps and against all those who still believe that the police is above the E jurisdiction of the High Court jointly and severally in their personal capacities. The treatment your office gave displays the highest levels of unprofessionalism. The same conduct that led to this order we seek to enforce was the conduct your good offices displayed.

We await to hear from you shortly.

Yours faithfully F

(signed)

Dube-Banda, Nzarayapenga and Partners

c.c The Registrar

High Court

Ref (HC 1444/12)".

On 26 February 2013 the applicant in the present application and the G Commissioner General of Police filed an urgent chamber application seeking the following relief:

"(a) TERMS OF FINAL ORDER SOUGHT

That you should show cause to this Honourable Court why a final order should not be made in the following terms: H

Makonese J

(i) Execution A of judgment handed down in case No. HC 851/11 be and is hereby stayed until finalisation of the application for rescission which is still pending under case No. HC 851/11.

(b) INTERIM RELIEF GRANTED

(i) Pending finalisation of this matter, the writ of execution granted, dated 21 December 2001 be and is hereby rescinded."

B The urgent application for stay of execution was filed by the Commissioner General of Police as the applicant. He avers that he is vicariously liable for actions of his officers, which actions are done during the course of employment. He further avers that the respondent should have sought recourse against the Commissioner General in his official capacity instead of executing it against C a mere police officer who is executing his duties. the applicant seeks an order staying execution and "rescinding the writ of execution."

The respondent has opposed the urgent chamber application and has raised several points *in limine*. The issues are dealt with *seriatim*.

1. Urgency

D The respondent contends that there is no urgency in the matter in that default judgment was obtained on 16 June 2011 and application for rescission of judgment was only filed on 29 November 2011. There was no application for condonation for late filing of the application for rescission of

judgment and there are no prospects of success for the application. When the parties E appeared before me, Mr *Bhasera,* who appeared on behalf of the applicant, properly conceded that there was no urgency established. The urgency, it was noted, only arose when there were attempts to enforce the orders of the court. In any event the order being contested is not against the applicant. The order for contempt of court was made against Supt Pilate Moyo. The urgent application by the applicant is therefore clearly misplaced under the F circumstances.

2. No matter before the court

The respondent contends that the founding affidavit sworn to by Joseph Mumbengegwi who is not a party to the proceedings effectively means that there is no application before the court.

G I cannot agree with that proposition. Mr Mumbengegwi is a law officer who is acting under the instruction of the applicant. He has averred that he has been authorised to swear positively to the facts and that he is acquainted with the facts of the matter. I am of the view that this point *in limine* cannot be sustained: see *Zimbabwe Banking Corporation Ltd v Trust Finance Ltd* H *and Another* 2006 (2) ZLR 404

Makonese J

3. Dirty Hands A

The applicant is a party to the proceedings still pending in court. the applicant purports to assume liability of a party who is in contempt of a court order. the applicant cannot be heard until he has purged his contempt. There is clear evidence that the court order has been ignored and violated by the applicant and his officers. It is abundantly clear that the conduct of the applicant and B Supt Pilate Moyo shows a flagrant disregard of a lawful order of the court. The level of defiance to the court order is in my view, not expected of law officers. If police officers violate court orders deliberately and knowingly, then there is likely to be a breakdown of law and order. the applicant should not be seen to be actively encouraging and aiding in the violation of orders of this court. The court frowns upon such conduct. I have no doubt, therefore, C that the applicant is approaching the court with dirty hands. On this basis alone he should not be heard by the court until he purges his contempt. See *Samudzimu v Ngwenya* 2008 (2) ZLR 228 (H).

The principle that a litigant who has dirty hands should be denied audience in the halls of justice was expressed by Bartlett J in *Deputy Sheriff, Harare* C *v Mahleza & Aner* 1997 (2) ZLR 425 (H) at 426 where he stated as follows:

> "People are not allowed to come to court seeking the court's assistance if they are guilty of a lack of probity or honesty in respect of the circumstances which cause them to seek relief from court. It is called, in time-honoured legal parlance, the need to have clean hands. It is a basic principle that litigants should come to court without dirty hands. If a litigant with unclean hands is allowed to seek a E court's assistance, then the court risks compromising its integrity and becoming a party to underhand transactions."

The same principle was adopted by Chidyausiku CJ in *Associated Newspapers of Zimbabwe (Pvt) Ltd v Minister of State for Information and Publicity in the President's office & Ors* 2004 (1) ZLR 538 (S). The learned Chief Justice stated at 547 as follows: F

> "The court will not grant relief to a litigant with dirty hands in the absence of good cause shown or until such defiance or contempt has been purged."

Mr *Muganyi,* for the respondent, contended that the applicant was persisting with the defiance of the court orders and had been extremely violent against the Deputy Sheriff and his assistants. This assertion has not been denied by G Mr *Bhasera,* appearing for the applicant.

I am satisfied therefore that the preliminary points raised by the respondent in this matter are meritorious. The urgency referred to by the applicant is certainly self-created. No reasonable explanation has been advanced for the failure to comply with the court order of Kamocha J dated 16 June 2011 and that of Cheda J dated 7 February 2013. The application for rescission of judgment H

Makonese J

A was made out of time and there was no application for condonation for the late filing of that application. The application for rescission of judgment is fatally defective and no attempt has been made to rectify the defect. Further, the applicant's hands are not clean. The court cannot assist the applicant to defy court orders. the applicant's conduct shows that he has no intention of respecting orders lawfully issued by the court and he must purge his contempt B if he is to seek the court's indulgence.

For these reasons, I upheld the preliminary points raised by the respondent and accordingly dismissed the application with costs on an attorney and client scale.

C *Civil Division, Attorney General's Office*, applicant's legal practitioners

Dube-Banda, Nzarayapenga and partners, defendant's legal practitioners

---

© 2015 Juta and Company (Pty) Ltd.

Document 36 of 73

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2013/Volume 1/CHIDAWU & ORS v SHAH & ORS 2013 (1) ZLR 260 (S)

CHIDAWU & ORS v SHAH & ORS 2013 (1) ZLR 260 (S)

Citation	2013 (1) ZLR 260 (S)
Case No	Judgment No. S-12-13
Court	Supreme Court, Harare
Judge	Malaba DCJ, Gowora JA & Omerjee AJA
Heard	19 June 2012; *CAV*
Judgment	18 March 2013
Counsel	*M Magwaliba* with *D Ochieng,* for the appellants *L Uriri,* for the first respondent *T Mpofu*, for the second and third respondents *T Tandi*, for the forth respondent No appearance for the fifth respondent
Case Type	Civil appeal
Annotations	Link to case annotations

Flynote

Practice and procedure – *urgent application – certificate of urgency – need for legal practitioner honestly and conscientiously to apply his mind to facts – must genuinely believe matter to be urgent – such belief must be consistent with facts* D

Headnote

A certificate of urgency is the *sine qua non* for the placement of an urgent chamber application before a judge. In turn, the judge is required to consider the papers forthwith and has the

discretion to hear the matter if he forms the opinion that the matter is urgent. In making a decision as to the urgency of the chamber application the judge is guided by the E statements in the certificate by the legal practitioner as to its urgency. In this exercise the judge is therefore entitled to read the certificate and construe it in a manner consistent with the papers filed of record by the applicant.

In certifying the matter as urgent, the legal practitioner is required to apply his own mind to the circumstances of the case and reach an independent F judgment as to the urgency of the matter. He is not supposed to take verbatim what his client says regarding perceived urgency and put it in the certificate of urgency. He is not permitted to make as his certificate of urgency a submission in which he is unable to conscientiously concur. He has to apply his own mind and judgment to the circumstances and G reach a personal view that he can honestly pass on to a judge and which he can support not only by the strength of his arguments but on his own honour and name. It is, therefore, an abuse for a lawyer to put his name to a certificate of urgency where he does not genuinely believe the matter to be urgent. Moreover, as in any situation where the genuineness of a belief is postulated, that good faith can be tested by the reasonableness H

A or otherwise of the purported view. Thus, where a lawyer could not reasonably entertain the belief he professes in the urgency of the matter, he runs the risk of a judge concluding that he acted wrongfully, if not dishonestly, in giving his certificate of urgency. The belief that a matter is urgent must be a matter of substance rather than form. The genuineness of the belief postulated in the certificate must be tested by reference to all B the surrounding circumstances and facts to which the legal practitioner is expected to have regard.

Case referred to

General Transport & Engineering (Pvt) Ltd & Ors v Zimbabwe Banking Corporation Ltd 1998 (2) ZLR 301 (H) C

Case information

M Magwaliba with *D Ochieng,* for the appellants

L Uriri, for the first respondent

T Mpofu, for the second and third respondents

T Tandi, for the forth respondent

D No appearance for the fifth respondent

Judgment

Gowora JA: This is an appeal against the judgment of the High Court dismissing an urgent application made by the appellants. The first appellant, Chidawu (hereinafter referred to by his name), is the beneficial holder of all E the shares in the rest of the appellants (hereinafter referred to as the appellant companies). In turn, the appellant companies owned cumulatively in excess of 380 million shares in Pelhams Ltd.

On 9 February 2011, Chidawu borrowed an amount of USD3 million from the first respondent (hereinafter referred to as Shah). The terms and conditions attaching to the loan were recorded in two written documents signed by F the parties on 9 and 10 February 2011 respectively. The second document, referred to by the parties as Annexure "B", provided in clause 2.1 that in the event of any inconsistencies in any of the provisions of the two documents, its provisions would prevail.

The material terms of the agreement were these, firstly, the loan would G attract an interest rate of 18 per cent *per annum* compounded monthly. The loan was repayable on or before 20 February 2011, subject to an extension to 20 March 2011 at the sole discretion of Shah. Secondly, as security for the loan, Chidawu was obliged to provide sureties in the form of deeds of surety executed by each of the appellant companies. The execution of a deed of surety was to be accompanied by the surrender of the share certificate H each appellant company held with Pelhams Ltd. Chidawu was also obliged

Gowora JA

to surrender the said share certificates in negotiable form to Shah or his A nominees by 10 March 2011 in the event that repayment of the loan would not have been effected by that date. On 9 February 2011, Chidawu handed over the shares certificates and executed the necessary transfer documents.

Chidawu was unable to pay the loan by due date. Through his legal practitioners, Atherstone & Cook, Shah called up the loan and by letter B dated 11 March 2011 threatened to liquidate the security in his possession. On 18 March 2011, Messrs Honey & Blanckenberg, on behalf of Chidawu, responded to the threat as follows:

> "We act for the above named Oliver Chidawu who has instructed us to respond to your letter dated 11 March 2011.
>
> Your client's threat to start liquidating the security tendered by our client without C instituting legal proceedings is a clear case of *paratie executie*. Accordingly, unless we receive written undertaking from either yourselves or Mr Shah that he is not going to proceed with the intended sale of our client's security by Monday 21 March 2011, we are under instructions to lodge an urgent application with the courts for relief."

On 5 April 2011, Shah caused summons to be issued out of the High Court D against all the appellants, claiming payment of the sum of USD2 700 000, interest at the rate of 18 per cent *per annum* and costs of suit. The appellants entered appearance to defend and filed a joint plea in which they denied being indebted to Shah. There does not appear to have been any further communication between the parties until 13 October 2011, when Atherstone E & Cook addressed a letter to Honey & Blanckenberg in the following terms:

> "We refer to previous correspondence addressed to you in this matter. As you will recall, our client is holding 357 million Pelhams shares in negotiable form.
>
> Your client owes an amount in excess of USD 2 550 000 exclusive of collection commission. We are happy to advise that our client has found a buyer of the aforesaid Pelhams shares. Accordingly, we advise that if your client fails to F pay the balance outstanding within 48 hours of receipt of this letter Messrs Lynton Edwards Stockbrokers will be instructed by our client to sell the shares at a floor price of USD 0.00711. In the event that the proceeds of the sale are not sufficient to cover the debt, our client reserves the right to proceed against yours in the usual manner."

The response from Honey & Blanckenberg was to same effect as their G previous letter of 18 March 2011. The letter threatened legal action if they did not receive written undertaking by 14 October 2011 to the effect that the proposed sale of the shares would not be proceeded with. There was no written undertaking given and on 20 October 2011, the appellants filed an urgent chamber application to stop the sale. The sale was concluded on 25 October 2011, which was the scheduled date for the hearing of the chamber H

Gowora JA

A application. It is common cause that an application to amend the provisional order to incorporate the sale of the shares and interdict their transfer was dismissed by the learned judge before whom the application had been placed. She also found that the founding affidavit had not been commissioned. As a result she held that there was no application before her.

B On 8 November 2011, the appellants made the urgent chamber application, which is the subject of the appeal. It was opposed by all the respondents, who raised a preliminary issue on the validity of the certificate of urgency filed with the application. It was contended by the respondents that there were obvious substantive similarities between the certificate of urgency signed by Miss Njerere, which was attached to the application filed on 20 C October under case no. HC 10410/11, and the certificate by Miss Mapota accompanying the application under case no. HC 11119/11. It was contended further that, in view of the alleged similarities, it was demonstrably clear that Miss Mapota did not apply her mind to the facts of the case when she certified that the matter was urgent. The learned judge found that Miss Mapota's certificate of urgency was a product of copying and pasting from D the certificate filed by Miss Njerere. He found that she had not applied her mind to the facts of the case. Accordingly the learned judge held that he could not act on the certificate of urgency as a valid document. He dismissed the application with costs.

The appellants filed the appeal on the following grounds:

1. That E the learned judge *a quo* misdirected himself by rejecting as invalid the certificate of urgency duly signed by Tecla Mapota on the basis that some statements in it were similar to those in the certificate of urgency filed in case no. HC 10410/11.
2. The F learned judge *a quo* misdirected himself by making a factual finding that Tecla Mapota did not apply her mind to the question of urgency on the basis of submissions made from the bar in the absence of any evidence to that effect.
3. The learned judge *a quo* misdirected himself, in any event, by determining that the fact of common passages or statements being found in the two G certificates of urgency invalidated Tecla Mapota's certificate.
4. The learned judge *a quo* misdirected himself as to the legal effect of the similarities between some statements and passages in Tecla Mpota's certificate of urgency and that of Sarudzayi Njerere.
5. The learned judge *a quo* misdirected himself by ignoring that the H similarities in some statements in the certificates of urgency were

---

Gowora JA

explicable by reference to the similarities in the facts and circumstances A as set out in the affidavits in both HC 11119/2011 and HC 10410/2011.

6. The learned judge *a quo* misdirected himself in coming to the conclusion that there was an unexplained delay starting from March 2011, when the facts clearly showed that it was not necessary to institute proceedings then. B
7. The learned judge *a quo* misdirected himself by determining that the appellants should have instituted the urgent application to stop transfer of the shares even before Makoni J had given her judgment in case no. HC 10410/2011.

Rule 244 of the Rules of the High Court provides: C

> "Where a chamber application is accompanied by a certificate from a legal practitioner in terms of paragraph (b) of subrule (2) of rule 242 to the effect that the matter is urgent, giving reasons for its urgency, the Registrar shall immediately submit it to a judge, who shall consider the papers forthwith."

It follows that the certificate of urgency is the *sine qua non* for the placement of an urgent chamber application before a judge. In turn, the judge is required D to consider the papers forthwith and has the discretion to hear the matter if he or she forms the opinion that the matter is urgent. In making a decision as to the urgency of the chamber application, the judge is guided by the statements in the certificate by the legal practitioner as to its urgency. In this exercise, the court is therefore entitled to read the certificate and construe E it in a manner consistent with the papers filed of record by the applicant.

In certifying the matter as urgent, the legal practitioner is required to apply his or her own mind to the circumstances of the case and reach an independent judgment as to the urgency of the matter. He or she is not supposed to take verbatim what his or her client says regarding perceived urgency and put it in the certificate of urgency. I accept the contention by the first respondent F that it is a condition precedent to the validity of a certificate of urgency that a legal practitioner applies his mind to the facts. Gillespie J had occasion to discuss the duty that lies upon a legal practitioner who certifies that a matter is urgent in *General Transport & Engineering (Pvt) Ltd & Ors v Zimbabwe Banking Corporation Ltd* 1998 (2) ZLR 301 (H) at 302E-303B, where he stated:

> "Where the rule relating to a certificate of urgency requires a legal practitioner G to state his own belief in the urgency of the matter that, invitation must not be abused. He is not permitted to make as his certificate of urgency a submission in which he is unable to conscientiously concur. He has to apply his own mind and judgment to the circumstances and reach a personal view that he can honestly pass on to a judge and which he can support not only by the strength of his arguments but on his own honour and name. H

Gowora JA

> A . . . It is therefore an abuse for a lawyer to put his name to a certificate of urgency where he does not genuinely believe the matter to be urgent. Moreover, as in any situation where the genuineness of a belief is postulated, that good faith can be tested by the reasonableness or otherwise of the purported view. Thus where a lawyer could not reasonably entertain the belief he professes in the urgency of the matter he runs

the risk of a judge concluding that he acted wrongfully if B not dishonestly in giving his certificate of urgency."

Whilst the remarks of the learned judge were not concerned with the validity or otherwise of a certificate of urgency, they are apposite and pertinent in that the requirement that a lawyer must apply his or her mind to the facts of the case is emphasised. In order for a certificate of urgency to pass the test of validity, it must be clear *ex facie* the certificate itself that the legal C practitioner who signed it actually applied his or her mind to the facts and the circumstances surrounding the dispute.

The appellants filed two chamber applications. Inevitably the court had to have recourse to the certificate of urgency which accompanied each of the chamber applications. The question of urgency was addressed in five D paragraphs in Miss Mapota's certificate of urgency, *viz.* paras 5 to 9 in which she stated the following:

"5. The first respondent issued summons out of this honourable court under case no. HC 3403/11 praying for an order that the applicants pay an amount USD2 700 000. The applicants defended the action on the basis that they are not indebted to the first respondent in any manner or in the amount E claimed. Further, the applicants said that the agreement and sureties were void for illegality. The matter has been referred to trial and is awaiting set down.

6. On 13 October 2011 the first respondent through his legal practitioners wrote to the applicants' legal practitioners stating that he had found a buyer for the Pelhams shares.

7. On F 20 October 2011, the applicants filed an urgent application seeking to interdict the first respondent and anyone acting for him from selling the shares. The matter was set down for 25 October 2011 which is the same date that the first respondent then purported to sell the shares. The sale was conducted after the first respondent had been served with an urgent chamber application to stop the sale.

8. The G urgency arises from the fact that although the first respondent instituted proceedings, which were referred to trial, to enable him to claim the amount he alleges he lent to the first applicant he has now proceeded to liquidate the security which had been tendered by the first applicant. This in my view amounts to *paratie executie* and is unlawful.

9. If the shares are transferred to second respondent the applicants will suffer H irreparable harm because the shares can be freely traded to multiple buyers

---

Gowora JA

on the stock exchange and the applicants will have no recourse against A *bona fide* purchasers".

When one considers the averments made in the certificate it is obvious and leaps to the mind that there is an omission in the manner in which the facts surrounding the matter have been set out. There is no explanation as to what transpired on 25 October 2011 when the first urgent application was scheduled B to be heard. The appellants, in order to have their application heard as urgent, had to explain what circumstances had arisen after 25 October to justify their need to have the matter dealt with on an urgent basis. The explanation of urgency in the certificate dealt with the execution by the first respondent of the security given to him by the first appellant. This is the same situation that existed when the initial urgent application was made. The complaint C was that the first respondent had chosen to execute against the security instead of awaiting the outcome of the proceedings that had been instituted for payment of the monies that were alleged to be owed.

The belief that a matter is urgent must be a matter of substance rather than form. The genuineness of the belief postulated in the certificate must be tested D by reference to all the surrounding circumstances and facts to which the legal practitioner is expected to have regard. The appellants have not denied that there is very little difference between the substance of the certificate of urgency signed by Miss Mapota and that signed by Miss Njerere. In both certificates the urgency is said to arise from the execution by the first respondent of the security granted in compliance with the loan. The words E used are the same. The conclusion that Miss Mapota copied and pasted Miss Njerere's certificate of urgency is inescapable. Once such a finding is made it follows that Miss Mapota failed to apply her mind to the facts of the case before certifying the matter as being urgent.

In respect of the certificate signed by Miss Mapota the learned judge said: F

"Mr *Zhou* [now Zhou J] for the applicants' response was that this was due to the there being a standard way of doing things among legal practitioners. Mr *Uriri*, however, argued that it was demonstrably clear that [Miss] Mapota did not apply her mind to the facts of the case before she certified that the application

was urgent. The deficiencies are extensively dealt with from pp 2 to 5 of the second respondent's opposing affidavit. In para 3.1 (a) of the second respondent's G opposing affidavit it is pointed out that the loan should have been repaid by March 2011, after which the shares which had been tendered together with signed share transfer forms in negotiable form could have been transferred to the first respondent or a third party. This means the shares had been exposed to disposal by the first respondent from that date, yet no action was taken to stop the possible sale of the shares till 20 October 2011. It was pointed out that [Miss] Mapota did not deal with or explain that delay in her certificate of H

2013 (1) ZLR p267

Gowora JA

A urgency proving that she did not apply her mind to the facts of this application before certifying the application as meriting the urgent attention of this court. I accept that this should have been explained and that failure to do so shows a failure by [Miss] Mapota to apply her mind to the facts of this application.

In para 3.1 (b) the second respondent questions the applicants' failure to institute litigation when the two notices of sale of the shares were given by the first B respondent. Again Miss Mapota did not deal with that issue in her certificate of urgency again demonstrating her failure to deal with the facts of the application before certifying it as urgent.

In para(s) 3.1 (e) and (g) the second respondent questions why the applicants did not communicate with second respondent on realising that it was buying the shares. The second respondent was only engaged through these proceedings C eighteen days after the applicants became aware of the sale of the shares to it. Again [Miss] Mapota did not deal with this issue in her certificate of urgency. She should have explained why the applicants did not engage the purchaser of the shares if they were treating this matter as one of urgency. She also did not explain the delay between the application which was dismissed by Makoni J and this application in spite of it being common cause that the applicants' attempt to amend that application was dismissed. This means from that date D the applicants were aware of the need to make this application but did not do so until 8 November 2011. [Miss] Mapota should, if she was applying her mind to the urgency of this matter, have explained this delay".

The learned judge cannot be faulted in his reasoning. There were pertinent issues regarding delays in instituting proceedings which should have been E obvious had Miss Mapota been applying her mind. There was an evident delay in the proceedings which had to be explained before the matter could be considered as being of an urgent nature. The appellants had tendered the share certificates together with signed transfer forms. Once the due date for the settlement of the loan passed without payment, it must have occurred to F the appellants that the first respondent had the right to sell the shares. The fear of irreparable harm arising from the sale of the shares would have arisen on 10 March 2011. There is no explanation from Miss Mapota as to why no action was taken soon after 10 March 2011 to stop the sale.

As mentioned by the learned judge, Shah had on two occasions issued threats to liquidate the security. There were letters written by on behalf of Chidawu G in answer to the threats. The threats would have caused fear of irreparable harm yet there was no explanation as to why action was not taken soon after the threats were uttered to stop the sale of the shares. This assumes paramount importance when regard is had to the fact that the shares had been tendered to Shah in negotiable form and could be transferred without H the need to notify any of the appellants.

2013 (1) ZLR p268

Gowora JA

On 13 October 2011 the appellants were advised that Shah had found a A purchaser for the shares and that they should pay the loan. They did not pay up approach the court immediately to obtain an interdict stopping Shah from liquidating the security. They did not even seek to engage the buyer. They issued a threat to institute legal proceedings but took no further action. There is no explanation as to why none was taken. B

In addition, once an application to amend the draft provisional order to stop the transfer of the shares was dismissed by Makoni J, the appellants would have been aware of the need to obtain an appropriate order interdicting the transfer of the shares to the purchaser. The appellants did not act immediately. They waited until 8 November 2011 before filing the application which is the subject of the appeal. They critically failed to explain why it had taken C fifteen days to file an application that they sought to persuade the court was urgent. In my view, primarily the failure by the appellants to act timeously when it was realised that the security was being liquidated by Shah, as well as the absence of an explanation as to why there was no action taken when the need arose, pointed to an

abject failure on the part of Miss Mapota to D apply her mind to the facts of the application before her.

The defects relating to her certificate of urgency show that Miss Mapota was doing no more than parroting Miss Njerere's opinion as expressed in the earlier application. She failed to deal with patent and pertinent facts placed before the court by the parties. These facts were known to her at the time she certified the application as urgent. Critically the inescapable conclusion is E that her opinion tested against the yardsticks of those common facts cannot stand scrutiny. It cannot be genuine. She did not apply her mind to the facts.

The appellants have contended that since the learned judge found that the application was not properly before the court by virtue of the defective certificate of urgency, the appropriate relief was to have the matter struck F off the roll. It was argued that the learned judge erred by dismissing the application. It is therefore prayed in the alternative, that in the event that the court finds that the certificate was defective, the matter be remitted to the High Court to be dealt with on the substantive issue of transfer of the shares.

The second respondent has argued that the matter be dismissed as the relief G sought by the appellants is no longer available as it has now been overtaken by events, as the shares have been transferred. As contended by the second respondent, correctly in the view of this court, courts exist to settle concrete and live disputes or controversies. There can be no discernible benefit to be derived from this appeal being remitted. To remit the matter to the High Court would result in that court presiding over a matter where any judgment H

Gowora JA

A it passes would not benefit any of the parties. The shares have now been transferred for value to a purchaser who to all intents and purposes is *bona fide*. The appellants on the papers before the High Court did not challenge the *bona fides* of the purchaser. They are not asking for a reversal of the transfer but an interdict against transfer of the shares. What relief then would the High Court give in the circumstances? The argument by the second B respondent that this is an abuse of court process has merit and finds favour with this court. Courts should not be used to proffer legal advice and should only pronounce upon abstract questions and differing contentions in very rare circumstances. There would be no justification for embarking upon an abstract exercise in this case.

C The appeal is dismissed with costs.

MALABA DCJ and OMERJEE AJA concurred.

Honey & Blanckenberg, appellant's legal practitioners

Atherstone & Cook, first respondent's legal practitioners

D *Mtetwa & Nyambirai*, second & third respondent's legal practitioners

Kantor & Immerman, fourth respondent's legal practitioner

© 2015 Juta and Company (Pty) Ltd.

Document 37 of 73

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2013/Volume 1/S v TSHUMA 2013 (1) ZLR 270 (H)

S v TSHUMA 2013 (1) ZLR 270 (H)

Citation 2013 (1) ZLR 270 (H)

Case No Judgment No HB-70-13

Court	High Court, Bulawayo
Judge	Mutema J
Heard	21 March 2013
Judgment	21 March 2013
Counsel	Details not supplied
Case Type	Criminal review
Annotations	No case annotations to date

Flynote

Criminal procedure (sentence) – *offences under Criminal Law Code – sexual* C *intercourse with a young person (s 70(1)(a)) – principles – factors to be considered*

Headnote

The accused, who was 20 years old, pleaded guilty to having sexual intercourse with a young person and was duly convicted. He was a first D time offender who said that he did not know that it was an offence. The complainant was aged between 14 and 15 years. The accused met the complainant when she was on the way to the shops and courted her but she turned him down. He met her again two days later and courted her and she agreed. After two days they met again and went to a secluded spot where they had sexual intercourse. The accused was sentenced to E 18 months imprisonment, six months of which were suspended.

Held, that the rationale behind punishing carnal knowledge of girls under 16 years is the protection of immature females from voluntarily engaging in sexual intercourse on account of a lack of capacity to appreciate the implications involved and the possibility of mental or physical injury.

Held, further, that a wide range of differing circumstances can attend this F crime. The factors that should be considered include, *inter alia*, the age, appearance and character of the complainant, the age of the accused and the circumstances of the offence. The complainant's age is relevant because, the younger she is, the more seriously will the court regard the exploitation of her youth, while the closer she is to 16 the less justified G will be any presumption of her incapacity to make an informed decision about sexual intercourse. Her appearance is important, because the moral blameworthiness of the man will be less if he wrongly believes, from her appearance, that she is older than she actually is. Similarly, the girl's character – whether she be a virgin or promiscuous, a flirt or demure – must have a like bearing on whether the accused was knowingly H

A preying on the innocent or merely risking lying with an underage but worldly-wise girl. In no case, though, can the girl's sexual experience be a defence. The accused's age is important because of the relevance to his moral blameworthiness and his own experience or lack of it and of any disparity in the ages of the parties. Apart from the accused's age, it is also important to determine whether the accused was in a position B of responsibility in relation to the girl. A careful investigation of these and other relevant factors by the trial court is essential.

Held, further, that the offence is mitigated where, for instance, (a) the complainant is of loose morals; or (b) she enticed the accused to have intercourse; or (c) the accused and complainant were genuinely in love; or (d) she was nearly 16 years old; or (e) the accused is a simple and C unsophisticated person from a community in which this law is not well known; or (f) he is a youth; or (g) he *bona fide* believed the complainant to be of age. On the other hand, the offence is aggravated where (a) the accused is much older and more mature than the complainant; or (b)

the complainant is just above the legal age of consent; or (c) the accused D has relevant previous convictions.

Cases cited

S v James 1998 (1) ZLR 424 (S)

S v Mutowo 1997 (1) ZLR 87 (H)

S v Nare 1983 (2) ZLR 135 (H)

Legislation considered E

Criminal Law (Codification and Reform) Act [*Chapter 9:23*], s 70(1)(a)

Judgment

Mutema J: The 20-year-old accused person in casu was correctly convicted, F following a plea of guilty, of having sexual intercourse with a young person in contravention of s 70(1)(a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*].

Apart from the plea of guilty and the age of 20 years, the accused is a first offender, who is a grade 7 drop-out, who said he did not know that it was G an offence. The dentist who examined the complainant opined that she is aged between 14 and 15 years. The accused met the complainant in February 2013 when she was on her way to the shops and courted her but she turned him down. He met her again after two days and courted her and this time she agreed. After two days the two met at a river where the complainant was fetching water. The accused called the complainant to a secluded spot H where he asked to have sexual intercourse with her and she consented. They

had sexual intercourse once and parted. The matter came to light after the A complainant told her grandmother that she was in love with the accused and she was taken to Gwanda Hospital where she told the nurse about the sexual encounter.

The provincial magistrate who convicted the accused sentenced him to "18 months' imprisonment, of which 6 months' imprisonment is suspended for B 5 years on condition accused does not within that period commit an offence of a sexual nature, for which he is sentenced to imprisonment without the option of a fine." He was sentenced on 25 February 2013. In justifying her sentence, the trial magistrate reasoned as follows:

> "The accused person is a mature first offender. He pleaded guilty to the charge C and did not waste the court's time. The offence committed by the accused person is a serious offence. Young girls need to be protected from people like the accused, especially in this era of sexually transmitted diseases. The girl is only 14 years and is doing Grade 7. Because of the gravity of the offence a fine/community service will be too lenient."

I did not consider it worthwhile to send a query to the trial magistrate D regarding the extremely harsh sentence that she imposed without any plausible justification, as it would have the effect of further prejudicing the accused. An insight into sentencing patterns in cases of having sexual intercourse with young persons would be instructive.

In *S v Nare* 1983 (2) ZLR 135 (H) the court held that the rationale behind E punishing carnal knowledge of girls under 16 years is the protection of immature females from voluntarily engaging in sexual intercourse on account of a lack of capacity to appreciate the implications involved and the possibility of mental or physical injury. The offence is mitigated where, for instance –

(i) the complainant is of loose morals; or
(ii) she enticed the accused to have intercourse; or F
(iii) the accused and the complainant were genuinely in love; or
(iv) she was nearly 16 years old; or
(v) the accused is a simple and unsophisticated person from a community in which this law is not well known; or G
(vi) he is a youth; or
(vii) he *bona fide* believed the complainant to be of age.

On the other hand, the offence is aggravated where –

(i) the accused is much older and more mature than the complainant; or

(ii) she is just above the legal age of consent; or

(iii) the accused has relevant previous convictions.

Other factors to consider in determining the seriousness of the offence are the age, appearance and character of the complainant, the age of the accused and the circumstances in which the offence was committed.

The *Nare* case *supra* offered guidance to magistrates in assessing appropriate sentences for the offence in issue for decades and it is still relevant to this day.

In *S v Mutowo* 1997 (1) ZLR 87 (H) Gillespie J remarked that the sentencing of persons found guilty of "statutory rape" is a difficult matter because of the wide range of differing circumstances that can attend this crime. The factors that should be considered include, *inter alia*, the age, appearance and character of the complainant, the age of the accused and the circumstances of the offence – a refreshment of memory of what was stated in the *Nare* case s*upra*. The complainant's age is relevant because the younger she is, the more seriously will the court regard the exploitation of her youth, while the closer she is to 16, the less justified will be any presumption of her incapacity to make an informed decision about sexual intercourse. Her appearance is important because the moral blameworthiness of the man will be less if he wrongly believes, from her appearance, that she is older than she actually is. Similarly, the girl's character – whether she be virgin or promiscuous, a flirt or demure – must have a like bearing on whether the accused was knowingly preying on the innocent or merely risking lying with an underage but worldly-wise girl. In no case, though, can the girl's sexual experience be a defence. The accused's age is important because of the relevance to his moral blameworthiness of his own experience or lack of it and of any disparity in the ages of the parties. Apart from the accused's age, it is also important to determine whether the accused was in a position of responsibility to the girl. A careful investigation of these and other relevant factors by the trial court is essential.

In the *Nare* case *supra*, the accused was 22 years old and was a captain in the army. He had sexual intercourse with a 15-year-old girl he had met, on the very day that he met her. He was sentenced to a fine of $750 or five months' imprisonment. In the *Mutowo* case *supra,* a 27-year-old widower had sexual intercourse with a 13-year-old girl. Due to inadequate investigation into factors relevant to sentence, the review court was obliged to give the accused the benefit of the doubt and treat him as a mature recently bereaved widower who sought release with a willing and experienced teenager whom he took to be 15. A sentence of 24 months' imprisonment, of which 10 months were suspended on condition of good behaviour, was altered to a fine of $300 or one month's imprisonment. In *S v James* 1998 (1) ZLR 424 (S) a 20-year-

old accused had sexual intercourse with an eleven-year-old girl on several occasions. He was sentenced to a fine of $600 or one month's imprisonment.

In the instant case, the accused is a 20-year-old who pleaded guilty and is a first offender. He is unsophisticated and did not know that it was an offence to have consensual sexual intercourse with a girl below 16 years of age. He had sexual intercourse with her two days after his advances were accepted. She was between 14 and 15 years old. The trial magistrate's reasons for sentence are very scanty and are devoid of an investigation into the essential relevant factors alluded to in the above-cited cases. For instance, the girl's appearance and character were not interrogated. How could a 14-15 year old girl just agree to have sexual intercourse with a stranger she had met four days previously and two days after accepting his proposition? This could well point to a girl of loose moral fibre or one sexually experienced – which fact was also not investigated.

The sentencing trends expounded above, coupled with the circumstances of this case, compel me to hold that the accused did not deserve to be incarcerated at all. The charge is corrected to read contravening s 70(1)(a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] and the conviction is confirmed. However, the sentence imposed is set aside and substituted with one of a

fine of $200 or 25 days' imprisonment. Since the accused has already served the 25 days, he is entitled to his immediate release.

Kamocha J concurred. E

© 2015 Juta and Company (Pty) Ltd.

Document 38 of 73

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2013/Volume 1/S v NDLOVU 2013 (1) ZLR 275 (H)

S v NDLOVU 2013 (1) ZLR 275 (H)

Citation	2013 (1) ZLR 275 (H)
Case No	HH-149-13
Court	High Court, Harare
Judge	Hlatshwayo J and Uchena J
Heard	28 March 2013
Judgment	28 March 2013
Counsel	Details not supplied
Case Type	Criminal review
Annotations	No case annotations to date

Flynote

Criminal procedure – *trial – record – lost record – reconstruction of – reconstruction procedure should be initiated by clerk of court – how record can be reconstructed using available evidence from other sources*

Headnote

D The accused was a legal practitioner. One of his colleagues had represented a foreign national who was on bail on a criminal charge. One of the bail conditions was that this person should surrender his passport to the clerk of court. The accused's colleague asked for an order that the foreign national's passport should be returned to him so that certain immigration matters could be attended to, and undertook not to give the E passport to the foreign national. After the court ruled that the passport could be returned, the accused signed for the passport, undertaking that he would only use it to sort out immigration formalities, and return it to the clerk of court. The foreign national did not return to court and left the country. The accused and his colleague were charged with defeating the F course of justice, alternatively giving false information to the court. The accused was convicted but given bail pending appeal. The record was subsequently lost, and the matter was referred by the trial magistrate to the chief magistrate, who sent the matter to the High Court for review, with a request that the proceedings be set aside. The reviewing judges, having heard the parties to the matter, issued an order requiring the clerk G of the trial court, with immediate effect, to cause the reconstruction of the record of proceedings. A

declaration was received from the trial magistrate, the trial prosecutor and the accused's counsel to the effect that reconstruction of the record of proceedings was impossible.

Held, that judges review proceedings to determine the result and not to rubber H stamp decisions from administrative officers. The chief magistrate's

---

request would be ignored and the court would determine the matter as A it deemed fit.

Held further, that the procedure for reconstruction of a record is that 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 B 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 must be sent for review. The procedure is not initiated by the officials who made the above-mentioned declaration and reconstruction does not only depend on their inputs. The reviewing judge should be informed by the clerk of court about the result of the C reconstruction, not by the declarants. The clerk of court should have obtained affidavits from them, the witnesses and others present at the trial. Their inputs should not have been sent directly to the reviewing judge but to the clerk of court, who could, if the result of his consultation with all he had to consult was in agreement with the view of the declarants, D have deposed an affidavit to that effect addressed to the Registrar for onward transmission to the reviewing judges.

Held further, that the trial magistrate should not have communicated directly with the prosecutor and defence counsel; he should have done so through the clerk of court. Such a direct communication was contrary E to judicial ethics.

Held further, that the evidence as to how the accused applied for the release of the passport, and signed for it, failed to return it and the absconding of his client should be in the court's records. The immigration department should have evidence on whether there was anything the accused needed to sort out at their offices using the accused's client's passport, whether F he attended at their offices for that purpose, and whether the client left the country using that passport. The simplicity of the evidence which should have been led at the trial whose record of proceedings has been lost had a strong bearing on the ease with which such proceedings could be reconstructed. The institutional nature of the source of such G evidence defeated the declarants' declaration that exhibits had been irretrievably lost. That, and the trial magistrate's use of an incorrect procedure to reconstruct the record, left no doubt that the record could be reconstructed. However, because the trial magistrate and his co-declarants had so compromised themselves that a reconstructed record in which they were participants could not be of any value at any legal H

A proceedings, the court reluctantly had to accept the declarants' averment that the record could no longer be reconstructed.

Cases cited

S v Manera 1989 (3) ZLR 92 (S)

S v S (a juvenile) 1991 (1) ZLR 237 (H)

Legislation considered B

High Court Act [*Chapter 7:06*], s 29(1)(c)

Judgment

Uchena J: Christopher Ndlovu, whom I will in this judgment refer to C as the convicted person, appeared before a regional magistrate sitting at Mutare magistrates court, charged with the contravention of s 184 of the Criminal Law (Codification and Reform Act [*Chapter 9:23*] (defeating the course of justice), alternatively contravening s180 of the Code (giving false information to the court). He was jointly charged with a co-accused whose fate is not under consideration in this review judgment. The convicted person D pleaded not guilty, but was convicted after a trial. It is,

however, not clear as to whether he was convicted on the main charge or the alternative as the record of proceedings has been lost.

The facts on which he was convicted are briefly the following. The convicted person and his co-accused are legal practitioners. His co-accused represented E an accused person of Mauritian origin, who was granted bail on 28 April 2008. One of the conditions on which this person was granted bail was that he was to surrender his passport to the clerk of court at Mutare magistrates court. The passport was surrendered to the clerk of court as per the bail condition. On 13 May 2008 the convicted person's co-accused applied for the Mauritian accused's passport to be temporarily released to him (the co- F accused), on the pretext that he required it for purposes of sorting out certain immigration formalities, but solemnly undertook not to give the passport to the accused, but to return it to the clerk of court. The court's ruling was deferred. On the date of determination the convicted person appeared for the accused. He signed for the passport after undertaking that he would only use it to sort out immigration formalities, and return it to the clerk of court.

G On 19 June 2008 the Mauritian accused defaulted court and the convicted person informed the court that the accused had gone to Harare to consult an advocate. The convicted person did not return the passport to the clerk of court. The Mauritian accused person did not stand trial as he had left the country. The convicted person and his co-accused were charged with defeating H the course of justice, alternatively with giving false information to the court.

2013 (1) ZLR p278

Uchena J

The convicted person was convicted and sentenced, after which he appealed and applied A for bail pending appeal before the same regional magistrate who was now sitting at Harare regional court. Things started going wrong when the regional magistrate attended to the record of proceedings which had apparently been sent to him from Mutare as the typist could not read his hand writing. Evidence led to prove and defend against these charges B was lost. The trial magistrate wavered over whether or not the record of proceedings could be reconstructed.

The regional magistrate, according to his own comments in a letter to the senior regional magistrate Harare dated 27 January 2012, said:

> "I recall it took me some time to complete the annotations since the record was C fairly voluminous, but I think I completed it in late 2008. Unfortunately, and this is where I erred, from that time I got preoccupied with other matters and ceased to attend to it."

There was no reason why the magistrate kept in his office a record he had finished annotating. He should have sent it back to the clerk of court who is the custodian of court records. D

The issue of the disappearance of this record moved a ladder up to the office of the Chief Magistrate who apparently gave a deadline for the reconstruction of the record of proceedings. By letter dated 22 August 2012 the regional magistrate wrote to the Chief Magistrate expressing doubts about the possibility of reconstructing the record of proceedings. E

On 6 September 2012 the Chief Magistrate's office forwarded the scant remains of the record to the Registrar for review. It landed on Hlatshwayo J's desk. During the period 4 February to 22 February 2013 I sat with Hlatshwayo J in the civil appeals court. We discussed this review and started working on it together. F

The correct reconstruction procedure should have been initiated by the clerk of court, Mutare, and not by the regional magistrate, senior regional magistrate and the Chief Magistrate. The clerk of court is the custodian of court records and could still have other documents to augment the scant remains of the proceedings which were forwarded for review by the Chief G Magistrate's office. The last paragraph of the Chief Magistrate's letter reads:

> "In light of the above, the matter is being placed before the Honourable Judge for setting aside of the proceedings".

Judges review proceedings to determine the result and not to rubber stamp decisions from administrative offices. We thus ignored his request and proceeded in the manner we deemed fit. Section 29(1) of the High Court H

2013 (1) ZLR p279

Uchena J

Act [*Chapter 7:06*], which provides for criminal reviews by judges provides as follows:

> "(1) For the purpose of reviewing any criminal proceedings of an inferior court or tribunal, the High Court may exercise any one or more of the following powers –
>
> (a) direct that any part of the evidence which was taken down in shorthand or recorded by mechanical means be transcribed and that the transcription be forwarded to the registrar of the High Court;
>
> (b) hear any evidence in connection with the proceedings, and for that purpose may cause any person to be summoned to appear and give evidence or produce any document or article;
>
> (c) where the proceedings are not being reviewed at the instance of the convicted person, direct that any question of law or fact arising from the proceedings be argued before the High Court by the Attorney-General or his deputy and a legal practitioner appointed by the High Court."

As this case had been forwarded to this court by the Chief Magistrate and was to be reviewed in terms of s 29(3) of the High Court Act, we in terms of s 29(1)(c) decided to hear the Attorney General and Mr *Mukombe* who had represented the convicted person at his trial. We heard Mr *Uladi* of the Attorney-General's office and Mr *Mukombe* in Hlatshwayo J's chambers and issued an order dated 14 February 2013 in which we required the clerk of court Mutare magistrates court, with immediate effect, to cause the reconstruction of the record of proceedings, and to submit by 15 March 2013 the reconstructed record to the Registrar of the High Court. We even had to refer the clerk of court and those who were to participate in the reconstruction, to *S v S* (a juvenile) 1991 (1) ZLR 237 (H) at 242C-E, where Adam J clearly explained the procedure to be followed when reconstructing a record.

Our effort bore no fruits. On 26 February 2013 we received a declaration from the trial magistrate, the trial prosecutor and Mr *Mukombe* the defence counsel. They, without the involvement of the clerk of court, declared:

> "We the undersigned parties wish to declare the following;
>
> We have met, exchanged notes and deliberated over the order of this Honourable Court in an effort to reconstruct the record of proceedings.
>
> We have come to the respectful view and conclusion that the reconstruction of the record of proceedings is impossible due to the following factors;
>
> (a) A very considerable and long time has lapsed between the trial and to date.
>
> (b) We deal with different and sometimes taxing cases.
>
> (c) Our memories have faded and our recollection of the proceedings is suspect and may result in inaccuracies.
>
> (d) The trial notes by the defence counsel are sketchy and not detailed.

Uchena J

> (e) The trial was lengthy and the record of proceedings was voluminous with a number of exhibits.
>
> We are thus unable to reconstruct the record of proceedings."

The declaration was signed by W Bhila, the trial magistrate, O Mabahwana, the trial prosecutor, and P Makombe, the defence counsel. The clerk of court and witnesses were not involved in arriving at the need to send the above quoted declaration to the reviewing judges.

Adam J i*S v S (a Juvenile)* supra 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 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 must be sent for review"* (emphasis added).

The procedure referred to by Adam J is not initiated by the officials who made the above mentioned declaration and reconstruction does not only depend on their inputs. The reviewing judge should be informed by the clerk of court about the result of the reconstruction, and not by the declarants. The clerk of court should have obtained affidavits from them, the witnesses and others present at the trial. Their inputs should not have been sent directly to the reviewing judge but to the clerk of court

who could, if the result of his consultation with all he had to consult was in agreement with the view of the declarants, have deposed an affidavit to that effect addressed to the Registrar for onward transmission to the reviewing judges. F

The declarants should have been guided by our order and our specifically referring them to the case of *S v S supra*. In view of their ignoring precedents and our order on how a proper reconstruction, whatever its result, should have been done, we suspect that their conduct was either presumptuous if they failed to appreciate our order and the precedent we referred them to, or at worst G protective of the convicted person. A judicial officer should communicate with the State and defence counsels through the clerk of court except if he is conducting a trial in open court. We are surprised that the trial magistrate avoided communicating with his fellow declarants through the clerk of court as we had ordered, choosing to communicate directly with them contrary to judicial ethics. Our order required the clerk of court to obtain from him H

A his views in affidavit form. He was not required to privately meet the State and defence counsel as he did. Our order specifically required the clerk of court to convene the meeting. We did not order them to meet on their own.

The trial magistrate's earlier communications indicated that the record of proceedings could be reconstructed. In his letter to the Acting Chief Magistrate, B dated 6 January 2012 he said:

> "I however, would like to suggest a reconstruction since this is possible."

We are surprised by his sudden change of view especially when he did so unprocedurally. In his letter to the Chief Magistrate dated 22 August 2012 the trial magistrate said:

> "I have to state that although I gave the deadline of 31 August 2012 as the final C day of the reconstruction of the record, we are finding it extremely difficult to recall exactly what the witnesses said. The possible result would be that the defence would most likely reject the reconstructed version.
>
> The situation is compounded by the fact that although the trial prosecutor Mr Mabhawana wrote hand written notes of the proceedings and these are not comprehensive and some of the notes are even missing from the docket. Further D Mr Mabhawana has since left the service and it is now difficult to get him to commit himself seriously to the task."

The magistrate seems to have already started his unprocedural communications with the State and defence counsel.

The initial view of the trial magistrate was consistent with the facts of this E case. The convicted person had signed for his client's passport from the clerk of court Mutare. He had promised to bring it back after satisfying procedural requirements at the Immigration offices. He did not bring it back. His client skipped bail and left the country. I find it difficult to accept that such a simple case cannot be reconstructed. The witnesses are court officials at Mutare magistrates court and officials from the Immigration F Department. The necessary evidence is on how the convicted person applied for the release of the passport, and signed for it, failed to return it and the absconding of his client. Most of this evidence should be in the court's records. The Immigration Department's crucial evidence is on whether there was anything the convicted person needed to sort out at their offices, using the convicted person's client's passport, whether he attended at their offices G for that purpose, whether the convicted person's client left the country using that passport. The simplicity of the evidence which should have been led at the trial whose record of proceedings has been lost, has a strong bearing on the case with which such proceedings can be reconstructed. The institutional nature of the source of such evidence defeats the declarants' declaration that H exhibits have been irretrievably lost. The above and the trial magistrate's use

---

of an incorrect procedure to reconstruct the record had convinced us that the A record could be reconstructed. I am still of that view, but am cognizant of the fact that the trial magistrate and his co-declarants have so compromised themselves that a reconstructed record in which they are participants can not be of any value at any legal proceedings. It is for these reasons that we reluctantly accept the declarants' erroneously arrived at declaration that the B record can no longer be reconstructed.

We have no option but to set aside the proceedings and leave the fate of the convicted person in the hands of the Attorney-General. We felt the urge to order a trial *de novo* but were restrained by precedents from the Supreme Court. We fear that a guilty man may unfairly escape the net of justice because of the mishandling of the record of proceedings by the trial magistrate. C

In *S v Manera* 1989 (3) ZLR 92 (S) at 94H-95B, Gubbay JA (as he then was), commenting on the possibility of a guilty man escaping the net of justice, when proceedings have to be set aside, because of a record being irretrievably, lost said:

> "In *S v Quali supra*, the question was debated whether the matter should be D remitted for hearing *de novo* before another magistrate. Mullins J (Kannemeyer JP *concurrente*) held that it ought not. He expressed the view at 584B-C that the proper course was simply to set aside the proceedings, leaving it open to the Attorney-General to decide whether to prosecute the accused afresh.
>
> That is the course I consider this court must adopt. *But I entertain an uneasy feeling that such an order may lead to a failure of justice in that a guilty person goes free*" (emphasis added). E

In spite of the above, we reluctantly set aside the convicted person's conviction and sentence.

HLATSHWAYO J concurred. F

© 2015 Juta and Company (Pty) Ltd.

Document 39 of 73

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2013/Volume 1/ZHUNG v MIAO 2013 (1) ZLR 283 (H)

ZHUNG v MIAO 2013 (1) ZLR 283 (H)

Citation	2013 (1) ZLR 283 (H)
Case No	Judgment No. HH-148-13
Court	High Court, Harare
Judge	Guvava J
Heard	4 April 2013
Judgment	4 April 2013
Counsel	*N Chikono* for the applicant
Case Type	Chamber application
Annotations	No case annotations to date

Flynote

C **Family law** – *husband and wife – divorce – jurisdiction – domicile – parties aliens resident in Zimbabwe and married in Zimbabwe – no evidence that husband domiciled in Zimbabwe – additional jurisdiction provided by s 3(1) of Matrimonial Causes Act [Chapter 5:13] – not applicable where husband is applicant or plaintiff –* D *provision only applies to wife – court may raise issue of domicile mero motu*

Headnote

The applicant and respondent were Chinese nationals resident in Zimbabwe since 2003. In late 2003 they married in Harare in terms of the Marriage Act [*Chapter 5:11*]. In 2010, the respondent deserted the marital home. E The applicant, not knowing where she was, sought an order for substituted service. When the court raised the issue of whether it had jurisdiction, the applicant did not aver that he was domiciled in Zimbabwe, but that the court had jurisdiction in terns of s 3(1)(b) of the Matrimonial Causes Act [*Chapter 5:13*], in that the marriage was celebrated in Zimbabwe F and the wife had resided in Zimbabwe for a period of at least 2 years immediately before the date of commencement of the action and was still so residing, notwithstanding that the husband had never been domiciled in Zimbabwe.

Held, that the court's jurisdiction in divorce matters is based upon the domicile of the husband at the time the action is instituted. This meant G that for the applicant to institute divorce proceedings in this court he must be domiciled in Zimbabwe. The issue of jurisdiction may be raised by the court *mero motu*, so that the court may satisfy itself that the basis of jurisdiction relied upon had been established.. Where a husband in divorce proceedings is not domiciled in Zimbabwe the court has H additional jurisdiction in terms of s 3 of the Matrimonial Causes Act,

but this provision covers instances where the applicant is the wife and A she wishes to sue her husband, who is not domiciled in Zimbabwe, for a divorce. The applicant *in casu*, being the husband, was not covered by the section. This is because the legislature was concerned about wives who would have been prejudiced because their husbands may no longer be domiciled in Zimbabwe. The mischief that the legislature sought to B deal with was clearly those circumstances where a wife wanted a divorce and the husband had changed his domicile or deserted her. The husband, on the other hand, is free to change his domicile should he so wish in order for the court to acquire jurisdiction. To acquire domicile of choice the applicant must establish that he is resident in the country concerned; that he has the intention of residing there permanently and that the choice C has been made freely. The applicant in this case had not relied on the basis of domicile as he had chosen not to change his domicile.

Cases cited

Boswinkel v Boswinkel 1995 (2) ZLR 58 (H)

Chikwenengere v Chikwenengere 2007 (1) ZLR 196 (S) D

de Jager v de Jager 1998 (2) ZLR 419 (H)

Kung v Kung 2008 (2) ZLR 170 (S)

Legislation considered

Matrimonial Causes Act [*Chapter 5:07*], s 3 E

Case information

N Chikono for the applicant

Judgment

Guvava J: The applicant filed an application seeking an order for substituted service in terms of Order 6 Rule 46. The facts of the matter are as set out in F the applicants founding affidavit and may be summarised as follows:

The applicant and the respondent are both Chinese nationals. They have been resident in Zimbabwe since 2003. On 23 December 2003 they married in terms of the Marriage Act [*Chapter 5:11*] in Harare. The marriage still subsists. Following irreconcilable differences the respondent deserted the G marital home in 2010. The applicant does not know where the respondent currently resides. He wishes to institute proceedings for a decree of divorce before the High Court in Zimbabwe. He has thus applied through the chamber book for an order for substituted service in the following terms:

"(a) An order for substituted service of summons for divorce be and is hereby granted. H

Guvava J

(b) Leave A be and hereby granted to the applicant to serve a copy of the summons for divorce in case no. HC 304/13 together with the notice of set down, through publication in the local newspaper circulating daily in Zimbabwe.

(c) Costs shall be in the cause."

Upon receipt of the application I raised a query with the applicants counsel as it did not appear to me that the court had jurisdiction to deal with the B matter. The applicant then filed a supplementary affidavit where he stated in para 6 as follows:

> "I am advised, which advice I accept, that this Honourable Court has power in terms of s 3(1)(b) to entertain my matter in that after the marriage my wife stayed more than two years before I instituted divorce proceedings and I believe she still resides here although she deserted me and failed to tell me where she C is staying now . . ."

The above quoted statement does not state which statute the applicant was relying upon. However, when I queried with the applicant's counsel, he stated that he was referring to the Matrimonial Causes Act [*Chapter 5:07*].

I dismissed the application as I was of the view that the High Court did not D have jurisdiction to determine the divorce. The applicant has sought my reasons for dismissing the application. These are they:

It is trite that the common law position in this country is that the court's jurisdiction in divorce matters is based upon the domicile of the husband at the time the action is instituted. See *de Jager v de Jager* 1998 (2) ZLR 419 E at 420 and *Kung v Kung* 2008 (2) ZLR 170 (S). This means that for the applicant to institute divorce proceedings in this court he must be domiciled in Zimbabwe.

It is also trite that the issue of jurisdiction may be raised by the court *mero motu.* In *Boswinkel v Boswinkel* 1995 (2) ZLR 58 (H) Chatikobo J dealt F with this very point and stated the following at p 60:

> "Indeed if it were to appear to the court either from pleadings or from the evidence led that the question of domicile was in doubt, then in such event the court itself would *mero motu* raise the question of domicile in order to satisfy itself that the basis of jurisdiction relied upon had been established. . ."

I am therefore satisfied that I could properly raise the matter *mero motu*.

G Where a husband in divorce proceedings is not domiciled in Zimbabwe, this court has additional jurisdiction in terms of the Matrimonial Causes Act [*Chapter 5:07*]. The relevant provision provides as follows:

> "3 Additional jurisdiction
>
> (1) Without prejudice to any other basis of jurisdiction which the High Court H has, the High Court shall have jurisdiction to entertain an action for divorce,

---

> judicial separation or nullity of marriage, where the wife is the plaintiff or A applicant –
>
> (a) if the wife has been deserted by her husband and, immediately before the desertion, the husband was domiciled in Zimbabwe, notwithstanding that the husband has changed his domicile since the desertion; or
>
> (b) if the marriage was celebrated in Zimbabwe and the wife has resided in Zimbabwe for a period of at least two years immediately before the date of B commencement of the action and is still so residing, notwithstanding that the husband has never been domiciled in Zimbabwe; or
>
> (c) if at the date of commencement of the action the wife is a citizen of Zimbabwe and, immediately before that date, she has been ordinarily resident in Zimbabwe for a period of not less than two years and is still so residing.
>
> (2) The High Court shall, in an action referred to in subsection (1), have C jurisdiction to entertain any counterclaim made by the husband which arises out of the marriage.
>
> (3) In any proceedings in which the High Court has jurisdiction by virtue of this section the issue shall be determined in accordance with the law which would be applicable thereto if both parties were domiciled in Zimbabwe at the time of the proceedings." D

The provision in my view is clear and unambiguous. The provision covers instances where the applicant is the wife and she wishes to sue her husband, who is not domiciled in Zimbabwe, for a divorce. It is clear to me that the applicant's counsel was wrong to rely on the above provision as

the applicant, being the husband, is not covered by section 3 of the Matrimonial Causes E Act. This is because the legislature was concerned about wives who would have been prejudiced because their husbands may no longer be domiciled in Zimbabwe. The mischief that the legislature sought to deal with was clearly in circumstances where a wife wanted a divorce and the husband had changed his domicile or deserted her.

The husband, on the other hand, is free to change his domicile should he F so wish in order for the court to acquire jurisdiction. In *Chikwenengere v Chikwenengere* 2007 (1) ZLR 196 (S), the court dealt at length with the issue of domicile. The court found that there were three varieties of domicile that is domicile of origin, domicile of dependence and domicile of choice. To acquire domicile of choice the applicant must establish that he is resident in G the country concerned; that he has the intention of residing there permanently and that the choice has been made freely. The applicant in this case has not relied on the basis of domicile as he has chosen not to change his domicile.

Having sought to bring the application on the basis of the additional jurisdiction as provided for by the Matrimonial Causes Act, I was of the firm view that the applicant was not covered by the Act. H

Guvava J

A It was on this basis that I dismissed the application with no order as to costs.

Ngarava, *Moyo & Chikono*, applicant's legal practitioners

© 2015 Juta and Company (Pty) Ltd.

Document 40 of 73

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2013/Volume 1/THE PRESIDENT v BHEBE & ORS AND RELATED CASES 2013 (1) ZLR 288 (H)

THE PRESIDENT v BHEBE & ORS AND RELATED CASES 2013 (1) ZLR 288 (H)

Citation	2013 (1) ZLR 288 (H)
Case No	Judgment No. HH-110-13
Court	High Court, Harare
Judge	Chiweshe JP
Heard	28 March 2013; 3 April 2013; 5 April 2013; *CAV*
Judgment	8 April 2013
Counsel	*P Machaya*, for the applicants in the first and second case *T Mpofu* & *T Zharara*, for the first to third respondents in the first case *T Shomwe*, for the respondent in the second case *C Mhike*, for the applicant in the third case
Case Type	Civil application
Annotations	No case annotations to date

Flynote

Court – *High Court – jurisdiction – management of execution of court orders – court entitled to manage orders so as to avoid absurd or irrational outcomes*

Elections – *by-elections – requirement to hold by-elections – general election imminent – holding of by-elections impractical – application to be* D *excused from holding by-elections granted*

Headnote

The three respondents in the first of these three related matters were elected as members of Parliament in 2008. In 2009 they fell out of favour with their party and were expelled. The party ensured that their membership E of Parliament was terminated, with effect from 22 July 2009. In August 2009 the Speaker of the House notified the President of the vacancies, as required of him in terms of s 39(1) of the Electoral Act [*Chapter 2:13*]. For over 18 months, the President did not take the necessary steps to fill the vacancies as required by law. The respondents then sought an order compelling the President to gazette a date for elections to fill the vacancies F in the three constituencies. An order was granted on 13 October 2011 directing the President to gazette a date for elections within 14 days. The President appealed against this order; in July 2012 the Supreme Court dismissed the appeal and ordered that by-elections be held no later than 30 August 2012. This date was extended by consent to 1 October G 2012. After a further application by the President to the High Court, the election date was extended to 31 March 2013. The reason given for the application – which was the same as that given previously – was lack of funds to conduct the by-elections. In the current proceedings, the President sought to be excused altogether from the performance of that order. H

A The reasons given for the application were that on 15 March a referendum had been held to adopt a new Constitution. A Constitutional Amendment Bill had since been gazetted, which would be debated in Parliament. Once the Bill was passed into law, the provisions of the new Constitution relating to elections would be brought into effect. The present Parliament would be dissolved automatically on 29 June, by which time harmonised B elections would have been held. It did not make economic or practical sense to conduct a parallel process leading to the holding of by-elections about the time it is anticipated to hold harmonised elections.

The respondents argued that relief sought was beyond the court's jurisdiction as the court has no power "to suborn, condone or in the very least C countenance" disobedience of its order. The court had become *functus officio*. Whereas in the past the applicant had sought extensions within which to abide by the order, what was presently sought was relief which the court could not entertain. They insisted that they had vested rights to participate in the by-elections, regardless of the fact that general elections may be imminent. Besides, they said, there was no guarantee D that general elections would be held by 29 June 2013 and the applicant had not told the court what would happen if general elections are not held by that date. The court order to hold by-elections must be obeyed.

Held, that there could be no doubt whatsoever that the life of the present Parliament would end on 29 June 2013. On that date Parliament would E stand dissolved by effluxion of time. Although it was permissible to extend the life of Parliament beyond that date on the grounds provided under s 63(5) and (6) of the Constitution (which allow for that extension only if the country is at war or under a declared state of public emergency), such a situation did not presently obtain in the country.

Held, further, that the various time lines of possible dates for the general F election showed that the respondents could, at most, hold their seats for 25 days at most. Another consideration was that these were not the only outstanding by-elections: there were 16 vacancies in the House of Assembly, 12 in the Senate and 164 in council wards.

Held, accordingly, that compliance with the existing order was no longer G reasonable or practical. The court had inherent jurisdiction to manage the execution of its own orders, ensuring whenever necessary that the execution of the same does not lead to absurd or irrational outcomes. The application would therefore be granted.

Editor's note: the two judgments of the High Court referred to above are H *Bhebhe & Ors v Chrmn, ZEC & Ors* 2011 (2) ZLR 274 (H); and *The*

President v Bhebhe & Ors HH-400-12. The general election was, in the A event, held on 31 July 2013.

Legislation considered

Constitution of Zimbabwe 1980, ss 63 & 66

Case information

P Machaya, for the applicants in the first and second case B

T Mpofu & T Zharara, for the first to third respondents in the first case

T Shomwe, for the respondent in the second case

C Mhike, for the applicant in the third case

Judgment

Chiweshe JP: I heard these three applications together. The first two C applications seek similar relief. The applicant in the third application seeks to be joined as fourth responded in the first application.

The respondent in the second application is not opposed to the relief sought and the application for joinder in the third application has since been withdrawn. This judgment therefore relates in the main to the issues raised D in the first application.

In that application the applicant sought, on an urgent basis, a provisional order in the following terms:

> "TERMS OF THE FINAL ORDER SOUGHT
>
> That the applicant be and is hereby excused from performance of the order E granted in case no. HC11222 of 2012.
>
> INTERIM RELIEF GRANTED
>
> That the applicant be and is hereby excused from performance of the order granted in case no. HC 11222 of 2012 provided that harmonised elections are held on or before 29 June 2013"

The respondents are opposed to the grant of this order. F

The background facts of this matter may be summarised as follows. 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 G subsequently expelled from the party and their membership of Parliament terminated at the behest of that party.

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. H

Chiweshe JP

A The respondents, under case no. HC 1485/10, then approached this court 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 B to gazette a date for elections within fourteen days of service of this order on him in the following House of Assembly constituencies, Nkayi South, Lupane East and Bulilima East.
>
> 2. There is no order as to costs."

The order was granted on 13 October 2011. The applicant, displeased with C that result, filed an appeal with the Supreme Court. After hearing argument from counsel, the Supreme Court, under Civil Appeal No. SC 267/2011, made the following order on 12 July 2012:

> "IT IS ORDERED THAT:

(1) The appeal is dismissed with costs.

(2) The D order of the lower court is altered to read as follows-

'(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.'

Under case no. HC 9781/12 the applicant sought and was granted, by consent E 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 1 October 2012.

2. There be no order as to costs.'"

This order is dated 30 August 2012.

F Under case no. HC 11222/12 the applicant sought and was granted another extension to 31 March 2013. In the present application the applicant seeks to be excused altogether from the performance of that order.

The founding affidavit is deposed to by P A Chinamasa, the Minister of Justice and Legal Affairs. It is to the following effect. The deponent is authorised by the applicant to swear to that affidavit. The applicant was G ordered by this honourable court to publish in the *Gazette* a notice ordering by-elections to fill three vacant House of Assembly seats in the Nkayi South, Lupane East and Bulilima East constituencies by 30 August 2012. This date was later extended to 31 March 2013. The applicant has to comply with the said order by that date. The applicant is unable to comply with the H order for the following reasons. In terms of the Global Political Agreement

---

Chiweshe JP

a referendum was held on 16 March 2013 to adopt a draft constitution. The A electorate voted to adopt that draft. A Constitutional Amendment Bill has since been gazetted. The bill will be debated in both Houses of Parliament. It is anticipated that the bill will take four days to complete its passage through Parliament. Thereafter the bill should be assented to by the President, who will enact it into law. In terms of para 3(1) of the Sixth Schedule to the draft B Constitution, provisions of the new Constitution relating to elections will be brought into effect. Thereafter amendments to the Electoral Act will be gazetted with a view to align the electoral laws with the new Constitution. It is expected that Parliament would take four days to debate and pass these amendments leading to assent by the President. Thereafter the electoral process will commence. It is anticipated that a proclamation for harmonised C elections will be published immediately after 8 May 2013. In terms of the Constitution the life of Parliament terminates on 29 June 2013, by which date harmonised elections must be held.

According to the applicant, it does not make economic or practical sense to conduct a parallel process leading to the holding of by-elections about the time it is expected to hold harmonised elections. Compliance with the D order to hold by-elections in the three constituencies is therefore no longer feasible as a general election is now imminent. It is for these reasons that the applicant seeks the court's indulgence to be excused from performance of the order requiring him to publish a proclamation for by-elections in the three constituencies by 31 March 2013. E

The opposing affidavit is deposed to by the first respondent, Abedinico Bhebhe. It raises a number of preliminary issues. It is averred that the application seeks relief that is beyond the court's jurisdiction as the court has no power "to suborn, condone or in the very least countenance" disobedience of its order. The respondents contend that the court has become *functus officio*. Whereas in the past the applicant has sought extensions within which to F abide by the order, what is presently sought is a different relief which the court cannot entertain.

The respondents further argue that the application lacks urgency and should on that basis be dismissed without further ado. The authority of P A Chinamasa to depose to the founding affidavit on behalf of the applicant is also queried. G It is alleged that the deponent to the founding affidavit is acting on a frolic of his own and for that reason the application must fall. The respondents also relate to what they call "speculation" in the founding affidavit with regards dates for general elections and the time lines necessary for the debate and adoption by Parliament of the draft

Constitution and proposed amendments to the electoral law. However, in view of the abandonment by the applicant H

2013 (1) ZLR p293

Chiweshe JP

A of that part of its prayer touching on the holding of general elections, these averments are no longer in issue.

The respondents also allege lack of probity on the part of the applicant stating that the applicant has all along lied to the court in seeking extensions under the pretext of lack of funding, when in fact it had contrived to bring the B present application at an opportune moment. That, avers the respondents, constitutes abuse of court process, and, for that reason the application should not be heard.

On the merits, the respondents insist that they have vested rights to participate in the by-elections, regardless of the fact that general elections may be C imminent. Besides, it is argued that there is no guarantee that general elections will be held by 29 June 2013 and in any event the applicant has not told the court what would happen if general elections are not held by that date. They insist that the court order to hold by-elections must be obeyed. It should not be sacrificed on the altar of economic or practical sense.

The applicant has filed a detailed answering affidavit. His averments may D be summarised as follows:

It is competent for the court to hear an applicant who seeks to have an order of court declared to be a *brutum fulmen.* In hearing such application the court cannot be said to be countenancing disobedience with its order. The court thus has jurisdiction to determine this application.

E The applicant wishes to be excused from compliance with the court order on the basis that Parliament will stand dissolved on 29 June 2013 and that harmonised general elections will constitutionally have to be held by that date.

The applicant also argues that the order to hold by-elections obliges the applicant to perform a duty. It does not, as contended by the respondents, F thereby create any vested rights in their favour. All that respondents have is an interest that the applicant will perform his duty so that by-elections can be held.

Further, the applicant takes exception to the averments by the respondents that he has "routinely lied" to this court in previous proceedings pertaining G to this matter and challenges the respondents to put up facts in support of that accusation. The applicant insists he has at all times acted in good faith in both the present and past applications.

The applicant reiterated his position that the present Parliament will stand dissolved on 29 June 2013 and harmonised elections, if not held by then, H will remain imminent.

2013 (1) ZLR p294

Chiweshe JP

He also argued that the matter under consideration is of national importance A and for that reason deserves urgent attention. The deponent scoffs at suggestions that he is on a frolic of his own acting without or outside the authority of the applicant.

The applicant also explains why he is unable to comply with the 31 March 2013 deadline as previously undertaken. He says he had previously envisaged B that the referendum on the draft constitution would have taken place by the first week of November 2012. That did not materialise for reasons beyond his control. It then became difficult to predict progress towards harmonised elections.

It became apparent that the parties were not agreed as to when the present C Parliament would stand dissolved. As I considered this point of crucial importance, I directed that we adjourn in order that the parties prepare and submit heads of argument on that point. At that stage Mr *Machaya* (for the applicant) had argued that parliament will stand dissolved at midnight 28 June 2013 whilst Mr *Mpofu* (for the respondents) was of the view that the term of Parliament would end on 29 October 2013. D

I heard their arguments the next day. Mr *Machaya*'s argument is in line with the provisions of s 66(4), which section reads as follows:

> "Parliament, unless sooner dissolved, shall last for five years, which period shall be deemed to commence on the day the person elected as president enters office in terms of section 28(5) after an election referred to in section 28(3)(a), and E shall then stand dissolved:
>
> Provided that, where the period referred to in this sub section is extended under subsection (5) or (6), Parliament, unless sooner dissolved, shall stand dissolved on the expiration of the extended period."

It is common cause that applicant was sworn in as President on 29 June 2009. The life of the present Parliament must be deemed to run from that F date, for a period of five years. Calculated from that date, there is no doubt whatsoever that the life of the present Parliament shall end on 29 June 2013. On that date, Parliament shall stand dissolved by effluxion of time. It is, however, permissible to extend the life of Parliament beyond that date on the grounds provided under s 63(5) and (6) of the Constitution. These sections G allow for that extension only if the country is at war or under a declared state of public emergency. No such situation presently obtains in the country. I have no reason to believe otherwise today or any time in the near future. I am convinced, therefore, that the life of the present Parliament will end by operation of law on 29 June 2013. In other words, the Parliament, to which the respondents aspire to be elected, shall cease to exist on that date. H

Chiweshe JP

A Mr *Mpofu* for the respondents could hardly argue against this interpretation of provisions so clear and unambiguous. Instead he sought, without much success, to emphasise the possibility of an extension of the five year period due to the calamities referred to under section 63(5) and (6). His thrust in that regard is understandable, given the intimation I had made to the parties, namely, that if Parliament stands dissolved on 29 June 2013, it may not be B prudent to conduct by-elections immediately before that date and that if, on the other end, dissolution occurs on 29 October 2013 (as argued by the respondents), then it may be reasonable to assume that by-election may be held in accordance with the order of this court given under case no. HC 11222/12.

It is illustrative to demonstrate by way of time lines what would obtain if C one were to find in favour of the respondents and direct that by-elections be conducted forthwith. Mr *Machaya* has indicated that the general time line from the date of proclamation would be a maximum of 71 days in terms of s 38(b)(i) and (ii) of the Electoral Act [*Chapter 2:13*].

That assertion has not been challenged by the respondents, save to state that in terms of the Electoral Law, by-elections may be held not less than D 21 days before dissolution of Parliament. That provision is permissive and not mandatory. Using the maximum 71 day period Mr *Machaya* was able to show that, assuming the relevant proclamation is published on 5 April 2013, the by-elections would be held on Saturday 15 June 2013 and the winners would be sworn in on Monday 17 June 2013. The winners would then sit E in the House of Assembly only up to 29 June 2013, a period of 12 days!

One may also consider the following scenario. If the proclamation were to be published on 31 March 2013, in terms of s 38(1)(b)(i) of the Electoral Act, a nomination court must be held not less than 14 days after that publication and not more than 21 days after publication. This means that the nomination F court would sit between 15 and 19 April 2013.

In terms of s 38(1)(b)(ii) of the Electoral Act, polling must be held not less than 28 days and not more than 50 days after nomination day. This means, therefore, that by-elections would be held on 13 May at the earliest or 4 June 2013 at the latest. If held on 13 May 2013, the winners of that by-election would enjoy their newly found status. If held on 4 June 2013, that period is G reduced to a mere 25 days.

These time lines, whose accuracy is subject to scrutiny, clearly demonstrate that there is merit in the applicant's submissions that it no longer makes practical economic sense to insist that these by-elections be held at all costs.

The court is informed that, apart from the three House of Assembly H constituencies under consideration, there are further vacancies in other

---

Chiweshe JP

constituencies, namely 16 in the House of Assembly, 12 in the Senate and A 164 council wards. Should this application fail the country would need to hold by-elections to fill these vacancies. Again, the winners would be in their seats for a very short period of time. The scale and extent of these by-elections suggests that enormous resources would need to be mobilised. Mr *Mpofu* argues that by- elections will be held under consideration and B no other. The truth of the matter, however, is that, if not granted the relief he seeks, the applicant will be obliged to hold by-elections in all vacant constituencies and wards.

In the final analysis, I agree with the applicant that compliance with the existing order is no longer reasonable or practical. Mr *Mpofu* argues that this court, being a court of law, has no jurisdiction to grant relief based on C equity and other practical considerations. I disagree. This is as much a court of law as it is a court of justice and equity. In any event, it is trite that this court has inherent jurisdiction to manage the execution of its own orders, ensuring whenever necessary that the execution of the same does not lead to absurd or irrational outcomes. D

The respondents raised a number of preliminary points to do with urgency, jurisdiction and others. I dealt with similar or the same preliminary matters in previous rulings in this matter. These preliminary objections stand dismissed.

It was for these reasons that I found for the applicant. The respondent in the second application did not oppose the application. For that reason I also found in favour of the applicant. E

Accordingly I ordered as follows:

1. That the applicant be and is hereby excused from performance of the F order of this honourable court granted on 2 October 2012 under case no. HC 11222/12.
2. That the applicant be and is hereby excused from performance of the order of this honourable court granted on 16 October 2012 under case no. HC 11962/12.

Civil Division of the Attorney-General's office, applicant's legal practitioners in the first and second case G

Zimbabwe Lawyers for Human Rights, respondents' legal practitioners in the first case

Mambosasa Legal Practitioners, respondent's legal practitioners in the second case

Atherstone & Cook, applicant's legal practitioners in the third case H

© 2015 Juta and Company (Pty) Ltd.

Document 41 of 73

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2013/Volume 1/S v MPOFU 2013 (1) ZLR 297 (H)

S v MPOFU 2013 (1) ZLR 297 (H)

Citation	2013 (1) ZLR 297 (H)
Case No	Judgment No: HH-95-13
Court	High Court, Harare
Judge	Hungwe J
Heard	10 April 2013
Judgment	10 April 2013

Counsel Details not supplied

Case Type Criminal review

Annotations No case annotations to date

Flynote

Legal practitioner – *conduct and ethics – prosecutor – duty to act impartially and fairly – prosecutor related to accused or complainant – duty to disclose such relationship at outset – need for court then to ascertain attitude of parties to prosecutor's participation in trial*

Headnote

D The magistrate presiding over the trial sent the record to the judge and said that it had come to his notice, before the trial was completed, that the prosecutor was related to both the complainant and the accused, who are brothers. He proposed that the uncompleted criminal proceedings be quashed and a trial before a different magistrate be ordered.

E *Held,* that a prosecutor must dedicate himself to the achievement of justice. He must pursue that aim impartially. He must conduct the case against the accused with due regard to the traditional precepts of candour and fairness. Like Caesar's wife, the prosecutor must be above any trace of suspicion. As a minister of truth he has the special duty to see that the F truth emerges in court.

Held, further, that where a prosecutor is related to any of the parties in a case, he should acknowledge the relationship at the commencement of the proceedings. The court can then elicit the attitude of the parties on whether they have any objections to the prosecutor's involvement. If the relationship is not declared, it would be very difficult, if not impossible, G for the prosecutor to be impartial and fair, as is expected of him.

Cases cited

R v Banks [1916] 2 KB 621

H *Smyth v Ushewokunze & Anor* 1997 (2) ZLR 544 (S)

Hungwe J

Judgment

Hungwe J: The record of uncompleted criminal proceedings in *S v Fannuel* A *Mpofu* CRB 19/07 was placed before me with the following comments from the presiding trial magistrate:

> "THE STATE v MPOFU: ATTEMPTED MURDER
>
> It has come to my notice that the trial prosecutor is closely related to both the complainant and the accused. The complainant and the accused are brothers B in that their respective fathers are also brothers. It has emerged that the trial prosecutor's late sister was married to another brother of the complainant and the accused's father. That relationship was brought to the attention of the court by the accused in a complaint he lodged against the trial prosecutor.
>
> The gist of the accused's complaint is that the trial prosecutor is partisan to the complainant. According to his complaint, the trial prosecutor who dealt C with the case even in the pre-trial stages, had discussed the matter with the complainant after which he (the trial prosecutor) had instructed the police to record statements from persons who did not witness the alleged assault on the complainant. According to the accused those witnesses are closely related to the complainant and were coached on what to say by the trial prosecutor before they were approached by the police. These are the witnesses who testified on behalf of the State. In cross-examining them, the accused's stance was that they D were not present when he fought with the complainant and that, contrary to their testimonies, he acted in self-defence after being assaulted by the complainant.
>
> In the circumstances, it is the accused's view that his right to a fair trial was violated. He explained that, as a lay person and a stranger to the courts, he found it difficult to raise the complaint at the commencement

of the trial because the persons he had a complaint against was the trial prosecutor and his uncle as well. E

My investigation has revealed that indeed the trial prosecutor is related to the parties as alleged by the accused. But was there a reasonable apprehension that the accused's fair trial rights may have been violated? As was stated in *Smyth v Ushewokunze & Anor* 1997 (2) ZLR 544 (S) at 549:

> 'A prosecutor must dedicate himself to the achievement of justice: see *R v Banks* (1916) 2 KB 621 at 623. He must pursue that aim impartially. He F must conduct the case against the accused with due regard to the traditional precepts of candour and fairness. *Like Ceasar's wife, the prosecutor must be above any trace of suspicion. As a minister of truth he has the special duty to see that the truth emerges in court* . . ." (my emphasis).

The trial prosecutor chose not to inform the court at the commencement of the proceedings that he is closely related to the complainant and the accused. It G was only after the issue had been raised by the accused, albeit at an advanced stage of the proceedings, that he acknowledged the relationship. In my view, that relationship placed the prosecutor in a position whereby he could easily favour either party as being alleged by the accused. It is also reasonable, under the circumstances, for the accused to be under the apprehension that the trial prosecutor handled the matter so as to secure a favourable outcome for the complainant with whom he relates better. In my view, the trial prosecutor's H

Hungwe J

A handling of this case before trial and during trial was ill-advised under the circumstances. It would have helped had he brought it to the court's attention before the trial commenced that he is closely related to the parties. Then the court would have elicited the attitude of the parties on whether they had any objections to his involvement. Given the undeclared relationship, it was very difficult, if not impossible, for the prosecutor to be impartial and fair as expected of him.

In the premises, it is my considered view that these uncompleted criminal B proceedings should be quashed and an order for trial *de novo* be made."

The magistrate is correct. The appropriate course of action is to quash the proceedings and order a trial *de novo* before a different magistrate.

C It is so ordered.

© 2015 Juta and Company (Pty) Ltd.

Document 42 of 73

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2013/Volume 1/EFROLOU (PVT) LTD v MURINGANI (1) 2013 (1) ZLR 300 (H)

EFROLOU (PVT) LTD v MURINGANI (1) 2013 (1) ZLR 300 (H)

Citation	2013 (1) ZLR 300 (H)
Case No	HH-112-13
Court	High Court, Harare
Judge	Mafusire J
Heard	10 April 2013
Judgment	10 April 2013
Counsel	Mrs *S Matshiya*, for the plaintiff *G C Manyurureni*, for the defendant
Case Type	Interlocutory application

Annotations No case annotations to date

Flynote

Land – *ownership – registration of ownership – effect – registration constituting constructive notice to the whole world of change of ownership – rights of transferee to enforce rights as owner of property*

Practice and procedure – *pleadings – amendment – when pleadings may be amended – principles – approach followed by courts*

Prescription – *extinctive – "debt" – what is – includes claim for reversal of* D *transfer after registration effected in Deeds Office*

Headnote

The plaintiff company brought an action for the eviction of the defendant from a house which it had bought from the defendant's late husband in 1996, following a sale in execution. The house had been transferred to E the plaintiff and the transfer registered in the Deeds Office. Summons was issued in March 2010. Before entering a plea, the defendant brought an action against the plaintiff, among others, to set aside the sale in execution on the basis that the transfer was unlawful, that the deceased had not been aware of the sale, and that the sale had been effected in F circumstances amounting to fraud. In its plea to this counter-claim, entered in May 2010, the plaintiff repeated its assertion that the sale had duly taken place and that the deceased was aware of the sale.

A pre-trial conference took place in February 2011, and in November 2012 the plaintiff filed a document to amend its plea to include the plea of prescription. It alleged that the defendant's claim had become prescribed, G the sale in execution having taken place in 1996 and transfer effected as far back as 1999.

When the consolidated matters came for trial, the defendant's counsel accepted that a party can amend its pleadings at any time before judgment if this does not cause prejudice to the other party. However, he submitted that neither the defendant nor the deceased had been aware of the sale of H

A the property; that the sale had been "fictitious", the transfer documents "fictitious" and the resultant transfer fraudulent. If the defendant's summons for the reversal of the transfer had been served on the plaintiff within the three years of her becoming aware of the transfer then the running of prescription would have been interrupted.

B *Held*, that the general rule is that an amendment of a pleading in an action will always be allowed unless the application is *mala fide* or the amendment would cause an injustice or prejudice to the other side which cannot be compensated by an order of costs. The court has a wide discretion to grant or refuse an amendment. The discretion has to be exercised judiciously. The approach of our courts is to allow amendments quite liberally, C although this liberal approach is affected where, among other things, there is no prospect of the point raised in the amendment succeeding. Here, the point raised in the notice of amendment was not *mala fide*. If it succeeded, it would virtually decide the case, for if the defendant's claim was prescribed, then she could not persist with seeking a reversal of the transfer.

D *Held*, further, that the fact that the special plea of prescription was not raised when the plaintiff first pleaded to the counter-claim did not mean that it could not be raised at this stage.

Held, further, that in terms of s 15 of the Prescription Act [*Chapter 8:11*], a debt generally (other than specific debts listed in the section) becomes prescribed after the lapse of a period of three years. The term "debt" is E defined in s 2 to include anything which may be sued for or claimed by reason of an obligation arising from statute, contract, delict or otherwise. In this case the defendant's claim for a reversal of the transfer that was registered in 1999 was plainly a debt, to which the applicable period of prescription was three years.

F *Held*, further, that the defendant became aware of the transfer of the property from the deceased's name to the plaintiff's in 1999, when the transfer was registered. Apart from the fact that the property was sold by public auction following a court judgment, in terms of which, among other things, the sale in execution would have been advertised to the public, the transfer was registered by the registrar of deeds, a public official, G through the deeds office, a public office. Registration of title in the deeds office is a transfer of real rights in a property from one person to another. The transferee becomes the owner of those rights in the property and can now enforce his rights against the whole world. The registration of transfer is constructive notice to the whole world of the H change of ownership, provided only that the transfer has been obtained

in good faith. Conversely, every member of the public is – subject to A certain exceptions – entitled to rely on the deeds register being correct.

Held, further, that the fact that the defendant did not sue in her individual capacity, but as the executrix of her husband's estate meant that it did not really matter when she herself became aware of the change of title. It was the knowledge of the deceased that mattered. On the facts, he had such B knowledge, as he did not challenge the sale in execution, only the price.

Held, further, that the plea of prescription would therefore succeed.

Cases cited

Commercial Union Assurance Co Ltd v Waymark NO 1995 (2) SA 73 (Tk) C

Frye's (Pty) Ltd v Ries 1957 (3) SA 575 (A)

UDC Ltd v Shamva Flora (Pvt) Ltd 2000 (2) ZLR 210 (H)

Legislation considered

Deeds Registries Act [*Chapter 20:05*], s 14

High Court Rules 1971 (RGN 1047 of 1971), rr 4C(a), 119, 132 and 137 D

Prescription Act [*Chapter 8:11*], ss 2, 15, 16(3) and 19

Case information

Mrs *S Matshiya*, for the plaintiff

G C Manyurureni, for the defendant

Judgment

Mafusire J: This is the judgment in the interlocutory application by Efrolou E (Pvt) Ltd, plaintiff in the case under reference number HC 1816/10, and first defendant in the case under reference number HC 3285/10 (hereafter referred to as "Efrolou"). Efrolou's interlocutory application aforesaid sought an order granting an amendment to its plea in the claim by one Mrs Muringani under HC3285/10. The amendment sought to incorporate the special plea F of prescription.

The facts of the matter are that on 24 March 2010 Efrolou issued a summons under HC 1816/10 against Mrs Muringani for her eviction from premises known as Lot 4 of Lot 9 of Chicago situate in the district of Que Que ("the property"). The basis of the claim by Efrolou against Mrs Muringani, as G pleaded in its declaration, was that Efrolou was the owner of the property which it had bought at an auction sale in 1996 following a judgment against Mrs Muringani's late husband; that Efrolou had obtained title to the property on 14 May 1999 under deed of transfer number 2421/99 and that despite Efrolou's notice to her on 31 March 2010 Mrs Muringani had refused or neglected to vacate the property. H

Mafusire J

A Mrs Muringani defended the claim. From her plea the defence was that Efrolou was not the lawful owner of the property; that Efrolou had obtained the title to the property fraudulently; that as the lawful beneficiary to the estate of the late Mr Muringani she had the right, title and interest in the property; that she had issued a summons against Efrolou and its directors to have the property

transferred back to her late husband's estate and that she B was entitled to occupation of the property until the dispute was resolved.

Mrs Muringani's plea in HC 1816/10 was filed on 18 May 2010. The day before, i.e. on 17 May 2010, Mrs Muringani had issued a summons under the name Emily Ntombizodwa Luwaca in HC3285/10 jointly against Efrolou, the Registrar of Deeds, Bulawayo, and the messenger of court, Kwekwe. C In her summons and declaration in HC 3285/10 aforesaid Mrs Muringani sought an order setting aside the transfer of the property to Efrolou from her late husband, one Anthony Anesu Muringani (hereafter referred to as "the deceased"). She also sought an order directing the messenger of court, Kwe Kwe, to sign all the necessary transfer papers. In her declaration Mrs Muringani alleged that the property had been illegally transferred by the D messenger of court to Efrolou; that the deceased had not been aware of the purported sale and transfer; that the transfer bordered on fraud and that the messenger of court was not supposed to have made the transfer.

Efrolou opposed Mrs Muringani's claim. In its plea filed on 15 June 2010 Efrolou essentially repeated the allegations in its declaration under HC 1816/10 E that it had bought the property from an auction sale and had subsequently obtained title on 14 May 1999. It further alleged that there had been nothing illegal or improper about the sale; that the deceased must have known about the sale in execution and the subsequent transfer and that Mrs Muringani had not laid out any basis upon which the transfer of the property should be set aside.

F The parties had subsequently filed further pleadings in the two matters. On 1 February 2011 the two matters had been consolidated at a pre-trial conference and had been referred to trial on three issues, namely:

(1) whether the purchase [of the property] by, and the subsequent transfer to Efrolou was tainted by fraud,

(2) whether G the transfer should be set aside,

(3) whether Efrolou was entitled to eviction,

On 26 November 2012 Efrolou filed a document entitled Notice of Amendment in terms of r 132 of the High Court Rules. This was to amend its plea to include the plea of prescription. In essence, it was alleged that Mrs Muringani's H claim had become prescribed; that the sale in execution had taken place in

---

1996; that transfer had been effected as far back as 1999; that it had been A more than three years since that transfer and that in terms of the Prescription Act [*Chapter 8:11*] the claim had become prescribed.

The matter, as consolidated, came up for trial before me on 18 March 2013. Mrs Muringani was no longer represented. The two records were not in order. I adjourned the matter to 8 April 2013 to enable Efrolou to sort out the record B and to allow Mrs Muringani to respond to the notice of amendment. When the trial resumed on 8 April 2013 Mrs Muringani was now represented. I heard argument on the propriety of Efrolou's notice of amendment and the merits of the new defence of prescription.

Very briefly, Mrs *Matshiya*, for Efrolou, submitted that a party to the C proceedings may amend its pleadings at any time before judgment if the amendment does not cause prejudice to the other party; that Efrolou was entitled to amend its plea as there would be no prejudice to Mrs Muringani; that the registration of transfer of the property by the Registrar of Deeds on 14 May 1999 was constructive notice to the whole world, including the deceased and Mrs Muringani, that title in the property had duly passed to D Efrolou and that it was now too late for Mrs Muringani to try and have the transfer reversed.

Mr *Manyurureni* accepted that a party can amend its pleadings at any time before judgment if this does not cause prejudice to the other party. However, he submitted that according to Mrs Muringani, neither she nor the deceased E had been aware of the sale of the property; that the sale had been "fictitious", the transfer documents "fictitious" and the resultant transfer fraudulent. Mr *Manyurureni* further submitted that Mrs Muringani was challenging the authenticity of the court judgment that preceded the sale in execution, the authenticity of the transfer documents signed by the messenger of court and the authenticity of the distribution schedule that the messenger of court had F prepared

showing, among other things, that after payment to his creditors the deceased had been paid the balance of the purchase price, amounting to $137 327.28.

In terms of Order 20 r 132 the court or a judge may at any stage of the proceedings allow a party to alter or amend its pleadings. The alteration should G be on such terms as may be just and for the purpose of determining the real question in controversy between the parties. The rule is worded as follows:

> "132. Court may allow amendment of pleading
>
> Subject to rules 134 and 151, failing consent by all parties, the court or a judge may, at any stage of the proceedings, allow either party to alter or amend his pleadings, in such manner and on such terms as may be just, and all such H

Mafusire J

> A amendments shall be made as may be necessary for the purpose of determining the real question in controversy between the parties."

The general rule is that an amendment of a pleading in an action will always be allowed unless the application is *mala fide* or the amendment would cause an injustice or prejudice to the other side which cannot be compensated by an order of costs. See *Commercial Union Assurance Co Ltd v Waymark NO* 1995 (2) SA 73 (Tk); B *UDC Ltd v Shamva Flora (Pvt) Ltd* 2000 (2) ZLR 210 (H).

The court has a wide discretion to grant or refuse an amendment. The discretion has to be exercised judiciously. In *UDC Ltd v Shamva Flora (Pvt) Ltd* Chinhengo J, whilst pointing out that the approach of our courts is to allow amendments quite liberally, went on to add that this liberal approach is C affected where, among other things, there is no prospect of the point raised in the amendment succeeding. In the present case the point raised in the notice of amendment is not *mala fide*. If it succeeds it will virtually decide the case in HC 3285/10. If Mrs Muringani's claim is prescribed, then she cannot persist with seeking a reversal of the transfer. I do not see any prejudice as would be caused by allowing the amendment as such. Mr *Manyurureni* has D not pointed out any. The fact that if the point of the amendment succeeds it will put paid to Mrs Muringani's claim is not such prejudice as will stem from the amendment itself.

The defence of prescription was available when Efrolou filed its main plea on 15 June 2010. No meaningful explanation has been given why it was E not pleaded at that time. In terms of r 119 the defendant is required to file his plea, exception or special plea within ten days of the service of the plaintiff's declaration. Mrs Muringani's summons and declaration having been served on 19 May 2010, and the special plea of prescription having been filed on 26 November 2012, it means there has been a delay of over 30 months. However, it cannot be the position that because the special plea F was not raised then it cannot be raised now. It has not been suggested that Efrolou waived its right to raise it or that it is now barred from doing so. At any rate in terms of r 4C(a) a court or judge may condone a departure from any provision of the Rules where this is required in the interest of justice. I will allow the amendment.

G As pointed out already, I heard argument on the merits of the special plea. In terms of s 15 of the Prescription Act [*Chapter 8:11*], a debt other than one secured by a mortgage bond, or a judgment debt, or a tax debt under an enactment or one owed to the State in the circumstances prescribed by that section, or a debt arising from a bill of exchange, becomes prescribed after the lapse of a period of three years. In terms of s16 of the Prescription Act, H prescription begins to run as soon as the debt is due.

Mafusire J

The term "debt" is defined in s 2 to include anything which may be sued for A or claimed by reason of an obligation arising from statute, contract, delict or otherwise. In this case, Mrs Muringani's claim for a reversal of the transfer that was registered on 14 May 1999 is plainly a "debt". It is "any other debt". Therefore the applicable period of prescription is three years.

Mr *Manyurureni* submitted that Mrs Muringani's claim has not prescribed B because she became aware of the judgment against the deceased, of the sale in execution and of the subsequent transfer only in 2008 when Efrolou initiated moves to evict her from the property. He further submitted that

Mrs Muringani having issued her summons in 2010, the period of prescription had not been completed.

In terms of s19 of the Prescription Act, the running of prescription is interrupted C by the service on the debtor of any process by the creditor claiming the debt. Thus, if Mrs Muringani's summons for the reversal of the transfer had been served on Efrolou within three years of her becoming aware of the transfer then the running of prescription would have been interrupted. Section 16(3) of the Prescription Act provides that a debt shall not be deemed to be due D until the creditor becomes aware of the identity of the debtor and of the facts from which the debt arises.

In my view, Mrs Muringani became aware of the transfer of the property from the deceased's name to Efrolou in 1999 when transfer was registered. Apart from the fact that Efrolou maintains that the property was sold by public auction following a court judgment, in terms of which, among other E things, the sale in execution would have been advertised to the public, the transfer was registered by the registrar of deeds, a public official, through the deeds office, a public office.

Section 14 of the Deeds Registries Act [*Chapter 20:05*] provides that the ownership of land may be conveyed from one person to another only by F means of a deed of transfer executed or attested by the registrar. Registration of title in the deeds office is a transfer of real rights in a property from one person to another. The transferee becomes the owner of those rights in the property. He or she can now enforce his or her rights against the whole world. The registration of transfer is constructive notice to the whole world of the change of ownership. H Silberberg *The Law of Property* (Butterworths, G 1975) at p 67 says:

> "The registration of a real right protects its holder and the public alike. As far as the former is concerned, he is entitled to rely on the doctrine of constructive notice which means that every person is deemed to have knowledge of the existence of a duly registered real right. In other words, once a real right has been registered it becomes enforceable against the world at large, provided only H

> A that it has been obtained in good faith. Conversely, every member of the public is – subject to certain exceptions – entitled to rely on the deeds register being correct"

At pp 67-68 the learned author criticises Hoexter JA for seemingly contradicting himself on the point in his judgment in *Frye's (Pty) Ltd v Ries* 1957 (3) SA 575 (A). In that judgment the learned judge of appeal seemed B to accept in one instance that the registration of title in the deeds office is intended to protect the real rights of those persons in whose names such rights are registered and that such are maintainable against the whole world. However, in another instance the judge dismissed the defendant's reliance on the doctrine of constructive notice, holding that ". . . that does not mean that C every person in the world must be deemed to know the ownership of every real right registered at the Deeds Office." Silberberg respectfully submits that this is exactly what the doctrine of constructive notice does mean. I agree.

There is also another basis for upholding the special plea of prescription. In her claim for a reversal of the transfer in HC 3285/10 Mrs Muringani does not sue in her individual capacity. She sues in her capacity as the "Executrix D Dative in the Estate of the late Anthony Anesu Muringani". Therefore, it does not really matter when she herself became aware of the change of title. It is the knowledge of the deceased that matters. Apart from the doctrine of constructive notice, I am satisfied that the deceased was actually aware, or ought to have been actually aware of the transfer. That aspect was ventilated E during argument. Among other things, there was a judgment against him which appears not to have ever been challenged. That judgment had been followed by an auction of the property. The only challenge that was mounted by the deceased seems to have been in relation to the auction price. The deceased seems to have succeeded in that challenge because the magistrate had subsequently directed a sale by private treaty for a higher amount. That F had been done. The revised purchase price had subsequently been paid and distributed amongst the deceased's creditors. The balance amounting to 82 per cent had been remitted to the deceased. The bid price at the auction had been $120 000. The sale by private treaty had been in the sum of $160 000. The messenger of court's schedule of distribution to the creditors had been on 18 September 1997. As pointed out already, the transfer was on 14 May 1999.

G The above facts are virtually common cause. Just before the commencement of the trial, that is to say, on 12 March 2013, Mrs Muringani filed a supplementary synopsis of evidence. In it she stated that she had had sight of the documents relating to the sale of the property. She went on to narrate

the sequence of events in some detail. She covered the above points. Mrs H Muringani's approach was to doubt the series of events and the transactions

Mafusire J

starting with the court judgment right up to the transfer. She denied that the A deceased had received the balance of the purchase price. She alleged that the transfer was "tainted with fraud".

I am mindful of the fact that the aspect of fraud is one of the issues for trial. I did not canvass it in any greater detail during the interlocutory application. However, I am satisfied that, even *ex facie* the documents in these two B consolidated matters, Mrs Muringani's claim has become prescribed. To accept her argument to the contrary I would need to ignore the judgment that was never rescinded; I would need to believe that the sale in execution never happened; I would need to ignore the subsequent sale by private treaty; I would need to ignore the fact that that sale had subsequently been confirmed and I would need to believe that Efrolou had never paid the full purchase C price, despite the documents to the contrary. That would be stretching it too far. Even from her own documents it appears that the transfer documents were signed by the messenger of court who went on to prepare a schedule of distribution from which the deceased received 82% of the sale proceeds. However, in argument it was submitted that the transfer was fraudulent.

Prescription goes to the root of a claim or defence. In terms of r 137 it is a D special plea in bar. It is taken where the matter is one of substance which would not involve delving into the merits of the case. If a special plea is allowed it disposes of the case.

I will allow the plea of prescription on the merits. In the premises Mrs Muringani's claim in HC 3285/10 is hereby dismissed. However, her claim E having been consolidated with HC 1816/10 the costs in respect of the issue of prescription in HC 3285/10 shall be costs in the cause in HC 1816/10.

Mtetwa & Nyambirai, plaintiff's legal practitioners [first defendant's legal practitioners in HC 3285/10] F

Manyurureni & Co, defendant's legal practitioners [plaintiff's legal practitioners in HC 1816/10]

© 2015 Juta and Company (Pty) Ltd.

Document 43 of 73

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2013/Volume 1/EFROLOU (PVT) LTD v MURINGANI (2) 2013 (1) ZLR 309 (H)

EFROLOU (PVT) LTD v MURINGANI (2) 2013 (1) ZLR 309 (H)

Citation	2013 (1) ZLR 309 (H)
Case No	Judgment No. HH-122-13
Court	High Court, Harare
Judge	Mafusire J
Heard	18 March 2013; 8 April 2013; 9 April 2013; 10 April 2013; *CAV*
Judgment	24 April 2013
Counsel	Mrs *M Matshiya*, for the plaintiff *G C Manyurureni*, for the defendant
Case Type	Civil trial

Annotations No case annotations to date

Flynote

Practice and procedure – *absolution from the instance – principles – application at close of plaintiff's case – onus – application made after close of defence case – lesser onus on applicant – when application might be granted even if defence leads no evidence*

D **Practice and procedure** – *burden of proof – duty of plaintiff to adduce his evidence first save where obligation to begin lies on defendant*

Headnote

The plaintiff sued the defendant for eviction from a property which the plaintiff had bought from the defendant's late husband in a sale in execution. Her E defence was that the plaintiff was not the lawful owner of the property; that the plaintiff had obtained the title to the property fraudulently; that as the lawful beneficiary to the estate of her late husband she had the right, title and interest in the property; that she had issued her own summons against the plaintiff and its directors to have the property transferred F back to her late husband's estate and that she was entitled to occupation of the property until the dispute was resolved.

It was agreed at the pre-trial conference that the duty to begin at the trial was on the defendant, whose evidence was duly led. At the close of the defendant's evidence, the plaintiff applied for absolution on the grounds that there was not a shred of evidence relating to any fraudulent dealings G or illegal conduct by anyone associated with the sale and transfer of the property to the plaintiff. The sale and transfer had been open, public and plainly above board. It was argued that, if the plaintiff was absolved from the instance, there would be no longer any issue for determination in the plaintiff's case because the plaintiff's case for eviction was predicted on H the fact of its ownership of the property and that the only issue standing

in the way was the defendant's defence of fraud, a defence which had A no substance.

Held, that in terms of r 437(1) of the High Court Rules 1971 (RGN 1047 of 1971), if the burden of proof is on the plaintiff, he shall adduce his evidence first and if absolution from the instance is not decreed the defendant will then adduce his evidence. However, r 441 provides that B when the right or obligation to begin lies on the defendant, the order of procedure should read as if the defendant was the plaintiff and the plaintiff was the defendant. In such a case, a plaintiff may properly apply for absolution at the close of the defendant's case since the duty or obligation to begin had lain on the defendant.

Held, further, that where absolution from the instance is refused at the C close of the plaintiff's case, the defendant can go to his own case and can simply close it and still apply for absolution from the instance on the same evidence. But the considerations at that stage are different. At the close of the case for the plaintiff, the question which arises for the consideration of the court is whether there is evidence upon which a D reasonable man might find for the plaintiff. In other words, was there such evidence before the court upon which a reasonable man *might*, not *should*, give judgment against the defendant? The test for absolution where the defendant closes his case without calling any evidence is whether there is such evidence upon which the court *ought to* give judgment in favour of the defendant. E

Held, further, that a trial court should be very wary of granting absolution from the instance at the close of a plaintiff's case as the practice is that judges are very loath to decide upon questions of fact without hearing all the evidence. A defendant who might be afraid to enter the witness stand should not be permitted to shelter behind the procedure of absolution from the instance. For a defendant to do so is to take a calculated risk F because the onus is higher where the application is made at the close of the plaintiff's case than when it is made after all the evidence had been led.

Held, further, that in the present case, the risk that the plaintiff took in applying for absolution from the instance at the close of the defendant's case and without closing its own case was well taken. Even if the court were to G apply the more stringent test of what "*ought*" a reasonable court do as

opposed to what *"might"* a reasonable court do, and even bearing in mind that the practice in our courts is to lean more in favour of hearing all the evidence before deciding on questions of fact, the plaintiff was entitled to be absolved from the instance. This was because the plaintiff's cause of action against the defendant was predicated purely on its ownership H

A of the property. An owner of a property is entitled to the full enjoyment of the property unless by agreement or operation of the law there has been a diminution of that right. The registration of a real right in the deeds office protects the holder and the public alike. Once a real right has been registered it becomes enforceable against the world at large. Accordingly, unless there was established a superior right to deprive it B of its right to the full enjoyment of the property, the plaintiff was entitled to recover possession of the property.

Cases cited

Bailey NO v Trinity Engineering (Pvt) Ltd & Ors 2002 (2) ZLR 484 (H)

C *Erasmus v Boss* 1939 CPD 204

Gascoyne v Paul & Hunter 1917 TPD 170

Standard Chartered Finance Zimbabwe Ltd v Georgias & Anor 1998 (2) ZLR 547 (H)

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

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

Theron v Behr 1918 CPD 443

Legislation considered

High Court Rules 1971 (RGN 1047 of 1971), rr 437(1) & 441

Case information

E Mrs *M Matshiya*, for the plaintiff

G C Manyurureni, for the defendant

Judgment

Mafusire J: After the preliminaries on 18 March 2013, the trial in this matter began in earnest on 8 April 2013. The defendant had the duty to begin. F That had been the agreement at the pre-trial conference.

At the close of the defendant's case the plaintiff applied for absolution from the instance. I reserved judgment. This is the judgment.

The facts of this case are virtually common cause. The plaintiff, a duly registered private company, seeks an order for the eviction of the defendant G from premises known as Lot 4 of Lot 9 of Chicago situated in the district of Kwe Kwe ("the property"). The plaintiff is the registered owner of the property. Through one of its directors at the time, one Emmanuel Papayianis, now deceased, the plaintiff had bought the property at an auction sale in June 1996. The owner of the property had been one Anesu Anthony Muringani, now deceased (hereafter referred to as "the late Muringani"). The defendant H is his surviving widow.

Mafusire J

The property had been auctioned at the instance of the City of Kwe Kwe as A the judgment creditor. The late Muringani had been the judgment debtor. The plaintiff's bid, at $120 000, had been the highest. The plaintiff had paid a deposit of $30 000 on the date of the sale. The provincial magistrate at Kwe Kwe had subsequently confirmed the sale to the plaintiff. However, the late Muringani had successfully challenged the purchase price on the B basis that it was too low. The magistrate had increased the purchase price from $120 000 to $160 000 and had directed a sale by private treaty. The late Muringani had further challenged the new price in this court. That had been

in 1997. He had lost. The sale by private treaty to the plaintiff had been confirmed by the magistrate in September 1997.

The plaintiff had paid the balance of the purchase price in the sum of $130 000. C Transfer of the property to the plaintiff had been registered in the deeds office on 14 May 1999 under deed of transfer no. 2421/99.

The plaintiff's summons for eviction was issued on 24 March 2010. That was more than ten years after the registration of transfer. In its pleadings, the plaintiff's explanation for the delay was that its director at the time, the said D Mr Papayianis, had subsequently died. His surviving widow had subsequently fallen ill. No one had had any knowledge of the existence of the property and its registration in the plaintiff's name and in its books until in late 2009.

It transpired through the defendant's case that the defendant and her husband, the late Muringani, had at one time been estranged. He had wanted to take on E another wife. Muringani had died in 2004. In September 2008 the defendant had obtained from the Master's office a certificate of authority authorising her to take transfer of the property. However she did not succeed. In proceedings in this court, in 2010, under HC 355/10, the plaintiff, represented by one of its directors at the time, one Daniel Mackenzie Ncube, sought an order not F only to stop the defendant's bid to take transfer of the property, but also to have the certificate of authority set aside. The defendant consented to those orders. She only sought to be excused from the order of costs.

In the current proceedings the defendant's defence to plaintiff's claim for eviction was that the plaintiff was not the lawful owner of the property; that G the plaintiff had obtained the title to the property fraudulently; that as the lawful beneficiary to the estate of the late Muringani she had the right, title and interest in the property; that she had issued her own summons against the plaintiff and its directors to have the property transferred back to her late husband's estate and that she was entitled to occupation of the property until the dispute was resolved. H

2013 (1) ZLR p313

Mafusire J

A The defendant's summons was issued on 17 May 2010 under the name Emily Ntombizodwa Luwaca in HC3285/10. She sought an order setting aside the transfer of the property from the late Muringani to the plaintiff that had occurred in May 1999. She also sought an order directing the Messenger of Court, Kwe Kwe, to sign all the necessary transfer papers.

The defendant gave evidence. She called one witness, Majorie Quinisela B Tshuma ("Ms Tshuma"). Ms Tshuma is the defendant's daughter and the late Muringani's step-daughter. The defendant testified that the property had been illegally transferred by the messenger of court to the plaintiff; that neither she nor her husband, the late Muringani, had been aware of the purported sale and transfer; that the transfer bordered on fraud; that the messenger of C court was not supposed to have made the transfer and that she had contributed directly to the purchase of the property through mortgage finance.

The plaintiff's plea on the merits of the defendant's claim was filed on 15 June 2010. It stated that it had bought the property from an auction sale and had subsequently obtained title on 14 May 1999. It further stated that there had been nothing illegal or improper about the sale; that the late Muringani D would have known about the sale in execution and the subsequent transfer and that the defendant had not laid out any basis upon which the transfer of the property should be set aside.

The parties had subsequently filed further pleadings in the two matters. On 1 February 2011 the two matters had been consolidated at a pre-trial conference E and had been referred to trial on three issues.

The three issues on which the matters had been referred to trial were (a) whether the purchase of the property by the plaintiff and the subsequent transfer was tainted by fraud; (b) whether the transfer should be set aside, and (c) whether the plaintiff was entitled to eviction.

F The plaintiff subsequently filed an amendment to its plea to include the special plea of prescription. It argued that the defendant's claim had become prescribed; that the sale in execution had taken place in 1996; that transfer had been effected as far back as 1999; that it had been more than three years since that transfer and that in terms of the Prescription Act the claim had become prescribed.

G Following argument on the question of both the propriety of the application for amendment and the merits of the defence of prescription I handed down my judgment on 10 April 2013. It was judgment

no. HH112/2013. I allowed the plaintiff's application for amendment and its special plea of prescription. I dismissed the defendant's claim in HC 3285/10. The full reasons are in H my judgment.

2013 (1) ZLR p314

Mafusire J

At the close of the defendant's case, there was no shred of evidence relating A to any fraudulent dealings or illegal conduct by anyone associated with the sale and transfer of the property to the plaintiff. The sale and transfer had been open, public and plainly above board.

The defendant was at first adamant that the transactions had not been clear to her and that the plaintiff had not paid the full purchase price. She said B she had not been privy to what was happening. However, she eventually conceded the absence of fraud after she was shown the documentary proof. The crucial exhibits produced in court included, among others, the letter to the messenger of court from the provincial magistrate dated 16 September 1997, exh 5, confirming the auction sale and authorising the transfer; the proof of payment of the full purchase price by the plaintiff in the form of a receipt C of $30 000 on 31 October 1997, exh 8(a); a statement by the conveyancers, Danziger & Partners dated 3 December 1997, exh 8(c), showing receipt of the full purchase price; and a schedule of distribution by the messenger of court on 18 September 1997, exh 8(d), showing that all the creditors of the late Muringani had been paid out and, crucially, that 82 per cent of the D balance of the proceeds, amounting to $167 378.16, had been remitted to him.

After the defendant's evidence, particularly her concession aforesaid, one would have thought that that would have been the end of the matter. However, the defendant insisted on calling her daughter. But none of Ms Tshuma's evidence was relevant. Her evidence was largely hearsay and therefore inadmissible. It was surprising that Mrs *Matshiya*, despite my raising of a E concern on what was manifestly a red herring, went the full distance in her cross-examination.

Ms Tshuma had in fact sat in court as the defendant was giving her evidence. Mr *Manyurureni* had been candid enough to bring this to my attention and to highlight the caution with which I would have to approach her evidence. F

Ms Tshuma's evidence was that, after the trial had begun, she had conducted some kind of investigation of her own. She had been to Stanbic Bank in Harare and had been told that the late Muringani had had no account with them. Stanbic Bank had been one of the late Muringani's creditors, whose name had appeared on the schedule of payments prepared by the messenger G of court as having received an amount in the sum of $4 277.21 through lawyers, Wilmot & Bennett, Kwe Kwe.

Ms Tshuma also said that she had been to the deeds office in Harare where she had asked someone there whether it was usual to make alterations on title deeds without proper "endorsements". She claimed that she had worked in some "records office'' and that therefore she knew "the procedure". She said H

2013 (1) ZLR p315

Mafusire J

A the deeds office at Harare had referred her to the deeds office at Bulawayo. That had been the office that had handled the transfer of the property back in May 1999.

Ms Tshuma went on to say that she had telephoned the deeds office at Bulawayo but that she had been asked to bring the original title deed in B question as no one could pass judgment in the absence of the document.

Ms Tshuma further said that she had asked her brother in Kwke Kwe to check on the messenger of court's office about the sale in execution. The messenger of court's offices had allegedly professed no knowledge of the sale in execution in 1999.

Ms Tshuma conceded that she was living in Harare when the events in C relation to the sale and transfer of the property were unfolding in Kwe Kwe. She however maintained that from time to time she would visit Kwe Kwe. She was adamant that the property could not have been sold because the late Muringani, whom she said was very close, would have told her. She said that the late Muringani had not told her anything and that therefore no D such sale or transfer could have taken place as claimed by the plaintiff. Ms Tshuma conceded that in her enquiries she had spoken to people in the

front office who had no records of the transaction and whose names she did not get. However, she said she had obtained their telephone numbers in case anyone wanted to verify her information.

In the light of the documentary evidence produced in court and the concessions E made by the defendant herself, Ms Tshuma's "evidence" was of no value. She was merely being argumentative. She conceded that she was pained by the fact that her mother, the defendant, stood to lose out if she was evicted.

In applying for absolution from the instance at the close of the defendant's case, Mrs *Matshiya* submitted that, given that the defendant's defence had F been predicated on the question of fraud; that since none of the elements of fraud had been raised, let alone proved at the close of the defendant's case; that in fact the evidence having established that the sale and transfer of the property had been above board; the defendant's own claim for a reversal of the transfer having been dismissed and that the defendant having had the duty to begin, there was no need to put the plaintiff on its case and that it G was proper to absolve it from the instance. She suggested that if the plaintiff was absolved from the defendant's case the plaintiff could then open its own case for eviction.

After I queried the propriety of her application and her intended course of action, the plaintiff's counsel clarified her position and said that if the plaintiff H was absolved from the instance there would be no longer any issue for

determination in the plaintiff's case because the plaintiff's case for eviction A was predicated on the fact of its ownership of the property and that the only issue standing in the way was the defendant's defence of fraud, but that this defence had no substance.

In terms of Order 49 r 437(1) if the burden of proof is on the plaintiff, he shall adduce his evidence first. If absolution from the instance is not decreed the B defendant will then adduce his evidence. However, r 441 provides that when the right or obligation to begin lies on the defendant, the order of procedure should be read as if the defendant was the plaintiff and the plaintiff was the defendant. Therefore the plaintiff in this case could properly apply for absolution from the instance at the close of the defendant's case since the duty or obligation to begin had lain on the defendant. C

Where absolution from the instance is refused at the close of the plaintiff's case the defendant can go to his own case, can simply close it and still apply for absolution on the same evidence. But the considerations at that stage are different.

The test for absolution from the instance at the close of the plaintiff's case D was laid down in *Gascoyne v Paul & Hunter* 1917 TPD 170 which Beadle CJ accepted as the *locus classicus* on the point. This was in *Supreme Service Station (1969) (Pvt) Ltd v Fox and Goodridge (Pvt) Ltd* 1971 (1) RLR 1 (A).

In *Gascoyne's* case the test was formulated by as follows by de Villiers JP at 173:

> "At the close of the case for the plaintiff, therefore, the question which arises for E the consideration of the court is: Is there evidence upon which a reasonable man might find for the plaintiff? . . .. The question therefore is, at the close of the case for the plaintiff, was there a *prima facie* case against the defendant . . .: in other words, was there such evidence before the Court upon which a reasonable man might, not should, give judgment against (the defendant)?"

De Villiers JP noted the difference in the tests where the defendant closes F his case without calling any evidence. He formulated the test for absolution where the defendant closes his case without calling any evidence as follows:

> "Is there such evidence upon which the court ought to give judgment in favour of the plaintiff?"

The difference is in the expressions "*might*" and "*ought to*". This difference G was then amplified and explained by Beadle CJ *Supreme Service Station supra* at 4A–5D, where the learned Chief Justice said:

> "I think it is unfortunate that the magistrate's attention was not specifically directed to the manner in which he should have approached this case. It was never stressed that the test to be applied was *might* a reasonable court give judgment for the plaintiff? No attempt was made to elaborate what the word 'might' meant in H

Mafusire J

> this context, and it is as well that I should do so now. The *locus classicus* of the cases dealing with the procedure of absolution from the instance is the old Transvaal case of *Gascoyne v Paul and Hunter* 1917 TPD 170 . . . *Gascoyne's* case stresses that it is perfectly competent for a court to refuse an application for absolution from the instance when the application is made at the close of the plaintiff's case but to grant it if the defendant then promptly closes his case and renews the application without calling any evidence at all. There is no inconsistency in two such diametrically opposed orders, though the evidence before the court in each application is identical.
>
> The reason why there is no inconsistency is because the test to be applied when application is made before the defendant closes his case is 'what *might* a reasonable court do?'; whereas the test to be applied when the application is made after the defendant has closed its case is 'what *ought* a reasonable court do?'.
>
> The distinction here between 'might' and 'ought' in this context is an important one. It must be assumed that any judgment which a court 'ought' to give must be the correct judgment, as no court 'ought' to give a judgment which is incorrect. Once it is accepted that a judgment which a court 'might' give may differ from that which it 'ought' to give, it is clear that the judgment which it 'might' give and which differs from the judgment which it 'ought' to give must be an incorrect judgment. As a matter of logic, therefore, in considering what a reasonable court 'might' do, allowance must be made for its making a reasonable mistake and giving an incorrect judgment. . . . The test, therefore boils down to this: Is there sufficient evidence on which a court might make a reasonable mistake and give judgment for the plaintiff?"

Beadle CJ further pointed out that the practice in the South African courts and ours was always that in the case of doubt as to what a reasonable court "might" do, a judicial officer should always lean on the side of allowing the case to proceed. He also pointed out that a defendant who closes his case without giving evidence risks having an inference being drawn against him from his failure to give evidence contradicting that of the plaintiff.

The test on absolution from the instance as formulated in *Gascoyne's* case has been followed in numerous other cases. Herbstein and van Winsen *The Civil Practice of the Superior Courts in South Africa* 3 ed at p 464 state that in view of the principles on absolution from the instance, a trial court should be very chary of granting absolution at the close of the plaintiff's case. Juta J's remarks in *Theron v Behr* 1918 CPD 443 at 451 (which were quoted with approval by Sutton J in *Erasmus v Boss* 1939 CPD 204 at 207, by Beadle CJ in *Supreme Service Station supra* p 207, by Smith J in *Standard Chartered Finance Zimbabwe Ltd v Georgias & Anor* 1998 (2) ZLR 547 (H) at 553B-C, and by Matika J in *Bailey NO v Trinity Engineering (Pvt) Ltd & Ors* 2002 (2) ZLR 484 (H) at 487) were to the effect that the practice is that judges are very loath to decide upon questions of fact without hearing all the evidence.

2013 (1) ZLR p318

Mafusire J

As was stated in *Supreme Service Station supra* and followed in *Standard Chartered Finance* and *Bailey NO supra*, a defendant who might be afraid to go into the box should not be permitted to shelter behind the procedure of absolution from the instance. I should say the same applies to a defendant, or in this case, the plaintiff, who might be *unwilling* to take the witness' stand. It should not shelter behind the procedure of absolution from the instance.

In this case, the plaintiff took a calculated risk to seek absolution at the close of the defendant's case. Despite the query that I raised with its counsel regarding her intended course of action should I grant absolution, the plaintiff did not seek to close its case, even though she made submissions to the effect that absolution at that stage would effectively mean the end of the case as there would be nothing else for plaintiff to say in support of its case for eviction.

I say the plaintiff was taking a risk because it is the principle of absolution from the instance that the onus is higher where the application is made at the close of the plaintiff's case than where it is made after all the evidence has been led. Beadle CJ in *Supreme Service Station supra* at 5F-G said:

> ". . . the onus on a defendant who applies for absolution from the instance before closing his case is greater than the onus placed upon him when he applies for absolution from the instance after closing his case . . ."

Furthermore, it is the practice in our courts to lean more in favour of deciding questions of fact after all the evidence has been led. However, every case depends on its own special set of facts. In the present case I am satisfied that the risk that the plaintiff took in applying for absolution from the instance at the close of the defendant's case and without closing its own case was well taken. Even if I were to apply the more stringent test of what "*ought*" a reasonable court do as opposed to

what "*might*" a reasonable court do, and even bearing in mind that the practice in our courts is to lean more in favour of hearing all the evidence before deciding on questions of fact, I still come to the conclusion that the plaintiff is entitled to be absolved from the instance. F

The special circumstances of this case are that plaintiff's cause of action against the defendant was predicated purely on its ownership of the property. An o wner of a property is entitled to the full enjoyment of the property unless by agreement or operation of the law there has been a diminution of that right. In the judgment on prescription aforesaid, I highlighted that G the registration of a real right in the deeds office protects the holder and the public alike. Once a real right has been registered it becomes enforceable against the world at large: Harry Silberberg *The Law of Property* (1975) at p 67. Therefore, in this case, unless there is established a superior right to deprive it of its right to the full enjoyment of the property, the plaintiff is plainly entitled to recover possession of the property. H

2013 (1) ZLR p319

Mafusire J

A The defendant's sole ground for resisting plaintiff's claim for eviction was predicated on the question of fraud. It was her defence that the transfer of ownership in 1999 had been fraudulent. But that defence completely evaporated once she took the witness stand. Even her counsel implored her to pin point the time and place at which the fraud might have taken place, B from the time that the magistrate had given judgment in favour of the City of Kwe Kwe against the late Muringani back in 1995; the time when the messenger of court had sold the property by public auction; the time when the magistrate had confirmed the sale; the time when the late Muringani had challenged the auction price; the time when the magistrate had directed a sale by private treaty; the time when the late Muringani had unsuccessfully C challenged the new price; the time when the magistrate had confirmed the new price and had directed the registration of transfer; the time when the messenger of court had signed the transfer papers; the time when the conveyancers Danziger & Partners had caused the registration of transfer, and finally, to the time when the registrar of deeds had registered the transfer D in the deeds office. She could not say where or when or by whom the fraud could have been committed.

In some of her papers the defendant had claimed rights of occupation until the "dispute" had been resolved. She said she was the surviving spouse of the late Muringani and the executrix dative to his estate. This was not the bulwark of her defence. But again, this other ground also evaporated once E she took the witness' stand. The certificate of authority from the Master's office that had given her the limited authority to take transfer of the property was set aside with her consent. The transfer to herself was stopped with her consent. She had been fully represented in those proceedings. The property had been registered in the sole name of the late Muringani.

F In terms of the Deeds Registries Act [*Chapter 20:05*], an owner of an immovable property is the registered owner. Registration of real rights in the deeds office is not a mere matter of form. In *Takafuma v Takafuma* 1994 (2) ZLR 103 (S), the Supreme Court,, *per* McNally JA at 105-106, stated as follows:

> G "The registration of rights in immovable property in terms of the Deeds Registries Act [*Chapter 139*] is not a mere matter of form. Nor is it simply a device to confound creditors or the tax authorities. It is a matter of substance. It conveys real rights upon those in whose name the property is registered. See the definition of 'real right' in s2 of the Act. The real right of ownership, or *jus in re propria*, is 'the sum total of all the possible rights in a thing' – see *Wille's Principles of* H *South African Law* 8 ed p 255".

2013 (1) ZLR p320

Mafusire J

In the circumstances of this case, the defendant has no right to remain in A occupation of the property without the plaintiff's authority. The plaintiff is entitled to immediate vacant possession of the property. There is nothing further for the plaintiff to say that should require its witness to take the stand.

In the final result the plaintiff's application for absolution from the instance at the close of the defendant's case is hereby granted with costs. The defendant B is hereby ordered to vacate the plaintiff's property known as Lot 4 of Lot 9 of Chicago, held under deed of transfer no. 2421/99 situate in the district of Kwe Kwe.

Mtetwa & Nyambirai, plaintiff's legal practitioners

Manyurureni &Company, defendant's legal practitioners C

© 2015 Juta and Company (Pty) Ltd.

Document 44 of 73

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2013/Volume 1/BOKA INVESTMENTS (PVT) LTD v THIRDLINE TRADING (PVT) & ORS 2013 (1) ZLR 321 (H)

BOKA INVESTMENTS (PVT) LTD v THIRDLINE TRADING (PVT) & ORS 2013 (1) ZLR 321 (H)
2013 (1) ZLR p321

Citation	2013 (1) ZLR 321 (H)
Case No	HH-104-13
Court	High Court, Harare
Judge	Patel J
Heard	5 March 2013; *CAV*
Judgment	25 April 2013
Counsel	*C Nhemwa*, for the applicant *J Muchada*, for the first and second respondents
Case Type	Civil application
Annotations	Link to case annotations

Flynote

Company – *winding up – grounds for – company unable to pay its debts – meaning of – commercial insolvency – when court may find company to be commercially insolvent – goodwill – may not be treated as an asset* D *in determining company's ability to pay debts*

Company – *winding up – grounds – just and equitable – situations where court may find winding up to be just and equitable*

Company – *winding up – order for – provisional order granted – importance of return day – effect of failure to confirm, discharge or extend provisional* E *order on return day*

Headnote

Where a provisional order for sequestration of an estate or the winding up of a company has been granted, the return day is critical to its confirmation or discharge. If the provisional order is not confirmed, discharged or extended on the stipulated return day, this would ordinarily entail the F conclusion that it has lapsed and is no longer extant.

In terms of s 206 of the Companies Act [*Chapter 24:03*], a company may be wound up if, among other grounds, it is unable to pay its debts. In terms of s 205, a company is deemed to be unable to pay its debts if it is proved to the satisfaction of the court that the company is unable to pay G its debts and, in determining this issue, the court shall take into account the contingent and prospective liabilities of the company. The test that is generally applied is that of commercial insolvency. The primary question which a court is called upon to answer in deciding whether or not a company carrying on business should be wound up as commercially insolvent is whether or

not it has liquid assets or readily realisable assets H available to meet its liabilities as they fall due to be met in the ordinary

course of business, and thereafter to be in a position to carry on normal A trading – in other words, can the company meet current demands on it and remain buoyant? It matters not that the company's assets, fairly valued, far exceed its liabilities: once the court finds that it cannot do this, it follows that it is entitled to, and should, hold that the company is unable to pay its debts and is accordingly liable to be wound up. B

A company may also be wound up if the court finds that it is just and equitable to do so. In making this determination, it is necessary for the court to take into account all the relevant circumstances, including the competing interests of all the parties concerned. There are five broad categories that that have been identified for winding up on just and equitable grounds: the disappearance of the company's substratum; the illegality of its C objects and fraud committed in connection therewith; a deadlock in the management of the company's affairs; grounds analogous to those for the dissolution of a partnership; and where there is oppression. These are not exhaustive; it is open to the courts to identify other circumstances or devise other categories in the future.

Goodwill cannot be treated as an asset in determining whether a company's D liabilities exceed its assets. Goodwill based on prospective revenues may be treated as an asset in valuing a company's business when it is sold or transferred as a going concern, but it is utterly valueless and cannot assist in discharging the company's debts and liabilities as and when they arise. E

Cases cited

ABSA Bank Ltd v Rhebokskloof (Pty) Ltd & Ors 1993 (4) SA 436 (C)

Asla Devco (Pty) Ltd v Bubesi Investments 74 (Pty) Ltd [2011] ZAWCHC 24 (WC)

Crundall Brothers (Pvt) Ltd v Lazarus NO & Anor 1990 (1) ZLR 290 (H); 1991 (3) SA 812 (ZH) F

Ex p S & U TV Svc (Pty) Ltd 1990 (4) SA 88 (W)

Hughes v John Dory Trucking (Pty) Ltd & Ors 2008 (5) SA 300 (N)

Ma-Afrika Groepbelange (Pty) Ltd & Anor v Millman & Powell NNO & Anor 1997 (1) SA 547 (C) G

Militala NO & Ors v Zimbabwe Textile Workers Union & Ors S-67-11

Moosa NO v Mavjee Bhavan (Pty) Ltd & Anor 1967 (3) SA 131 (T)

RAG (Pvt) Ltd v Huizenga NO 1986 (2) ZLR 203 (S)

Legislation considered

Companies Act [*Chapter 24:04*], ss 205(c) & 206(f) & (g) H

Patel J

A High Court Rules 1971 (RGN 1047 of 1971), rr 4C and 247(3)

Case information

C Nhemwa, for the applicant

J Muchada, for the first and second respondents

Judgment

Patel J: This is an application for the confirmation of a provisional order, B granted on 23 February 2011, for the winding up of the first and second respondents (the respondents). The latter companies were the tenants of the applicant and jointly operate a tobacco auction floor under the trade name of Zimbabwe Industry Tobacco Auction Centre (ZITAC) together with their sub-tenants.

C The applicant avers that the respondents have failed to satisfy an arbitral award for moneys owed that was granted in its favour on 16 April 2010 and registered by this court on 19 May 2010.

Together with sales commission and arrear rentals due, the total amount that the respondents owe the applicant stands at US$460 800. The applicant further contends that the respondents' confirmed liabilities of US$1 630 800 exceed their assets of less than D US$100 000 and that they have no prospect of recovery in the future as they were not granted an auction licence for the 2011 season.

The respondents' preliminary objection is that the provisional order in this case was granted unprocedurally for a number of reasons. On the merits, they contend that the applicant has ignored their goodwill and volume of E business, approximating US$6 million annually, which must be included in the valuation of their tobacco auction business. Therefore, their assets far exceed their liabilities. Their auction licence for 2011 was not granted because of an interdict by this court preventing the Tobacco Industry Marketing Board from issuing the licence. The respondents have applied for the interdict order to be set aside and the matter is still pending. Moreover, soon after F the provisional order was granted, the provisional liquidator voluntarily vacated the leased premises. Both the interdict and provisional liquidation were manipulated by the applicant to wrongly evict the respondents under the guise of liquidation. Before their provisional liquidation, the respondents had loan facilities with ZABG Bank and did not owe any arrear salaries to their employees. Again, their trading debts due were normal and the income G that would have been generated in 2011 would have sufficed to satisfy those debts. The provisional liquidator's interim report is grossly inaccurate in understating their assets and income and in inflating or falsifying their liabilities. In short, the respondents argue that they are not insolvent and that the provisional order should be discharged with costs *de bonis propriis* H or on an attorney and client scale.

Patel J

Procedural irregularities A

The principal argument for the respondents is that the provisional order *in casu* was obtained unprocedurally in breach of rr 223, 231 and 232 of the High Court Rules 1971. Firstly, the notice of set-down for hearing on the unopposed roll was filed on the Friday instead of the Thursday preceding the next Wednesday of set-down. Secondly, the application and supporting B papers were not served on either of the respondents. Thirdly, the application was filed on 18 February and granted on 23 February 2011, before the period of 10 days for the filing of any notice of opposition had elapsed. Mr *Nhemwa* concedes these irregularities but submits that they should be condoned in the interests of justice.

Rule 4C of the High Court Rules provides for departures from the Rules and C directions as to procedure:

> "The court or a judge may, in relation to any particular case before it or him, as the case may be –
>
> (a) direct, authorise or condone a departure from any provision of these rules, including an extension of any period specified therein, where it or he, as the case may be, is satisfied that the departure is required in the interests of D justice;
>
> (b) give such directions as to procedure in respect of any matter not expressly provided for in these rules as appear to it or him, as the case may be, to be just and expedient."

In the instant case, the respondents' procedural objections were first raised in E an urgent chamber application, filed in March 2011 in Case No. HC 2854/11, wherein the final relief sought was the invalidation of the provisional order for breach of the Rules. This application was dismissed for want of urgency and the respondents lodged an appeal in Case No. SC 69/11. The respondents then failed to file their heads of argument or to pursue the appeal further and must be deemed to have abandoned it. Again in March 2011, the respondents F also filed an application in Case No. HC 2942/11 for the rescission of the provisional order premised on the same grounds, *i.e.* breach of the Rules. The applicant duly filed its notice of opposition, but the respondents have to date neither filed their answering affidavit or heads of argument nor done anything else to pursue that application, and the matter is still pending. G

Turning to the interests of the creditors and other parties concerned with this matter, I note that the respondents were placed under provisional liquidation over 24 months ago. In the intervening period, the provisional liquidator has completed the whole process of investigation and issued his interim report confirming that the liabilities of the respondents far exceed their assets. Having regard to this scenario, coupled with the flagrant abuse of H

Patel J

A court process exhibited by the respondents as described above, it seems to me that this matter must be brought to finality. Moreover, I do not perceive that the respondents will suffer any prejudice in having this matter finally determined as they have had ample opportunity to oppose the confirmation of the provisional order. In the premises, I am inclined to condone the procedural irregularities preceding the issuance of the provisional order so B that the interests of justice are duly served.

Whether provisional order has lapsed

At the hearing of this matter, Mr *Muchada* raised the new point that the original return date for confirmation of the provisional order was 17 May 2011 and, because the date was not extended, the order lapsed on that date. C Consequently, there is no provisional order to be confirmed. Reliance for this submission is placed upon Ex p *S & U TV Services (Pty) Ltd* 1990 (4) SA 88 (W) and *Crundall Brothers (Pvt) Ltd v Lazarus NO & Anor* 1990 (1) ZLR 290 (H); 1991 (3) SA 812 (ZH) at 823G-I. As against this, Mr. *Nhemwa* explains that the respondents filed their notice of opposition on 16 May 2011, the day before the return date. Because the matter could no longer D proceed on the unopposed roll, he argues that there was no need to extend the provisional order once it was opposed. He relies for this proposition on the decision of the Supreme Court in *Militala NO & Ors v Zimbabwe Textile Workers Union & Ors* S-67-11. According to Mr. *Nhemwa*, it was held that a provisional order for liquidation or judicial management, whether it is E opposed or unopposed, does not lapse until it is confirmed or discharged.

My reading of the cases relied upon by both counsel is that they do not meaningfully support their respective arguments. In the *S & U TV Services* case, the applicant applied for and obtained an order for its own provisional winding up. On the extended return day, there was no appearance on behalf of the applicant and the rule *nisi* was therefore expressly discharged by order F of the court. An application for its revival three weeks later was refused because matters would no longer have been *res integra* at that stage. The *Crundall Brothers* case involved a dispute over a right of pre-emption incorporated in an order of court. The return day of the relevant rule *nisi* was postponed but the rule itself was not extended accordingly. It was held that the postponement of the return day *ipso facto* extended the rule *nisi* to G the new return day. In my view, both of these cases are distinguishable on their facts and findings from the present matter and do not really advance the position of the respondents. In the same vein, I do not think that the decision in the *Militala* case can be construed to support the applicant's position. In that case, an appeal against the decision of this court in Case No. H HC 2540/11 was allowed and it was ordered that the provisional order for

Patel J

judicial management of the applicants "remains of full force and effect until A discharged in terms of the law". Although applications for winding up and judicial management are similar in nature, they are not necessarily identical in terms of the processes involved and their objectives. In any event, I am advised that there are no written reasons for the order of the Supreme Court and I am therefore unable to glean anything from the case to substantiate B Mr *Nhemwa's* submissions in that regard.

Rule 247(3) of the High Court Rules stipulates the procedural requisites of a provisional order for sequestration or winding up as follows:

> "Where a provisional order relates to the sequestration of an estate, the winding up of a company or any other matter in which interested parties generally are to be given an opportunity to oppose the granting of a final order, the provisional C order shall –
>
> (a) be in Form 29D; and
>
> (b) specify the date and place at which the court will hear argument on the confirmation of the provisional order; and
>
> (c) specify the manner in which the provisional order is to be published and, where appropriate, the persons on whom copies of the provisional order, D together with all supporting documents, are to be served."

The relevant paragraphs of the provisional order *in casu* are in the following terms:

"1. The 1st and 2nd Respondents' companies . . . are provisionally wound up, pending the granting of an Order referred to in paragraph 3 or the discharge E of this Order.

2. . . .

3. Any interested party may appear before this Court sitting at Harare on 17 May 2011 at 10.00 am, to show cause why a Final order should not be made placing the Respondent Company (*sic*) in liquidation and ordering that the costs of these proceedings shall be the costs of liquidation.

4. Pending the return day, this Order shall operate as a Provisional Order of F winding up.

5. . . .

6. . . .

7. Any person intending to oppose or support the application on the return day of this Order shall . . . give due notice . . . and . . . serve . . . a copy of an G affidavit which it (*sic*) files . . . ."

It is abundantly clear from the Rules as read with the terms of the provisional order that the return day is critical to its confirmation or discharge. What appears from the papers and from submissions by counsel is that the respondents filed their notice of opposition the day before and that the applicant attempted to extend the provisional order. It is not clear how this attempt H

A was made or why it was unsuccessful. What is clear is that the provisional order was not confirmed, discharged or extended on the stipulated return day. Ordinarily, this would entail the conclusion that it has lapsed and is no longer extant for the purposes of these proceedings. While this conclusion seems inescapable, I am loath to endorse it in the circumstances of this case for the following reasons.

B Firstly, just before the return day, the applicants filed voluminous documentation, 85 pages in total, by way of opposition to the confirmation of the provisional order. After the return day had passed, they did not challenge the order or its continued operation on the ground that it had lapsed. Instead, they awaited the filing of the applicant's heads of argument and responded C by filing their own heads of argument on 7 August 2012. Even at that late stage, they did not take the point that the provisional order had lapsed. This objection was only raised at the hearing of this matter, almost 22 months after the return day. In my view, their conduct in this regard is again tantamount to gross abuse of court process.

Secondly, as I have already stated, the respondents were placed under D provisional liquidation over 24 months ago. Thereafter, other creditors have lodged their claims and the provisional liquidator has issued his interim report. At this juncture, it is of cardinal importance to have regard to the general advantage and benefit of all the persons concerned or interested in the matter. The court should be less inclined to interfere at a late stage in E the winding up process than it would be at an early stage in that process. See *Ma-Afrika Groepbelange (Pty) Ltd & Anor v Millman and Powell NNO & Anor* 1997 (1) SA 547 at 566A-E, in the context of an application for the removal of a liquidator. In the instant case, the general balance of convenience is overwhelmingly in favour of treating the provisional order as having remained operational up to the present time. Moreover, the interests F of justice dictate that the matter be finally determined to enable all the parties concerned, including the respondents, to know where they stand. Having regard to all of these factors, I take the view that the failure to extend the return day of the provisional order should not be regarded as being fatal to its continuing validity. Accordingly, I deem it appropriate to exercise my G discretion under Rule 4C to condone that failure and to proceed with this matter on the basis that the provisional order remains in full force until it is confirmed or discharged.

Grounds for winding up

Section 206 of the Companies Act [*Chapter 24:03*] specifies the circumstances H in which a company may be wound up:

"A company may be wound up by the court – A

(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 B 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;

(g) if the court is of opinion that it is just and equitable that the company should C be wound up."

It is clear that the circumstances enumerated in this section are to be read disjunctively and not conjunctively. With particular reference to para (f) of s 206, s 205 provides that:

"A company shall be deemed to be unable to pay its debts – D

(a) if a creditor, by cession or otherwise, to whom the company is indebted in a sum exceeding one hundred United States dollars then due, has served on the company a demand requiring it to pay the sum so due by leaving the demand at its registered office and if the company has for three weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor; or E

(b) if the execution or other process issued, on a judgment, decree or order of any competent court in favour of a creditor, against the company is returned by the Sheriff or messenger with the endorsement that no assets could be found to satisfy the debt or that the assets found were insufficient to do so; or

(c) if it is proved to the satisfaction of the court that the company is unable to pay its debts and, in determining whether a company is unable to pay F its debts, the court shall take into account the contingent and prospective liabilities of the company."

For the purposes of s 205(c) as read with s 206(f), the test that is generally applied is that of commercial insolvency. See *RAG (Pvt) Ltd v Huizenga NO* 1986 (2) ZLR 203 (S) at 206A-B. With reference to the equivalent provisions of the South African Companies Act 61 of 1973, the test was expounded G in *ABSA Bank Ltd v Rhebokskloof (Pty) Ltd & Ors* 1993 (4) SA 436 (C) at 440F-H as follows:

"The concept of commercial insolvency as a ground for winding up a company is eminently practical and commercially sensible. The primary question which a court is called upon to answer in deciding whether or not a company carrying on business should be wound up as commercially insolvent is whether or not H

A it has liquid assets or readily realisable assets available to meet its liabilities as they fall due to be met in the ordinary course of business and thereafter to be in a position to carry on normal trading – in other words, can the company meet current demands on it and remain buoyant? It matters not that the company's assets, fairly valued, far exceed its liabilities: once the court finds that it cannot do this, it follows that it is entitled to, and should, hold that the company is unable to pay its debts . . . and is accordingly liable to be wound up."

B As regards the just and equitable criterion set out in para (g) of s 206, which postulates not facts but only a broad conclusion of law, it is necessary to take into account all the relevant circumstances, including the competing interests of all the parties concerned. See *Moosa NO v Mavjee Bhavan (Pty) Ltd & Anor* 1967 (3) SA 131 (T) at 136H. There are five broad categories C that that have been identified for winding up on just and equitable grounds: the disappearance of the company's substratum; the illegality of its objects and fraud committed in connection therewith; a deadlock in the management of the company's affairs; grounds analogous to those for the dissolution of a partnership; and where there is oppression. See *Hughes v John Dory Trucking (Pty) Ltd & Ors* 2008 (5) SA 300 (N) at paras 16-17. These circumstances are D not exhaustive and it is open to the courts to identify other circumstances or devise other categories in the future. The first step is to determine the facts relevant to the formation of an opinion as to justice and equity. The second step is for the court to decide whether or not to exercise the discretion to wind up. See *Asla Devco (Pty) Ltd v Bubesi Investments 74 (Pty) Ltd* [2011] E ZAWCHC 24 (WC) at paras. 29-32.

Whether respondents should be wound up

Dealing with the commercial solvency of the respondents prior to the granting of the provisional order, it is fairly clear, despite their attempt at denial, that they had several outstanding liabilities. These included the following: F lease fees and good tenancy deposit owing to the applicant, sums

due to several financial institutions, and levies due to the Ministry of Agriculture and Tobacco Industry Marketing Board. After they were placed under provisional liquidation, they have incurred further liabilities in the form of overdue wages and salaries and related statutory levies. According to the provisional liquidator's interim report, submitted on 11 May 2011, the G respondent's liabilities stand at US$6 937 633 while their assets are estimated at US$300 000, leaving a negative solvency of US$6 663 633.

The respondents dispute most of their liabilities before their provisional liquidation. They also dispute the extent of liabilities tabulated by the provisional liquidator as being inflated and inaccurate. In my assessment, H their assertions in this regard are not borne out by the documentary evidence

---

Patel J

adduced by them. For instance, in their letter dated 4 June 2010, addressed A to the applicant, the respondents admit the accrual of deposit rent, monthly rentals and commissions, and openly plead for time to pay off the arrears due. Moreover, their liability for these amounts is confirmed in the arbitrator's interim award in April 2010 and the final award in September 2010.

In light of all of the documentation before the Court, it is clear that, before B the provisional order was granted in February 2011, the respondents did not meet their liabilities as they arose. It is equally clear that, after February 2011, their inability to satisfy their indebtedness has been exacerbated by the accumulation of further liabilities. In this regard, I am not persuaded by the argument that their predicament has been deliberately orchestrated through the machinations of the applicant in collusion with the provisional C liquidator. Critical to this argument is the interdict of this court restraining the Tobacco Industry Marketing Board from issuing an auction licence to the respondents. This interdict was granted many months ago, in November 2010, and remains in force to this day. The respondents claim to have challenged it but have not demonstrated what further steps they have taken to have the D matter finalised in their favour.

Related to the auction licence is the argument that, but for the interdict, the respondents would have generated approximately US$6 million in the 2011 season and would have been more than able to meet their normal trading debts. They further contend that their goodwill and volume of business E must be included in the valuation of their tobacco auction business. By their calculation, that business is worth US$18 million and, therefore, their assets far exceed their liabilities. In my view, this contention is entirely spurious and fallacious in the present context. From a commercial perspective, goodwill based on prospective revenues may be treated as an asset in valuating a company's business when it is sold or transferred as a going concern. F However, goodwill is utterly valueless and cannot assist in discharging the company's debts and liabilities as and when they arise. I am fortified in this view by *The Shorter Oxford English Dictionary* definition of "goodwill" as:

> "the privilege, granted by the seller of a business to the purchaser, of trading as his recognised successor; the possession of a ready-formed connection of G customers, considered as a separate element in the saleable value of a business."

In the final analysis, it is abundantly clear that the respondents did not and presently do not have liquid or readily realisable assets available to meet their liabilities as they fall due in the ordinary course of business. I am adequately satisfied that they are not in a position to carry on normal trading and are therefore commercially insolvent. It follows that they are unable to pay their H

Patel J

A debts within the meaning of s 205(c) as read with s 206(f) of the Act. This is sufficient to warrant a final order for their liquidation.

In view of this conclusion, it seems unnecessary to consider the additional or alternative ground for winding up envisaged by s 206(f) of the Act. However, for the sake of completeness, it may be as well to do so. As I have already indicated, the interdict against the issuance of an auction B licence still stands and effectively operates to hamstring the respondents from carrying out their operations. The further practical impediment to their business is the requirement of the Tobacco Industry Marketing Board that they rehabilitate the auction floor infrastructure. Thus, even if they were duly licensed, they do not have the requisite capital base in order to rectify the C necessary infrastructure. What all of this means is that the substratum of the respondent companies has

effectively disappeared. Moreover, whilst they remain in legal existence, they will continue to incur further liabilities in the form of bank interest and charges, unpaid wages and salaries and attendant statutory levies. To avoid further financial prejudice to the applicant and other creditors, it is imperative that the respondents be liquidated so as to D enable the proportional sharing of their remaining assets amongst all of their confirmed creditors. All in all, it seems eminently just and equitable that the respondents be finally wound up.

In the result, it is ordered that the provisional order for the winding up of the first and second respondents granted by this court on 23 February 2011 E be and is hereby confirmed and made a final order.

C Nhemwa & Associates, applicant's legal practitioners

F *Dube, Manikai & Hwacha*, first and second respondents' legal practitioners

© 2015 Juta and Company (Pty) Ltd.

Document 45 of 73

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2013/Volume 1/ELLINGBARN TRADING (PVT) LTD v ASSISTANT MASTER 2013 (1) ZLR 332 (H)

ELLINGBARN TRADING (PVT) LTD v ASSISTANT MASTER 2013 (1) ZLR 332 (H)

Citation	2013 (1) ZLR 332 (H)
Case No	Judgment No. HB-82-13
Court	High Court, Bulawayo
Judge	Mutema J
Heard	4 April 2013; *CAV*
Judgment	25 April 2013
Counsel	*S Mguni*, for the applicant No appearance for the first respondent *C Nunu*, for the second respondent
Case Type	Application for judicial management
Annotations	No case annotations to date

Flynote

Company – *judicial management – application – must be by court application – urgent chamber application not competent – when application may be granted – purpose of judicial management – what must be shown before order may be granted*

Practice and procedure – *respondent's heads of argument – when must be* D *filed – failure by respondent to file heads of argument timeously – effect*

Headnote

The second respondent obtained judgment against the applicant following non-repayment of moneys loaned to the applicant. It also obtained judgment against the applicant's co-principal debtors and guarantors in E their personal capacities. When the second respondent sought to execute the writ of execution against movable and immovable property, which included a dwelling belonging to one of the co-principal debtors, the applicant and its co-defendants filed an application for the suspension of the sale of the dwelling in terms of the High Court Rules 1971. This F application was dismissed by the High Court. Realising that the sale in execution of the immovable property was to go ahead, the applicant, undaunted, applied for provisional judicial management via an urgent chamber application. The applicant also sought a stay of all proceedings against all its directors and/or guarantors or other persons who had underwritten the applicant's debts. A provisional order was granted but G the second respondent opposed confirmation of the order.

At the hearing the second respondent took the point *in limine* that the applicant was automatically barred on account of not having filed its heads of argument within the ten day period after receipt of the second respondent's heads, the period stipulated in r 238(2a), as read with (2b), of the High Court Rules 1971. H

A *Held*, that the respondent is to file his heads of argument within ten days of being served with the applicant's heads. If the respondent has been served with the applicant's heads close to the set down date, he shall not have the benefit of the full ten day period within which to file and serve heads but must do so five clear days before the set down date. No reasons were proffered for filing the applicant's heads out of time B and, more importantly, the matter had already been delayed more than necessary. A further delay would not be in the interests of justice.

Held, further, that ss 299 and 300 of the Companies Act [*Chapter24:03*] make it clear that an application for judicial management must be a court application, not an urgent chamber application. In any event, there was C no urgency about the matter.

Held, further, that the order sought by the applicant to exonerate its directors and guarantors from their personal liabilities was incompetent. In its founding affidavit, the applicant never stated the basis upon which liability against its directors and guarantors was founded and why action against them should be stayed, nor did those directors and guarantors D file any supporting affidavits.

Held, further, that judicial management is an extraordinary procedure available to a company in special circumstances and for prescribed purposes. It is only adopted when the court is satisfied that there is a reasonable possibility that, if placed under judicial management, a company which E is unable to pay its debts will be able to do so in full, meet its obligations and became a successful concern. It is not an experiment to determine whether a company can extricate itself from financial difficulties. The concept of judicial management is premised on the basis that a company has failed to be viable due to mismanagement which can be corrected by a judicial manager. In the instant case, the applicant did not allege F mismanagement in its application; it alleged lack of capital, the liquidity crunch and competition, problems which no judicial manager can arrest.

Held, further, that on the return day of a provisional order for judicial management, the court may, in terms of s 305(1) of the Companies Act, discharge the order or make any order it thinks fit. This can include an G order for the winding up of the company. Such an order would be just and equitable in this case.

Cases referred to

Feigenbaum & Anor v Germanis & Ors 1998 (1) ZLR 286 (H)

RAG (Pvt) Ltd v Huizenga NO 1986 (2) ZLR 203 (S)

H *Tenowitz v Tenny Invstms (Pty) Ltd* 1979 (2) SA 680 (E)

Mutema J

Vera v Imperial Asset Management Co 2006 (1) ZLR 436 (H) A

Legislation considered

Companies Act [*Chapter 24:03*] , ss 299, 300 and 305

High Court Rules 1971 (RGN 1047 of 1971), r 238(2a) B

Case information

S Mguni, for the applicant

No appearance for the first respondent

C Nunu, for the second respondent

Judgment

Mutema J: In order for the avid reader to fully comprehend the outcome of this proceeding, I find it in order to start by briefly outlining, in its C chronological order, the path which it has trodden.

The applicant was incorporated on 13 March 2007. It is essentially a restaurant whose speciality is traditional food. In case no. HC 3829/11, the second respondent, as plaintiff, issued summons against the applicant and three other defendants on 20 April 2011 for the recovery of money lent and advanced in D the sum of $18 761.68 plus interest and costs. The second respondent also sought and obtained an order declaring the mortgaged property, namely stand 14475 Bulawayo Township of stand 150038 Bulawayo Township, registered in the name of Samuel Ncube (the fourth defendant), specially executable. The second respondent did obtain judgment against the applicant, its co-principal debtors and guarantors in their personal capacities on 25 November 2011. E

When the second respondent sought to execute the writ of execution against movable and immovable property, the applicant and its co-defendants filed an application for the suspension of the sale of the dwelling in terms of Order 40 r 359 of the High Court Rules 1971. This application was dismissed by this court on 7 May 2012. Realising that the sale in execution of the immovable F property was to go ahead, the applicant was undaunted and it applied for provisional judicial management via an urgent chamber application on 22 June 2012.

On 5 July 2012 Ndou J granted the provisional order couched in the following terms:

> "TERMS OF THE FINAL ORDER SOUGHT G
>
> That you show cause to this Honourable Court if any, why a final order should not be made in the following terms:
>
> (1) That the applicant, Ellingbarn Trading (Pvt) Ltd
>
> INTERIM RELIEF GRANTED
>
> Pending confirmation or discharge of this provisional order, H

Mutema J

(i) Whilst A the judicial management is in force, all actions, executions of writs, summons and other proceedings against the applicant and all its directors and or guarantors or other legal persons and or other legal persona who have underwritten the applicant's debtors shall be stayed and not proceeded with without leave of this Honourable Court.

(ii) The Assistant Master shall forthwith appoint a provisional judicial manager B in terms of section 302(1)(b)(i) of the Companies Act [*Chapter 24:03*].

(iii) All interested parties may appear before this Honourable Court on the 18th day of October 2012 at 10:00 am or so soon thereafter as they may be heard, should they wish to oppose the confirmation of this provisional order."

When the applicant finally sought confirmation of the provisional judicial C management order – it having flouted procedures on several return dates, for instance by failing to publish the provisional order in the *Chronicle* newspaper and the Government *Gazette* and convening of creditors meeting by the provisional judicial manager (both of which have not been done to date) – the second respondent opposed the confirmation sought.

At the hearing the second respondent's counsel took the point *in limine* that D the applicant was automatically barred on account of not having filed its heads of argument within the ten day period stipulated in Order 32 r 238(2a) as read with (2b) of the High Court Rules 1971.

The point taken had substance, in view of the fact that the applicant not having initiated the filing and service of its heads of argument (as is generally E the norm), the second respondent filed its

heads of argument on 21 January 2013 and served them upon the applicant on 22 January 2013. The applicant did not file its heads of argument until 27 March 2013, when the matter had been set down for hearing on 3 April 2013.

The applicant's counsel, despite the fact that no copy of the applicant's heads F was filed of record (though the court should accept that its heads were filed as alleged by counsel for the second respondent), argued with a straight face that the applicant was not barred, because its heads were filed five days prior to the date of hearing, as is required by r 238(2a), proviso (ii).

It would appear that some legal practitioners are not conversant with the G correct interpretation of proviso (ii) to r 238(2a). Rule 238(2a) provides that:

> "Heads of argument referred to in subrule (2) shall be filed by the respondent's legal practitioner [or applicant's legal practitioner as the case may be] not more than ten days after the heads of argument of the applicant or excipients [or respondent as the case may be] as the case may be, were delivered to the respondent in terms of subrule (1):
>
> H Provided that –

> (i) no period during which the court is on vacation shall be counted as part of A the ten day period;
>
> (ii) the respondent's heads of argument shall be filed at least five days before the hearing."

The correct interpretation of this provision was articulated by Makarau J (as she then was) in *Vera v Imperial Asset Management Co* 2006 (1) ZLR 436 (H). B At 437F-G the learned judge held as follows:

> "The operative part of the rule is not to be found in the proviso. It is in the main provision and is to the effect that the respondent is to file his or her heads of argument within 10 days of being served with applicant's heads. That is the immutable rule. However, in the event that the respondent has been served with the applicant's heads close to the set down date, he or she shall not have the benefit of the full 10 day period within which to file and serve heads stipulated C in the main provision but shall have to do so five clear days before the set down date. This is the import of the proviso to the main provision of the rule."

While in that case the court considered it in the interests of justice so as to avoid further costs and delays, exercised its discretion in terms of r 4C and granted the applicant a default judgment, in the instant case, despite Mr D *Mguni*'s attempt to cajole me to invoke r 4C, I have not been persuaded that doing so will be in the interests of justice. I say so because no reasons were proffered for filing the applicant's heads out of time and, more importantly, as already shown above, the matter has already been delayed more than is necessary. Surely a further delay will not be in the interests of justice. It is for that reason that I directed that the matter be heard on the merits with the E applicant having been barred.

On the merits, Miss *Nunu* submitted that the applicant in fact used a wrong procedure in bringing the application for provisional judicial management. As already stated above, the application to place the applicant under provisional judicial management order was made by way of an urgent F chamber application. Nowhere in the Companies Act [*Chapter 24:03*] is it provided that an application of this nature can be made via the chamber book. Sections 299 and 300 of the Act are apposite. They are clear in their wording that the application for judicial management shall be a court application. The sections provide:

> "*Judicial Management Instead of Winding Up* G
>
> 299 Circumstances in which provisional judicial management may be obtained
>
> (1) Subject to section *three hundred*, the court may –
>
> (a) on an application being made to it for such an order by any person who would be entitled to apply for the winding up of the company, grant a provisional judicial management order; or H

> (b) on A an application being made to it for the winding up of the company, grant instead a provisional judicial management order.
>
> (2) . . .
>
> 300 Requirements for provisional judicial management order
>
> The court may grant a provisional judicial management order in respect of a company

(a) on B an application referred to in paragraph (a) of subsection (1) of section *two hundred and ninety nine*, if it appears to the court –

(i) that by reason of mismanagement or for any other cause the company is unable to pay its debts or is probably unable to pay its debts and has not become or is prevented from becoming a successful concern; C and

(ii) that there is a reasonable probability that if the company is placed under judicial management it will be enabled to pay its debts or meet its obligations and become a successful concern; and

(iii) that it would be just and equitable to do so; or . . .”

In view of the foregoing statutory provisions, which admit of no other canon D of statutory interpretation except their ordinary grammatical meaning, it is clear that the correct procedure of obtaining a provisional judicial management order is not by way of a chamber application to a judge but by way of a court application. The provisions of Order 32 r 226(2)(a), which allow a chamber application where the matter is urgent and cannot wait to be resolved through E a court application, are not applicable *in casu* for the following reasons:

1. the application was made *ex parte*, yet in HC 3829/11 the other four interested parties therein were not served with it; and
2. the matter was, with respect, clearly not urgent since it is clear that the application was designed to shield Samuel Dube’s immovable property from being sold in execution and nothing else; and
3. the F application was also clearly designed to frustrate the second respondent who had obtained a judgment against the applicant and its fellow defendants as far back as November 2011 and a writ of execution in February 2012.

Summons was issued in April 2011 when the applicant had failed to pay its G debt to the second respondent. Surely if the need for judicial management became apparent at that time, the applicant would not have waited until 22 June 2012 to file the purported urgent *ex parte* chamber application for its placement under provisional judicial management.

Also, the fact that applicant instituted a chamber application instead of a H court application is fatal and r 229C(b) or 4C cannot come to the applicant’s

---

Mutema J

rescue because the second respondent was clearly prejudiced by the applicant’s A *mala fides* and is still being prejudiced. It is therefore not in the interests of justice to condone such non-compliance.

Another issue I am constrained to advert to at this juncture, which is closely connected with the above issue, relates to the incompetence of the order sought by the applicant, *viz.* to exonerate its directors and guarantors from B their personal liabilities. In its founding affidavit the applicant never stated the basis upon which liability against its directors and guarantors was founded and why action against them should be stayed. Those directors and guarantors did not file any supporting affidavits to the application but the applicant simply threw in a paragraph in the provisional judicial management order seeking to have the court grant them immunity from legal action, yet C *in casu* they are liable in their personal capacities.

Utmost good faith must be observed by litigants making *ex parte* applications in placing material facts before the court, so much so that if an order has been made upon an *ex parte* application and it appears that material facts have been kept back, whether wilfully and *mala fide* or negligently, which D might have influenced the decision of the court whether to make an order or not, the court has a discretion to set the order aside with costs on the ground of non-disclosure: *Civil Practice of the Supreme Court of South Africa* 4 ed by van Winsen, Cilliers and Loots p 367.

Had the material facts stated *supra* been disclosed to the court in the *ex parte* application, the court would, I believe, not have been hoodwinked into E granting an order that has no legal basis, namely that of granting immunity against legal action to directors and guarantors who had been found liable in their personal capacities. This court is therefore constrained to exercise its discretion and set aside the provisional order on that basis.

The other relevant issue to consider is whether there is a reasonable F probability that the applicant will be a successful concern. The requirements for confirmation of a provisional order for judicial management are provided for in s 305 of the Companies Act as follows:

"305 Return day of provisional judicial management order

(1)On the return day fixed in the provisional judicial management order, or on the day to which the court or a judge may have extended it, the court, after G considering –

(a) the opinion and wishes of the creditors and members of the company; and

(b) the report of the provisional judicial manager prepared in terms of section *three hundred and three*; and

(c) the number of creditors who did not prove claims at the first meeting of creditors and the amounts and nature of their claims; and H

2013 (1) ZLR p339

Mutema J

(d) the A report of the Master; and

(e) the report of the Registrar;

may grant a final judicial management order if it appears to the court that there is a reasonable probability that the company concerned, if placed under judicial management, will be enabled to become a successful concern and that it is just and equitable to grant such an order, or it may discharge the provisional judicial B management order or make any other order that it thinks just."

In *Feigenbaum and Anor v Germanis and Ors* 1998 (1) ZLR 286 (H) it was held that judicial management is an extraordinary procedure available to a company in special circumstances and for statutorily prescribed purposes and is only adopted when the court is satisfied that there is a reasonable C possibility that, if placed under judicial management, a company which is unable to pay its debts will be able to do so in full, meet its obligations and became a successful concern.

In *Tenowitz v Tenny Investments (Pty) Ltd* 1979 (2) SA 680 (E) Smallberger J clearly underscored the position at 685F-G when he said:

"Judicial management is clearly not an experiment to determine whether a D company can extricate itself from financial difficulties . . . and the fact that it would have to continue for at least a number of years before [it] could hope to pay its debts suggests that it is not capable of becoming a successful concern within a reasonable time."

The concept of judicial management is premised on the pedestal that a company has failed to be viable due to mismanagement which can be corrected E by a judicial manager. In the instant case, the applicant has not alleged mismanagement in its application. It alleged lack of capital, the liquidity crunch and competition. These are problems no judicial manager can arrest. The onus is on the applicant to show that the company's misfortunes can be turned around by a judicial manager. This onus can only be discharged F *inter alia* through the factors to be considered by the court which are listed in paras (a) to (e) in s 305(1) *supra*. In the instant case, none of all those factors was filed in this application and consequently the court is hamstrung in determining whether there is a reasonable probability that the applicant, if placed under judicial management, will be able to become a successful concern and that it is just and equitable to grant an order for judicial management.

G The above immediate finding brings me to the exercise of discretion reposed in the court by s 305(1) of the Companies Act that the court, on the return day "may discharge the provisional judicial management order or *make any other order that it thinks just*" (emphasis supplied).

Such other order includes a winding up order. Section 206 of the Companies H Act empowers a court to wind up a company where *inter alia* the company

---

2013 (1) ZLR p340

Mutema J

is unable to pay its debts or if the court is of the opinion that it is just and A equitable that the company be wound up. In *RAG (Pvt) Ltd v Huizenga NO* 1986 (2) ZLR 203 (S) the Supreme Court held that where a company is commercially insolvent, its winding up would be justified on the additional ground that it is just and equitable, if that is the only means by which a creditor can obtain payment. The discretion being dealt with here was also B exercised in the *Tenowitz* case *supra* where the court *inter alia* discharged a provisional judicial management order and substituted it with an order for provisional liquidation.

In casu the applicant has clearly been unable to pay its debt owed to the second respondent as far back as 2011. It has abused court process by employing several delaying tactics in an endeavour to

avoid payment. It C cannot be conscionable for the court to make a creditor wait so long before being paid by a dilly-dallying debtor. Where a company is unable to pay its debts, as is the position in the present case, an unpaid creditor has a right *ex debito justitiae* to have it placed in liquidation. It is just and equitable that the applicant be wound up.

In the result, I make the following order: D

> The provisional judicial management order granted by this court on 5 July 2012 and the order staying execution in respect of applicant's directors and guarantors be and are hereby discharged and be substituted with an order for the applicant's winding up. E

Hwalima, Moyo and Associates, applicant's legal practitioners

Mawere & Sibanda, c/o Calderwood, Bryce Hendrie and Partners, second respondent's legal practitioners F

© 2015 Juta and Company (Pty) Ltd.

Document 46 of 73

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2013/Volume 1/FORESTRY COMMISSION v CELL INSURANCE CO (PVT) LTD & ANOR 2013 (1) ZLR 341 (H)

FORESTRY COMMISSION v CELL INSURANCE CO (PVT) LTD & ANOR 2013 (1) ZLR 341 (H)

Citation	2013 (1) ZLR 332 (H)
Case No	Judgment No. HH-116-13
Court	High Court, Harare
Judge	Patel J
Heard	17 January 2013; *CAV*
Judgment	25 April 2013
Counsel	*T Mpofu,* for the first applicant *L Uriri,* for the second and third applicants
Case Type	Civil application
Annotations	No case annotations to date

Flynote

Insurance – *policy – claim – when claim must be made – notification given promptly of accident but claim submitted after 50 days – need for claim to be expeditiously lodged within reasonable period*

Insurance – *policy – renewal – renewal endorsement incorporating provisions* D *of original policy – policy thus subject to same terms and conditions as original – original policy requiring payment of premium before insurer obliged to indemnify insured – insurer signing endorsement after occurrence of accident but before payment of premium – insurer not liable*

Insurance – *premium – failure to pay – payment of premium a condition* E *precedent to provision of insurance cover – failure to pay premium prior to accident fatal to plaintiff's claim*

Headnote

In October 2008, the plaintiff insured its vehicle with the first defendant for a period of three months. On 24 December 2009, and shortly before the expiry period of the insurance, it wrote to the second defendant, its F insurance broker, requesting that the period of insurance be extended for a further two months. In answer thereto, the second defendant confirmed the extension of the policy until 28 February 2009. On 14 January 2009, the vehicle was involved in an accident. The plaintiff duly telephoned the second defendant the next day and gave him notice thereof. On 16 January 2009, it provided written notice of the accident and stated that G the claim documents would be submitted in due course. While both defendants were fully aware of the accident and the pending claim, it was only on 30 January 2009 that the plaintiff signed the endorsement extending the policy until 28 February 2009, and it was only on 6 February that the plaintiff paid the premium for the renewal period. Subsequently, H on 4 March 2009, the plaintiff submitted that requisite claim documents

to the first defendant. On 10 March, the second defendant, on behalf A of the first defendant, the insurer, wrote to the plaintiff repudiating the claim. It did so on the basis that premium had been paid after the loss had occurred and that the claim documents had been submitted after the permissible period of 30 days.

It was the plaintiff's submission that the contract of insurance did not require B the premium to have been paid to be fully effective. The defendants, on the other hand, relied upon the precise wording of the original written contract which was incorporated into the extended agreement between the parties. This provided that in ". . . consideration of the Insured having actually paid the premium for the period of the insurance . . . the Insurers agree to indemnify the Insured in respect of accident loss or damage C occurring during the period of insurance". In so far as the second point was concerned, the original written contract, incorporated into the extended agreement, required that written notice of loss or damage had to be provided to the first defendant as soon as possible after its occurrence. While the requirement only related to the notification of the D loss or damage and not to the submission of the relevant documents, the defendants argued that all such documents had to be provided to the insurer within a reasonable period thereafter. Submission of the relevant documents after a period of nearly fifty days was, they argued, excessive.

Held, that although an insurance contract requires no special form and comes E into existence as soon as the parties have agreed on its terms and without any premium having been paid, *in casu* the contract was governed by the terms of the original written contract which had been incorporated into the extended contract. This required the payment of the premium as a condition precedent to the provision of insurance cover. An insurance contract subject to a condition precedent cannot be enforced before the F fulfilment of the condition. After that condition is fulfilled, the contract operates prospectively. What existed between the parties as at the date of the accident was not a contract of insurance, but a contract to insure, subject to the payment of premium by the plaintiff as a condition precedent to the first defendant's obligation to indemnify. This obligation only G materialised once the premium had been paid and then only in relation to any accident, loss or damage that occurred thereafter. The failure to pay premium before the accident was therefore fatal to the plaintiff's case.

Held, further, dismissing the plaintiff's claim with costs, that in any event the documents had not been given to the defendants within a reasonable period as required by the insurance contact, as extended. It should have H

A been possible to have submitted such documents within 30 days of the accident.

Cases cited

Malaba v Takangovada 1991 (1) ZLR 1 (H)

National Employers' Mutual General Ins Assn Ltd v Myerson 1938 TPD 11

B *Ndawana v Nasho & Ors* 2000 (1) ZLR 23 (H)

Radar Holdings Ltd & Anor v Eagle Insurance Co Ltd 1998 (1) ZLR 479 (H)

Robinson v Randfontein Ests GM Co Ltd 1925 AD 173

Shill v Milner 1937 AD 101

Wamambo v General Accident Insurance Co (Zimbabwe) Ltd 1997 (1) ZLR 299 (H) C

Case information

L Uriri, for the plaintiff

T Mpofu, for the defendants

Judgment

Patel J: This matter concerns an insurance claim arising from an accident D involving one of the plaintiff's motor vehicles. The plaintiff seeks a declaratory order that its insurance cover with the first defendant was effective and operational as from 1 January 2009. It further seeks an order for the first defendant to meet its claim, submitted on 4 March 2009, within 14 days of judgment.

E At the commencement of suit, the plaintiff had also claimed consequential loss arising from the non-use of its vehicle. However, this claim was abandoned at the trial because the relevant documents had not been duly discovered. The summons and declaration were accordingly amended by consent.

The first issue for determination is whether there was a contract of insurance between the parties at the time when the plaintiff suffered its loss. The second F issue is whether payment of the premium for the period of insurance was a condition precedent for insurance cover. The final issue is whether the plaintiff's claim was submitted within a reasonable time.

The evidence

Webster Tendai Choruma is employed as an accountant at the plaintiff's G headquarters. He is responsible for the plaintiff's group insurance portfolio. His evidence was as follows. The plaintiff entered into a contract of insurance with the first defendant (Policy No. MFHR000953), brokered through the second defendant, for the period from 1 October to 31 December 2008. Thereafter, following a letter from the plaintiff to the second defendant on H 24 December 2008, the insurance policy was extended for a further two

---

months from 1 January to 28 February 2009. This was confirmed by a letter A from the second defendant dated 6 January 2009. Subsequently, the plaintiff received an endorsement to the policy covering the renewal period. This was signed on behalf of the first defendant on 30 January 2009. The premium of US$4250 for the renewal period was paid on 6 February 2009.

The accident involving the plaintiff's Toyota Hilux (registration number B ABE 5753) occurred on 14 January 2009. The witness telephoned the second defendant the next day and followed up with a letter on 16 January 2009 giving notice of the accident. The relevant claim documents, including three quotations for repairs, were then submitted on 4 March 2009. This was because the driver of the vehicle had damaged his right arm and was hospitalised. He was only available to complete the claim form after his C release from hospital in late February 2009. On 19 March 2009 the second defendant wrote to the plaintiff repudiating the claim on the grounds that the premium was paid after the loss had occurred and that the claim papers had been submitted after the permissible period of 30 days.

Under cross-examination, the witness was shown several documents and D asked to explain them. On 16 January 2009 the plaintiff wrote to its bank in Bulawayo applying for the transfer of foreign currency to renew its motor insurance policy. He stated that the plaintiff had previously made the same application, on 13 January, to its bank in Harare. The police report in respect of the accident was date-stamped 20 November 2008 and shows that the driver paid a deposit fine for driving without due care and attention. He explained E that the date-stamp was clearly wrong but conceded that the insurer's consent was not obtained before the admission of guilt was made. He also accepted that the claim form itself was completed and signed by the driver (Nkomo) on 5 February 2009 but the claim papers were only submitted on 4 March 2009. When questioned by the court, the witness was unable to satisfactorily explain why he obtained two further quotations for repairs to

the same vehicle F in November 2009. These quotations were for figures that were less than half the amount of US$28 690 originally claimed by the plaintiff.

Charles Makirimani is the managing director of the second defendant and has been an insurance broker for 14 years. He testified as follows. In terms of the policy of insurance between the parties, and the endorsement thereto, G insurance cover only began after the premium was paid. Similarly, the extension of the policy was also subject to payment of the premium. This was normal practice at that time. Where a claim is submitted, what is required are a claim form, three repair quotations, a copy of the driver's licence and a police report. Under normal circumstances, it should be possible to notify the accident within seven days and to submit the claim papers within 30 H

Patel J

A days. This accords with prevailing practice in the insurance industry. In exceptional circumstances, it might take longer to submit the claim. In this case, the delay of 48 days after the accident and 26 days after the claim form was completed was unreasonable. The only inference one could draw is that the plaintiff was waiting for the required foreign currency amount to be reflected in its bank account. The letters of 13 and 16 January 2009 from B the plaintiff to its bank, requesting the transfer of foreign currency, were not stamped by the bank and were therefore probably not authentic. In March 2009 the plaintiff submitted three quotations for repairs to the vehicle. The second set of quotations obtained by the plaintiff in November 2009 was never submitted to the second defendant. It was not clear why they were C attached to the plaintiff's further particulars filed in May 2010.

Under cross-examination, the witness conceded that the premium of US$4 250 received by the defendants related to the full two-month period of insurance. The witness also accepted that the endorsement to the original policy covered the entire period of insurance and was signed by the first defendant on 30 D January 2009. As at that date, the second defendant was aware that the plaintiff had given notice of the accident on 16 January. In turn, the second defendant would have notified the first defendant within a week, *i.e.* by 23 January. Both defendants were therefore aware of the accident when the first defendant signed the endorsement on 30 January.

E **The established facts**

As shown by the evidence adduced at the trial, the following facts are common cause. The plaintiff wrote to the second defendant on 24 December 2008 requesting an extension of the original policy of insurance. By letter dated 6 January 2009, the second defendant confirmed the extension of the F policy. The accident involving the motor vehicle in question occurred on 14 January 2009. The plaintiff telephoned the second defendant the next day to give notice of the accident. The plaintiff then followed up with a written notification on 16 January 2009 stating that the claim documents would be submitted in due course. Thereafter, on 30 January 2009, the first defendant signed an endorsement renewing the policy as from 1 January G 2009 to 28 February 2009. At that stage, both defendants were fully aware of the accident *in casu* and of the pending claim. On 6 February 2009, the plaintiff paid the premium of US$4 250 for the renewal period. Subsequently, on 4 March 2009, the plaintiff submitted the requisite claim documents. Eventually, on 19 March 2009, the second defendant wrote to the plaintiff H repudiating the claim.

Patel J

Contract of insurance at time of loss A

It is evident from the foregoing that, before the accident in question, the original policy of insurance had been extended by the second defendant. The renewal of the policy was confirmed by the first defendant after the accident but before the stipulated premium was paid. Thus, subject to what is stated below, it is reasonably clear that there was a contract of insurance B between the parties in place at the time when the plaintiff suffered its loss. What is in dispute is whether the obligations of the first defendant under that contract were subject to the prior payment of premium by the plaintiff.

Payment of premium as condition precedent for cover

Mr *Uriri*, for the plaintiff, makes two differing submissions in this regard. C The first is that the condition requiring the payment of premium had already been met under the original policy and did not apply to the renewed policy after it was extended by the second defendant. This is because an insurance contract requires no special form and comes into existence as soon as the parties have agreed on its terms, without any policy having been issued or D any premium having been paid. The second is that the first defendant agreed to extend the policy with full knowledge that the accident had occurred during the period of insurance. It is therefore estopped from relying on facts entitling it to repudiate, i.e. non-payment of the premium. Consequently, it must be held to have undertaken to cover the claim in question. Counsel E relies for these submissions on Gordon and Getz *The South African Law of Insurance* 4 ed (1993) at 133-4 and 152.

While there may be some merit in these submissions, they ignore one critical aspect of all contractual relations, to wit: what the parties have actually agreed. As the learned authors themselves explain, at pp. 133-4: F

> "Neither the issue of a policy nor the payment of a premium is essential to the conclusion of the contract, *unless the parties have expressly or impliedly agreed to the contrary*" (the emphasis is mine).

The plaintiff's case is founded on the endorsement signed by the first defendant on 30 January 2009. This clearly covers the date of the accident in question G within the agreed period of insurance. However, the endorsement, which operated to renew the insurance policy, explicitly incorporates and forms part of the original policy. Therefore, it cannot be doubted that it is governed by the provisions of that policy. In other words, the policy as renewed is subject to the same terms and conditions as applied to the original policy. In terms of the preamble to that policy: H

Patel J

> A "In consideration of the Insured having actually paid the premium for the period of insurance . . . the Insurers agree to indemnify the Insured in respect of accident loss or damage occurring during the period of insurance".

Taken in its ordinary and unadorned sense, what this means is that the insured must have actually paid the premium for the period of insurance B in order to be indemnified for any loss or damage that occurs during that period. In short, the payment of premium is clearly a condition precedent to the provision of insurance cover.

The fact that the endorsement renews the policy for the entire period of insurance does not assist the plaintiff's case. As was recognised in *Malaba v Takangovada* 1991 (1) ZLR 1 (H) at 4-5, a contract of sale subject to C a condition precedent that has not been fulfilled cannot be regarded as a sale; no sale exists until fulfilment of the suspensive condition. By parity of reasoning, an insurance contract subject to a condition precedent cannot be enforced before the fulfilment of the condition. After that condition is fulfilled, the contract operates prospectively. In *National Employers' Mutual* D *General Insurance Association Ltd v Myerson* 1938 TPD 11 at 15, the court was called upon to interpret a clause similar to the one presently under consideration. It was held that:

> "It is not contended on the appellant's behalf that these documents constitute a contract of insurance, but merely a contract to insure, and if this be correct the E so-called premium is the consideration (a) for the promise to insure if the event, namely the payment of the premium, takes place and (b) for the subsequent insurance."

Thus, in the instant case, what existed between the parties as at the date of the accident was not a contract of insurance *sticto sensu*. It was essentially a contract to insure subject to the payment of premium by the plaintiff as a F condition precedent to the first defendant's obligation to indemnify. Moreover, this obligation only materialised once the premium had been paid and then only in relation to any accident, loss or damage that occurred thereafter. It follows that the plaintiff's claim for a *declaratur* and consequent relief cannot be sustained.

G In any event, I should add that the relief sought by the plaintiff is questionable on the further ground that the amount it originally claimed in March 2009 was US$28 690. This is more than double the amount reflected in the repair quotations that it subsequently obtained in November 2009. This aspect was not satisfactorily explained by the plaintiff's witness in his testimony and H not addressed at all by plaintiff's counsel in his closing submissions.

Patel J

Submission of claim in reasonable time A

Although the final issue seems redundant in view of the above conclusion, I think necessary to deal with it for the sake of completeness. In this regard, the undisputed facts are as follows. The accident *in casu* occurred on 14 January 2009. The plaintiff gave notice of the accident by telephone the next day and in writing on 16 January 2009, stating that the claim forms B would follow in due course. Coincidentally, on the same day, the plaintiff wrote to its bank applying for the transfer of foreign currency to renew the insurance policy. The claim form was signed by the plaintiff's driver on 5 February 2009. The full premium of US$4 250 was paid on 6 February 2009. Eventually, on 4 March 2009, the plaintiff submitted the claim form C with the necessary supporting documents.

The relevant conditions incorporated in the original policy are clauses 1 and 12. Clause 1 stipulates that notice in writing of any accident, loss or damage must be given to the insurer as soon as possible after its occurrence. Clause 12 exempts the insurer from any liability after the expiration of 12 months from the happening of the event, unless the claim is the subject of D any pending action or arbitration.

It is clear that the policy itself only deals with notification of an accident and not the submission of claim documents. Does this mean, as is contended by Mr *Uriri*, that once notice of the accident is duly given, the insurer is liable to satisfy any subsequent claim made within 12 months? It seems to me, E however, that the relevant case authorities lean heavily against any such contention. The purpose of immediate written notification is to enable the insurer to investigate the matter quickly in order to obviate the perpetration of any fraud or forgery. In this context, the claim itself should be expeditiously lodged within a reasonable period. See F *Wamambo v General Accident Insurance Co (Zimbabwe) Ltd* 1997 (1) ZLR 299 (H); *Radar Holdings Ltd & Anor v Eagle Insurance Co Ltd* 1998 (1) ZLR 479 (H); *Ndawana v Nasho & Others* 2000 (1) ZLR 23 (H).

According to the uncontested testimony of the second defendant's witness, the documents that need to be furnished for the purpose of making a claim G are the claim form, three quotations for repair work, a copy of the driver's licence and a police report. Under normal circumstances, in keeping with prevailing practice in the insurance industry, it should be possible to notify the accident within seven days and to submit the claim documents within 30 days. However, in exceptional circumstances, it might take longer to submit the claim. H

Patel J

A In the instant case, having regard to the relative practicability of the steps required, the documents furnished by the defendant could have been obtained and forwarded within two weeks. Instead, they were furnished almost 50 days after the occurrence of the accident in question. The reason given for this delay is that the driver of the vehicle had fractured his right arm and was only available to complete the claim form after his release from hospital B in late February 2009. It seems to me that this explanation tendered by the plaintiff's witness is no more than a tissue of lies. It does not appear in the plaintiff's pleadings and was put forward for the first time at the trial. No plausible explanation was given as to why the claim form could not have been completed or signed by someone else on behalf of the driver. Moreover, C the fact that the driver himself completed and signed the claim form on 5 February 2009 utterly belies the allegation that he was hospitalised until late February 2009. Again, the plaintiff's witness was unable to explain why further repair quotations for considerably lesser amounts were obtained over 8 months after the claim papers were submitted. All in all, taking into account all the surrounding circumstances, I am satisfied that the delay in D submitting the claim documents was unreasonably inordinate. It follows that the plaintiff's claim was not submitted within a reasonable time.

The plaintiff's reliance on clause 12 of the policy conditions does not detract from this conclusion. That clause is a prescriptive provision which precludes any court action or arbitration beyond the stipulated period of 12 months. E It does not assist the plaintiff in advancing its contention that its claim was submitted within a reasonable time.

Disposition

One outstanding issue pertains to the additional defence put forward by Mr *Mpofu* at the trial. This arises from clause 2 of the policy conditions, which F prohibits any admission by or on behalf of the insured without the consent of the insurer. It was conceded by the plaintiff's witness that its driver had admitted to driving without due care and attention without obtaining the first defendant's consent. Ordinarily, this would operate to disentitle the plaintiff from making any claim.

It is fairly well established that, where a relevant issue of fact or law is not G pleaded but is adequately canvassed at the trial, the court is not strictly bound by the pleadings and has the discretion to take it into account in making its determination. However, the exercise of this discretion is always subject to the limitation that any such departure from the pleadings should not cause any prejudice to either party or prevent full enquiry. See *Robinson v* H *Randfontein Estates GM Co. Ltd* 1925 AD 173 at 198; *Shill v Milner* 1937

Patel J

AD 101 at 105. In the present matter, an amendment to the plea at the trial A stage, advancing an entirely new defence founded on the driver's admission of guilt, would undoubtedly occasion prejudice to the plaintiff. In any event, having regard to my findings and conclusions on the agreed issues for determination, I take the view that the proposed amendment is superfluous and entirely unnecessary at this stage in the proceedings.

For all of the afore-stated reasons, the plaintiff's claim for a declaratory order B and consequential relief cannot succeed. Its only remedy might be to seek a proportional refund of the premium paid in respect of the period for which it was unindemnified. I note that an offer to that effect was in fact made by the second defendant through its letter dated 12 June 2009.

As for costs, there is no reason *in casu* why costs should not follow the cause C in the ordinary way. In the result, the plaintiff's claim is hereby dismissed with costs.

Dube Manikai & Hwacha, plaintiff's legal practitioners

Mbidzo Muchadehama & Makoni, defendants' legal practitioners D

© 2015 Juta and Company (Pty) Ltd.

Document 47 of 73

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2013/Volume 1/NYAMANGUNDA v MASHONALAND TURF CLUB 2013 (1) ZLR 351 (H)

NYAMANGUNDA v MASHONALAND TURF CLUB 2013 (1) ZLR 351 (H)

Citation	2013 (1) ZLR 351 (H)
Case No	Judgment No. HH-125-13
Court	High Court, Harare
Judge	Mangota J
Heard	25 April 2013
Judgment	25 April 2013
Counsel	*T Mawere,* for the applicant *T S Manjengwa*, for the respondent
Case Type	Application for upliftment of bar

Annotations No case annotations to date

Flynote

C **Legal practitioner** – *conduct and ethics – duty – to court – duty to assist court to arrive at real and substantial justice*

Legal practitioner – *conduct and ethics – duty – to exercise professional competence and diligence – failure to do so – when client should be penalised for such failure*

D **Practice and procedure** – *rules – compliance with – failure by legal practitioner to comply with rules due to incompetence – extent to which client should be penalised for such failure*

Headnote

A party which engages the services of a legal practitioner generally reposes E its trust and confidence in its legal practitioners to perform, on its behalf, all necessary work which must be performed as and when such work is due. The party does not, for instance, know that there are time lines within which certain actions must be carried out in litigation; that there are rules which guide and govern the operations of the court particularly such matters as the issuance, servicing and/or filing of court process; F or that failure to comply with the rules of court can be fatal to its case.

Those who are trained in the law, legal practitioners, do know or, at the very least, are presumed to have knowledge of all of the abovementioned and, indeed, many more matters which relate to litigation. The question which begs an answer is this: should a party which engages a legal practitioner who makes serious technical blunders in the course of prosecuting the G case of, or defending, his client be penalised for the obvious mistakes of its legal practitioner(s)? Put differently, that question is: should the sins which a party's legal practitioners commit be visited upon the party itself? The answer to that question depends on the circumstances of each case. Generally, the answer is in the affirmative. That is so in situations where H a party's case is hopelessly devoid of merit. Where, however, a party's

Patel J

case seems, on the face of it, to command some merit, the interests of A justice would best be served if the court makes a conscious distinction between the sins of a party's legal practitioners, which sins arise out of the practitioners' cavalier approach to the work of their client, and the substance of the party's case as a whole. The duty of the court is not to always allow parties to hinge their cases on technicalities. Its sworn B duty is to dispense real and substantial justice.

This is not to suggest that the rules of court should be taken lightly or ignored by litigants. Those rules are so important that a party whose case is before the court must always make every effort to comply with them for its own benefit. The court put the rules in place as a way of ensuring that its work operates in a smooth and clearly defined manner. The rules C assist the parties to move their respective cases forward leading to a speedy resolution of disputes. It follows that non-observance of, or non-compliance with, the rules of court by a party does, as a general rule, lead to that party's case falling. That is particularly so where a party's case, viewed holistically, is, on the face of it, hanging on nothing. Where, D however, a party's case, taken as a whole, appears to be substantially strong, an injustice would have been visited upon the party which has, out of the inadvertence of its legal practitioners, failed to observe, or to comply with, this or that rule of court if the court were to allow the case to fall on the basis of those procedural failures.

Litigation is not like a game of chess. It is not a game where one party makes E a conscious and deliberate decision to ambush the other and, as it were, catch it unawares. The duty of counsel, as an officer of the court, is to protect the interests of its own client and to assist the court to arrive at real and substantial justice in any matter which is before the court.

Case information

T Mawere, for the applicant F

T S Manjengwa, for the respondent

Judgment

Mangota J: This is an application for the upliftment of a bar which the respondent imposed against the applicant.

History of the case G

On 13 March 2012, the respondent (plaintiff in the main case) issued summons against the applicant (defendant in the main case) claiming:

(a) an order for the eviction of the respondent and all those occupying through her from the property known as Zimbabwe Betting and Sports at the Borrowdale Park race course; and H

Patel J

A (b) payment of costs of suit.

On 10 April 2012 the applicant entered appearance to defend and, on 8 May 2012, the applicant filed a request for further particulars.

The respondent refused to furnish the applicant with further particulars. It communicated its refusal in this mentioned regard through a letter which it B addressed to the applicant on 9 May 2012.

On 5 June 2012 the respondent filed with the court, and served upon the applicant, a notice to plead and an intention to bar. The notice gave the applicant five days within which it had to file its plea to the respondent's claim, failing which the respondent would file a copy of the notice with the C Registrar as a bar. The applicant did not file its plea within the stipulated five days and, on 13 June 2012, the respondent placed a bar against the applicant. It is this bar which is the subject of these proceedings.

Analysis of the case

In its application for the upliftment of the bar, the applicant did not give a D complete story of the matter. It attached to its application a document, Annexure B, which related to its request for further particulars. That document, read alone, would not assist anyone who is dealing with the matter to appreciate the circumstances which surrounded the applicant's request for further particulars. For instance, one needs to know whether or not the request which the applicant made was a genuine attempt on its part to have issues E placed in their clear perspective and, in the process, assist it in its pleading to the respondent's claim.

The need to have a clear position of the matter prompted me to call for the record which related to the main case. My intention was to examine the present application in a holistic, as opposed to an isolated or piecemeal, F manner which would do not justice, but injustice, to the parties whose case had been placed before me for consideration. I had, in short, to convince myself, without going into the merits of the main case, that:

- the applicant's request was not frivolous and/or vexatious; and
- the present application is not devoid of substance or merit.

G The applicant made a number of technical blunders which, taken from a superficial point of view, tend to dent its case in a very serious way. For the avoidance of doubt, I state some of the blunders hereunder as follows:

(i) the applicant entered appearance to defend on 10 April 2012 and it made its request for further particulars on 8 May 2012, which is a period of 20 H working days after its initial action. It did not proffer any explanation

Patel J

for this delay and one is left to wonder as regards the fact of what the A cause of the delay was.

(ii) the applicant became aware of the respondent's attitude to its request for further particulars during the period which extends from 10-15 May 2012. The exact date remains unknown. What is known, however, is that the applicant became aware, within that stated period of time, B that the respondent had refused to furnish it with further particulars. That knowledge on its part notwithstanding, the applicant, for some unexplained reasons, refrained from seeking to enforce its rights in terms of r 142(b) of the Rules of this court. The rule, in part, reads:

"If a party applies for particulars, the time for replying to the pleading of which particulars are sought shall be calculated – C

(a) . . .

(b) where the particulars are refused and the *applicant fails to make a court application for an order* within . . ." (my italics).

The rule shows, in a clear and unambiguous language, that a party which requires the other party to furnish it with further particulars has D every right to approach, and request, the court to compel the refusing party to furnish it with the particulars which it requires to enable it to plead. The applicant gave no explanation at all for its failure to invoke the provisions of this rule which, to all intents and purposes, was, and is, for its own benefit.

(iii) On 5 June 2012 the respondent served the applicant with the notice to E plead and intention to bar. The notice in question reached the applicant's legal practitioners at about 12 midday on its date of issue as well as service. The applicant remained unaware of the notice from the date it was served upon it right up to 28 June 2012 when, according to the applicant's legal practitioner, one Tatenda Mawere, the respondent's legal practitioners alerted him to the notice. What this means is that the F notice was in the offices of the applicant's legal practitioners' law firm for 16 working days without being acted upon.

The dilatory manner in which the applicant's legal practitioners handled their client's case is inexcusable. If the applicant is made to suffer, it will endure the suffering, not because of its own action or conduct, but because G of its legal practitioners' cavalier approach to their work. The ripple effect of this analysed set of circumstances is that the applicant's choice of legal practitioners amongst many which are within, and outside, the jurisdiction of this court causes it to endure the suffering, if it will. Its legal practitioner, Tatenda Mawere, who deposed to an affidavit in support of the present application, laid the entire blame on the applicant's lawyers for the mishap H

A which pertained to matter of the notice to plead and intention to bar. One would not stop at that, but would go further and assert that the applicant's firm of legal practitioners cannot excuse themselves at all in respect of *all* the three matters which the court has had occasion to observe. That is so because a party which engages the services of a legal practitioner generally does repose its trust and confidence in its legal practitioners to perform, on B its behalf, all necessary work which must be performed as and when such work is due. The party does not, for instance, know that:

- there are time lines within which certain actions must be carried out in litigation; or
- there are rules which guide and govern the operations of the court, C particularly such matters as the issuance, servicing and/or filing of court process; or
- failure to comply with the rules of court can be fatal to its case.

Those who are trained in the law, legal practitioners, do know or, at the very least, are presumed to have knowledge of all of the abovementioned and, D indeed, many more matters which relate to litigation. The question which begs the answers is: should a party which engages a legal practitioner who makes serious technical blunders in the course of prosecuting the case of, or defending, his client be penalised for the obvious mistakes of its legal practitioner(s)? Put differently, that question is: should the sins which a party's legal practitioners commit be visited upon the party itself? The answer to E that question does, and should, in my view, depend on the circumstances of each case. Generally, the answer is in the affirmative. That is so in situations where a party's case is hopelessly devoid of merit. Where, however, a party's case seems, on the face of it, to command some merit, the interests of justice would best be served if the court makes a conscious distinction F between the sins of a party's legal practitioners, which sins arise out of the practitioners' cavalier approach to the work of their client, and the substance of the party's case as a whole. The duty of the court is not to always allow parties to hinge their cases on technicalities. Its sworn duty is to dispense real and substantial justice.

The foregoing does not, in any way, suggest that the rules of court should G be taken lightly or ignored by litigants. Those rules are so important that a party whose case is before the court must always make every effort to comply with them for its own benefit. The court put the rules in place as a way of ensuring that its work operates in a smooth and clearly defined manner. The rules assist the parties to move their respective cases forward leading to a H speedy resolution of disputes. It follows from this set of circumstances that

---

non-observance of, or non-compliance with, the rules of court by a party does, A as a general rule, lead to a party's case falling. That is particularly so where a party's case, viewed holistically, is, on the face of it, hanging on nothing. Where, however, a party's case, taken as a whole, appears to be substantially strong, an injustice would have been visited upon the party which has, out of the inadvertence of its legal practitioners, failed to observe, or to comply B with, this or that rule of court if the court were to allow the case to fall on the basis of those procedural failures. The present matter is one such case where the applicant's legal practitioners made some errors which, viewed in isolation, tend to make the applicant's case an inexcusable one.

As was stated in the foregoing paragraphs, the complexity of the matter and the need on my part to appreciate the circumstances of this case prompted me C to call for the parties' record in the main case. That record was duly provided and I went through its contents. In particular, I focused my attention on the respondent's declaration. I did so as I remained alive to the fact that the declaration forms the substance, or the basis, of the respondent's cause of action. On going through it, and without applying much effort to what was D contained in the declaration, I realised that its contents raised more questions than answers. I realised, further, that the declaration, as read together with annexure J, made it very difficult, if not impossible, for one to ascertain the exact relationship which the parties to this case had created between themselves. Annexure J is the letter which the respondent, through its legal practitioners, wrote to the applicant's legal practitioners on 17 November E 2009. The applicant filed that letter as an annexure in support of its application. The letter, *in extenso*, reads:

> ". . . our client's position as outlined earlier on in the proceedings HC 253/08 and our subsequent letter of 20 April 2009. Your client had the right to occupy the portion described as the area extending from the middle of the eastern side F of the shop floor rectangular in shape, together with the adjoining offices in the built up area of ZBS measuring approximately 35 m2. This is as per the attached shop floor illustration. Your client's right of occupation was on the basis of a sublease with the then substantive tenant Lunar Graphics (Pvt) Ltd which our client ratified. As far as our client is concerned, when it terminated the substantive tenants' lease, *your client's right was also terminated* and your G client remained in occupation without our client's consent.
>
> Our client has, since June 2009, entered into another lease with the former substantive tenant who has authority over the whole premises, 360 m2 in size. As Lunar Graphics are the tenant for the whole premises, if your clients want to regularise their position, they will have to approach Lunar Graphics, *for our client cannot purport to lease out a portion of what they have already leased to Lunar Graphics.* H

> A What our client can only do is, if it is in Lunar Graphics' best interests and their best interests, ratify any agreement of sublease that your client may be granted as they have done previously. They reiterate that they are not due any rentals from you, but from Lunar Graphics, and if you intend to compensate anyone for your unilateral occupation, then it has to be Lunar Graphics.
>
> It remains that our client as Lunar Graphics' landlord has an obligation to ensure B peaceful enjoyment of the whole leased premises and if your client's position is not regularised within a reasonable time, *they will have no option but to institute proceedings to evict your client from the premises*."

The contents of the letter, annexure J, spells in a clear and succinct manner that there was, or is, no privity of contract between the applicant and the respondent. The declaration, on the other hand, tends to suggest that the C applicant was, or is, the tenant of the respondent. Howard Mukundu, who is the respondent's operations executive, deposed to an affidavit in opposition to the application. His affidavit left the matter which related to para 21.7 of Tatenda Maware's affidavit totally unanswered. Yet it is within the context of that paragraph that annexure J was made part of this application. Paragraphs 16, 17, 18 and 19 of Mr Mukundu's affidavit confused the issues further than D where the declaration and annexure J had left them. He states, in para 16 of his affidavit, that the

issues surrounding the dispute between the parties centred on the fact whether the applicant was a tenant or subtenant. He goes on to state that the tender of rentals and subsequent acceptance of such tender by the respondent meant the formalisation of a landlord and tenant relationship. E He states, further, and in the same paragraph that after the acceptance of the tender, the applicant was obliged to perform in terms thereof. All this and many other observed matters which have not been specifically mentioned run contrary to the letter and spirit of the contents of annexure J, where the respondent stated, in clear and an ambiguous language, that there is no privity of contract between the applicant and the respondent. The import of F the last sentence of annexure J is that it is Lunar Graphics (Pvt) Ltd and no one else who has the right to evict the applicant. Such matters as these are probably the reasons which prompted the applicant to request the respondent to furnish it with further particulars.

Accepting, as we must, that there is no privity of contract between the parties, G the issue of the respondent's *locus standi* in the case cannot be glossed over, let alone be ignored. The relationship of the parties, it has been observed, is not as clear as the respondent seems to suggest. It is clouded with many interlocking matters which, in the interests of real and substantial justice, would have been cleared by the respondent furnishing the applicant with the particulars which the latter had requested. The answers which the respondent H was going to give would, in all probability, have assisted the parties to clarify

---

Patel J

and define the relationship which existed, and exists, between the parties. The A respondent was accordingly not being reasonable when it refused to furnish the applicant with answers to the questions which it had posed in the form of an application for further particulars. Counsel who are seized with this matter know, as much as I do, that litigation is not like a game of chess. It is not a game where one party makes a conscious and deliberate decision to B ambush the other and, as it were, catch it unawares, so to speak. It requires little, if any, emphasis to state that the duty of counsel, as an officer of the court, is to protect the interests of its own client and to assist the court to arrive at real and substantial justice in any matter which is before the court.

Counsel submitted heads of argument in support of their respective positions. They drew my attention to a number of authorities in an effort to persuade me C to go with the one, or the other, party's view. I commend counsel's effort in this mentioned regard. The authorities which they cited did not only enrich my understanding, but they also widened my knowledge, of the law. Those authorities did not, however, assist in the resolution of the matter with which I am currently seized. D

It has been observed that this case requires further ventilation of issues. The ventilation would assist the parties to define the relationship which exists between them. That clarified position will be of benefit to the parties themselves as well as to the court which will deal with the main case.

On 8 May 2012 the applicant made, and filed with the court, a formal application for further particulars. It did so as it realised that there were issues which E required clarification for its own benefit as well as that of the respondent and, more importantly, the court. The respondent unreasonably refused to furnish the applicant with the particulars which it had requested. From the time of the respondent's refusal to furnish the requested particulars to date, the parties went on what I may refer to as a wild goose chase, with one party making F every effort to knock the other down on procedural technicalities, which exclude the substance of the case, and the other putting up a spirited fight in an effort to remain in the boxing ring, if you may favour the comparison. The net effect of all this was that a lot of time was unnecessarily wasted when it could have been served for the benefit of the court which was, or is, dealing with the main case and the parties themselves. G

Conclusion

I have, in the circumstances of this case, as well as in the interests of justice and the need for the case to move forward, no option but to invoke the provisions of r 4C of the Rules of this court and order that:

(i) The bar which operates against the applicant be, and is hereby lifted, H

Patel J

(ii) Within A five days of its receipt of this order, the respondent furnishes the applicant with the particulars which it sought from it on 8 May 2012;

(iii) Thereafter, the matter be, and is hereby, allowed to proceed in terms of the rules of this court.

(iv) Each party bears its own costs.

Mawere B *& Sibanda*, applicant's legal practitioners

Wintertons, respondent's legal practitioners

© 2015 Juta and Company (Pty) Ltd.

Document 48 of 73

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2013/Volume 1/S v MARIPFONDE & ANOR 2013 (1) ZLR 361 (H)

S v MARIPFONDE & ANOR 2013 (1) ZLR 361 (H)

Citation	2013 (1) ZLR 361 (H)
Case No	Judgment No. HB-81-13
Court	High Court, Bulawayo
Judge	Mutema J
Heard	25 April 2013
Judgment	25 April 2013
Counsel	Details not supplied
Case Type	Criminal review
Annotations	No case annotations to date

Flynote

Criminal law – *offences under Criminal Law Code – unlawful entry into* C *premises and theft from those premises – correct way to charge such offence – not competent to charge unlawful entry and theft as separate offences*

Headnote

The two accused were each charged with four counts, each framed as D contravening s 131, as read with s 113, of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] – unlawful entry into premises and theft. The allegations were that on four occasions each accused unlawfully entered the complainant's dormitories and stole property. They were both found guilty. The first accused had a previous conviction and so E was sentenced to two years' imprisonment. The second accused was sentenced to one year's imprisonment.

Held, that s 113 and 131 of the Act created two separate, stand alone, offences of theft and unlawful entry into premises, respectively. Neither of these two crimes could be read one with the other, as used to be done in the old offence called housebreaking with intent to steal and theft. That F

offence had now been codified into two stand alone offences. It was accordingly procedurally both wrong and incompetent to charge one as read with the other. Where a person unlawfully enters premises and steals property therefrom, the aspect of theft remains encompassed in s 131 and should not be ascribed separately to s 113. The clear meaning G of s 131 was that where the accused unlawfully enters into premises and steals property therefrom and the premises are a dwelling house, or if the accused knew that there were people in the premises, or if the accused carried a weapon or used violence against anyone in effecting the entry, there was absolutely no procedural legal justification for charging the accused with two separate offences of unlawful entry into premises and H

A theft. The proper charge was simply one of unlawful entry into premises in aggravating circumstances, in contravention of s 131(1)(a), as read with subs (2)(a), (b), (c) or (d) of the Code, in respect of each count.

Legislation considered

Criminal Law (Codification and Reform) Act [*Chapter 9:23*], ss 113 &131

B Criminal Procedure and Evidence Act [*Chapter 9:07*], s 327

Judgment

Mutema J: This matter emanated from Mvurwi and found its way to my desk via the automatic review process. I discerned a number of irregularities which prompted me to write to the trial magistrates thus:

C "Two issues are of concern to me:

1. The two accused persons were each charged with four counts with each count framed thus: 'charged with contravening s 131 as read with 113 of the Criminal Law Codification and Reform Act [*Chapter 9:23*] "Unlawful entry into premises and theft.' The allegations were that on four occasions each accused unlawfully entered the various complainants' dormitories and D stole property therefrom.

   Sections 113 and 131 of Chapter 9:23 create two stand alone offences of theft and unlawful entry into premises respectively. Either of the two crimes cannot be read with the other. Where one commits the offence of unlawful entry into premises in contravention of s 131 and steals property therefrom, that offence of unlawful entry into premises is then committed in E aggravated circumstances and one must be charged only with the offence of unlawful entry into premises in aggravating circumstances in contravention of s 131 (1)(a), as read with subs (2)(a) or (b) or (c) or (d).

   In the result, were the four counts properly framed?

2. (a) Both accused pleaded guilty to all four counts. After taking the accused through the essential elements the trial magistrate on verdict wrote:-

   F 'V-Guilty as pleaded both counts and both accused'.

   Both counts mean two counts yet there were four counts. Whence did the 'guilty as pleaded both counts' come?

   (b) As if that was not enough misdirection, regarding sentence, the trial magistrate wrote:-

   'S- a 1 (for accused 1) – 2 years imprisonment (3 months suspended G on Gve 627/12 brought into effect and incorporate (sic) in the 2 years imprisonment).

   S - a 11 (for accused 2) – 1 year imprisonment'.

   (c) The trial magistrate did not, following production of accused 1's certificate of previous conviction, bother to find out from him whether he was admitting the previous conviction and if he had any cause to show why H the suspended sentence should not be brought into operation.

Mutema J

   (d) Further, the trial magistrate did not indicate in respect of which count A or counts each accused person's sentence related to. Was this proper?

   Could I have the trial magistrate's comments?"

The trial magistrate's response was as follows:

"Review Minute: State vs Edward Maripfonde and Gift Banda MV 921-2/12

1. In relation to the charge contravening section 131 as read with 113 B of the criminal law codification and reform act I stand guided by the Honourable Judge's decision. This has been a grey area and has created a lot of confusion with some learned judges preferring count 1 unlawful entry, count 2 Theft other review matter with unlawful entry and theft have been confirmed. However your decision is quite commendable.
2. (a) There was an oversight the count took the accused persons through the C essential elements of the 4 counts which they were facing instead of indicating verdict- Guilty as pleaded all 4 counts for both accused persons. The court proceeded to indicate guilty as pleaded both counts.

   (b) In failing to question the accused person about the certificate of previous conviction I erred this was a serious misdirection. I also failed to indicate to which count the sentence was relating to. Intended to treat all 4 counts as one for sentence globular approach since these offences were committed D on single day, almost at the same time, the offence being similar in nature i.e. the essential elements.

It is my humble submission that if the matter be referred back to me so that I recall the accuseds explain to them that the guilty plea was in respect of all 4 counts, explain the essence of the previous conviction to the first accused – show cause why it should not be brought into effect and then sentence the accused E accordingly."

As regards the first issue *supra,* I have noted that it is not settled as to what charge(s) should be preferred in a case where one unlawfully enters into premises and steals property therefrom. In the majority of cases depicting the scenario postulated above the prosecution is preferring two separate F charges, *viz.* contravening s 131(1) (unlawful entry into premises) and contravening s 113(1) (theft) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. Most judges have found this acceptable and have confirmed the proceedings.

It has indeed been a grey area, as stated by the trial magistrate in his response G *supra.* However, I have not been privy to the other scenario he alluded to, *viz.* that some judges have been confirming proceedings such as *in casu* where the charge is framed "charged with contravening s 131 as read with s 113 of Chapter 9:23 (unlawful entry into premises and theft)".

As observed *supra* in my query to the trial magistrate, the two ss 113 and 131 of Chapter 9:23 create two separate or two stand alone offences of theft H

Mutema J

A and unlawful entry into premises respectively. Neither of these two crimes can be read with the other, as was done in the case at hand. Probably the old adage that old habits die hard can be ascribed to the failure by the prosecution to separate these two now distinct offences, emanating from the old offence called housebreaking with intent to steal and theft. That old offence has now been codified into two stand alone offences. It is accordingly procedurally B both wrong and incompetent to charge one as read with the other.

I will stop short of holding that it is also wrong and incompetent to charge one with both unlawful entry into premises in contravention of s 131 and theft in contravention of s 113 of Chapter 9:23 in the scenario I postulated above without according the matter the benefit of informed sufficient argument by the C relevant stakeholders. However, it is my considered, humble and respectful opinion that by creating the two stand alone offences of unlawful entry into premises (s 131(1) and theft in s 113) and then providing in s 131(1)(a), as read with subs (2)(e) of that section, the legislature was clear that it intended those two offences to be stand alone. Where one unlawfully enters premises and steals property therefrom, the aspect of theft remains encompassed in D s 131 and should not be ascribed separately to s 113. A close reading of s 131 should make this not difficult to comprehend.

The section reads:

"131 Unlawful entry into premises

(1)Any person who, intentionally and without permission or authority from E the lawful occupier of the premises concerned, or without other lawful authority, enters the premises shall be guilty of unlawful entry into premises and liable –

(a) to a fine not exceeding level thirteen or not exceeding twice the value of any property *stolen*, destroyed or damaged by the person as a result of the crime, whichever is the greater, or imprisonment for a period not exceeding fifteen years, or both, if the crime was committed in any one or more of the aggravating circumstances set out in subsection (2); (my emphasis) or

(b) in F any other case, to a fine not exceeding level ten or not exceeding twice the value of any property destroyed or damaged by the person as a result of the crime, whichever is the greater, or imprisonment for a period not exceeding ten years, or both.

(2) For the purposes of paragraph (a) of subsection (1), the crime of unlawful entry into premises is committed in aggravating circumstances, if ,on the occasion G on which the crime was committed, the convicted person –

(a) entered a dwelling house; or

(b) knew there were people present in the premises; or

(c) carried a weapon; or

(d) used violence against any person, or damaged or destroyed any property, H in effecting the entry; or

---

2013 (1) ZLR p364

Mutema J

(e) committed or intended to commit some other crime." A

The wording of the statutory provision cited above is so clear and unambiguous that it admits of no other interpretation save its ordinary grammatical meaning. This meaning is that where one unlawfully enters into premises and steals property therefrom and the premises are a dwelling house, or one knew that there were people in the premises or one carried a weapon or used violence B against anyone in effecting the entry, there is absolutely no procedural legal justification to charge one with two offences of unlawful entry into premises and theft. The proper charge is simply one of unlawful entry into premises in aggravating circumstances, in contravention of s 131(1)(a), as read with subs (2)(a) or (b) or (c) or (d) of Chapter 9:23 in respect of each count.

In the event, if the above interpretation is correct, which I respectfully think C it is, then on the facts of the present case of the accused persons unlawfully entering, on each of the four occasions, St Alberts High School Girls' quarters and stealing property therefrom, each accused should simply have been charged with four counts of unlawful entry into premises in aggravating circumstances in contravention of s 131(1)(a) as read with subs (2)(a) of Chapter 9:23. Since D all the essential elements relevant to the proper offence were canvassed with both accused persons, there will be no prejudice occasioned to each if each count is corrected to read the proper one as crafted above and either count is accordingly so amended.

Regarding query 2(a) *supra*, it is clear that this was as an error in grammar of E the English language – not a mother tongue. The verdict should read: Each accused, guilty as pleaded on all four counts. The verdict is accordingly so amended as no prejudice will be suffered by either accused as a result.

Regarding query 2(b) and (c), *supra*, in terms of s 327(3) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] the trial magistrate was enjoined F to ask the accused whether he admitted the previous conviction or not. And, as per practice, to also ask accused 1 if he had any cause to show why the suspended sentence should not be brought into effect. This was not done. Also, in terms of query 2(d) *supra* the trial magistrate did not indicate in respect of which count(s) each accused person's sentence related to.

In the result, the trial magistrate is directed to recall both accused persons G and do the following:

(1) explain to them the two amendments I have effected above, *viz.* relating to the correct charge for all counts;

(2) explain to both accused that the correct verdict is: each accused is found guilty as pleaded in respect of all the four counts; H

2013 (1) ZLR p365

Mutema J

(3) explain A to both accused that all the four counts were treated as one for sentence; and

(4) in respect of accused one, an enquiry be made whether he is the person so alleged to have been previously convicted and if so to show cause why the suspended sentence of three months' imprisonment should not be brought into operation.

B Thereafter the proceedings shall be re-submitted for review.

Takuva J agrees.

© 2015 Juta and Company (Pty) Ltd.

Document 49 of 73

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2013/Volume 1/AIR ZIMBABWE (PVT) LTD & ANOR v NHUTA & ORS 2013 (1) ZLR 366 (H)

AIR ZIMBABWE (PVT) LTD & ANOR v NHUTA & ORS 2013 (1) ZLR 366 (H)

Citation	2013 (1) ZLR 366 (H)
Case No	Judgment No. HH-129-13
Court	High Court, Harare
Judge	Mafusire J
Heard	25 April 2013; *CAV*
Judgment	2 May 2013
Counsel	Ms *B Rupapa,* for the applicants *T Mpofu,* for the first respondent
Case Type	Urgent chamber application
Annotations	No case annotations to date

Flynote

Aviation – *Air Zimbabwe Corporation – successor company to – whether more than one successor company could be formed – other companies subsequently formed in Air Zimbabwe "stable" – not successor companies to Corporation and not enjoying protection of State Liabilities Act [Chapter 8:14]* D

Statutes – *Air Zimbabwe Corporation (Repeal) Act (Act 4 of 1998) – successor company to Corporation – whether more than one successor company could be formed – other companies subsequently formed in Air Zimbabwe "stable" – not successor companies to Corporation and not enjoying protection of State Liabilities Act [Chapter 8:14]* E

Headnote

The applicants brought an application, under a certificate of urgency, seeking the release of certain goods, mostly vehicles, that had been attached in execution. They also sought, as an interim relief, an order that the respondents should pay any storage costs that might have been incurred F as a result of the attachment of the assets. Finally, they sought an order that the actions of the respondents be declared illegal for allegedly contravening s 9A of the Finance (No. 2) Act, 2012, as read with the State Liabilities Act [*Chapter 8:14*].

The first respondent was a former employee of Air Zimbabwe Holdings (Pvt) Ltd, the second applicant. In October 2010 an award for outstanding G wages and benefits had been made in his favour. He had subsequently, in September 2012, registered the award as an order of the High Court. He proceeded to execute and the disputed assets were attached by the Deputy Sheriff.

The basis of the current application was that the assets belonging to either of the applicants, or any other company hailing from what they called H

A "the Air Zimbabwe stable," had become immune from attachment and execution by virtue of the Finance (No. 2) Act (which had been promulgated in December 2012), as read with the State Liabilities Act. It was also argued that the applicants both hailed from the "Air Zimbabwe stable"; and that both were successor companies to the Air Zimbabwe Corporation. The applicants accepted that the attached assets did not B belong to the first applicant, against which the first respondent had no judgment, but to the second applicant.

The Finance (No. 2) Act had inserted a provision into the Air Zimbabwe Corporation (Repeal) Act ("the Repeal Act") to the effect that the State Liabilities Act [*Chapter 8:14*] "applies with necessary changes to legal C proceedings against the Corporation or any successor company". The applicants argued that *any* company formed by "the shareholder or board of the National Airline" would automatically enjoy the same immunity provided by that amendment and that the second applicant, like the first, was a successor company to the Corporation and enjoyed the same immunity.

D *Held,* that it was not the intention of the legislature to extend such immunity to an indeterminate number of companies some shareholders or board somewhere could think of floating. The amending section did not grant the power to anybody, let alone some shareholder or board of directors somewhere, to create a successor company, let alone several of them, to the defunct Corporation. The words used in the amendment are "or any E successor company". The word "company" is used in the singular. The use of the word "any" before the noun "company" did not transformed the word "company" from the singular to "companies" in the plural. A reading of the amendment and the Repeal Act as a whole left no doubt that it was intended to refer to a single successor company. For F example, in terms of s 5, the Minister was empowered to transfer the assets and liabilities of the Corporation to the successor company. In terms of the other sections, the successor company inherited the rights and obligations of the Corporation, including contracts of employment in terms of s 8. To hold that there could be any number of successor companies would lead to absurdity. In addition, the power to declare a G successor company to the defunct Corporation in terms of the Repeal Act was not given to all and sundry, but to the Minister of Transport only, who was empowered, in terms of s 3 of the Repeal Act, to form "a company . . . which shall be the successor company to the Corporation". The proviso to s 3 envisaged that the company that the Minister could H nominate or direct as being the successor company could be one already

---

in existence prior to the Act. Thus, if the Minister did not want to form A a new company, he had a choice to nominate a pre-existing one. The first applicant was already in existence when the Repeal Act became law and was declared by the Minister, in 2000, to be the successor company. The second applicant was incorporated later but was not the successor company to the Corporation. B

Cases cited

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

Shah v Air Zimbabwe Corporation 2010 (2) ZLR 94 (H)

Legislation considered C

Air Zimbabwe Corporation (Repeal) Act 1998, ss 3 and 9A

Finance (No 2) Act 2012 (Act 6 of 2012), s 8

State Liabilities Act [*Chapter 8:14*]

Case information

Ms *B Rupapa,* for the applicants D

T Mpofu, for the first respondent

Judgment

Mafusire J: The applicants brought the above application under a certificate of urgency. In the interim, they sought the release of certain goods, mostly vehicles, that had been attached in

execution. They also sought, as an interim E relief, an order that the respondents should pay any storage costs that might have been incurred as a result of the attachment of the assets. For the final order it was sought that the actions of the respondents be declared illegal for allegedly contravening s 9A of the Finance Act (No. 2) of 2012 (*sic*) as read with the State Liabilities Act [*Chapter 8:14*]. One has to read the main body of the application to appreciate what exactly were those actions which the F draft order sought to have declared as being illegal and a contravention of the two statutes. The final relief also sought an order barring the respondents from attaching or executing against the assets of the applicants ". . . and any company in the Air Zimbabwe stable" sought an order of costs on the higher scale. G

I heard the matter on an urgent basis on 25 April 2013. After argument I dismissed the application with costs for lack of urgency and lack of merit. I gave my reasons *ex tempore*. On 26 April 2013 the applicants' legal practitioners wrote to seek the reasons for my decision. The letter was placed before me only on 29 April 2013, presumably because of the supervening weekend. My reasons for dismissing the application appear below. H

Mafusire J

A To avoid confusion, I shall refer to the first applicant as Air Zimbabwe; the second applicant as Air Zimbabwe Holdings and the two of them collectively as the applicants; the first respondent as Nhuta and the second and third respondents, collectively, as the Deputy Sheriff.

The circumstances of the case are that Nhuta was an employee of Air B Zimbabwe Holdings. In October 2010 an award for outstanding wages and benefits had been made in his favour. He had subsequently, in September 2012, registered the award as an order of this court. He proceeded to execute. It seems that in November 2012 Air Zimbabwe filed papers with this court. Therein the Deputy Sheriff was cited as the applicant, Nhuta as the judgment creditor, Air Zimbabwe Holdings as the judgment debtor and Air Zimbabwe C as the claimant.

[*The learned judge then dealt with the status of certain earlier proceedings, and continued*:]

In those proceedings Air Zimbabwe, as the claimant, claimed ownership of the assets which the Deputy Sheriff had attached in pursuance of the writ D that had been issued at Nhuta's instance. In the founding affidavit deposed to on behalf of Air Zimbabwe in those proceedings, the order sought was one to stop the sale in execution of certain assets allegedly belonging to Air Zimbabwe and to cancel the writ of execution. In the draft order was sought an order to dismiss Nhuta's claim. Nothing could be more confused. It emerged from Nhuta's opposing papers in the urgent chamber application E before me, and in the parties' argument, that on 19 December 2012 Air Zimbabwe had brought an urgent chamber application to stop execution of the attached property, but that Mtshiya J had dismissed it for lack of urgency. These facts, which were plainly material, were conspicuous by their absence in the founding papers of the proceedings before me.

F The urgent chamber application before me is premised on the allegation and contention that the assets belonging to Air Zimbabwe or Air Zimbabwe Holdings or any other company hailing from ". . . the Air Zimbabwe stable" had become immune from attachment and execution by virtue of the Finance (No. 2) Act 2012, as read with the State Liabilities Act [*Chapter 8: 14*). I shall refer to the Finance (No. 2) Act (No. 6 of 2012) as "the Finance No. 2 Act". G It was also argued that the applicants both hailed from the Air Zimbabwe stable, that both were successor companies to the Air Zimbabwe Corporation, that the Finance No. 2 Act had been promulgated in December 2012, that following that promulgation Nhuta had, in response to the promulgation, caused the release of the attached assets, that it is therefore surprising that H Nhuta is now apparently recanting his position by re-instructing the re-

---

Mafusire J

attachment of the same assets on the basis of the same writ and that this is A unlawful. It was further argued that, as a matter of fact, the attached assets did not belong to Air Zimbabwe, against which Nhuta had no judgment, but to Air Zimbabwe Holdings and that the proof of such ownership was in the interpleader proceedings.

Incidentally, the only reference to the so-called interpleader proceedings in the B founding papers before me was in para 9.1 of the founding affidavit. It reads:

> "9.1 Of the 29 vehicles which were attached, none belonged to second applicant. The vehicles belonged to the first applicant and other companies in the Air Zimbabwe stable and, as a result, interpleader notices were filed to safeguard the Claimants' interests. The interpleader notices are still pending".

The applicants argued that the wording of the Finance No. 2 Act, particularly C the use of the word "any", meant that there is no limit to the number of companies that could be formed by ". . . the shareholder or board of the National Airline . . ." as successor companies to Air Zimbabwe Corporation under the Air Zimbabwe Corporation (Repeal) Act, 1998) (hereinafter referred to as the "Repeal Act").

It transpired during argument that, contrary to the allegations by the D applicants in their founding papers, the release from attachment of the assets in question at Nhuta's instance in February 2013 had not been the result of any respect by Nhuta of the Finance No. 2 Act, which he had never at any stage recognised as applying to any company other than Air Zimbabwe, but that the release followed an agreement between Nhuta and Air Zimbabwe E Holdings regarding a payment arrangement in terms of which Air Zimbabwe Holdings would liquidate the judgment debt. The re-attachment of the same assets in terms of the same writ in April 2013 was triggered by Air Zimbabwe Holding's failure to respect the payment terms. Again this material fact was not disclosed in the applicants' founding papers.

I dismissed the urgent chamber application, firstly for lack of urgency. It F was argued on behalf of the applicants that the need to act had arisen from 13 April 2013 when Nhuta had caused the re-attachment of the assets. In the certificate of urgency it was stated that the removal of the assets had been scheduled for Monday, 22 April 2013. That was the very day the urgent chamber application was filed. Therefore, somehow it was expected that G the application would be filed, and, on the same day, the registry would complete all the necessary administrative procedures of receipting the court fee, issuing the application, allocating it to the duty judge who in turn would peruse the papers, arrange set down and advise the applicants' counsels who in turn would have had to serve the papers and still have the matter heard on the same day. As it happened, the application was only heard on 25 April H

2013 (1) ZLR p371

Mafusire J

A 2013, after the applicants' counsel had intimated that the removal of the attached property was no longer going ahead on 22 April 2013. But it was never explained when next it was feared it would happen.

In *Kuvarega v Registrar-General & Anor* 1998 (1) ZLR 188 (H) Chatikobo J said at 193F-G:

> B "What constitutes urgency is not only the imminent arrival of the day of reckoning; a matter is urgent if, at the time the need to act arises, the matter cannot wait. Urgency which stems from a deliberate or careless abstention from action until the dead-line draws near is not the type of urgency contemplated by the rules. It necessarily follows that the certificate of urgency or the supporting affidavit must always contain an explanation of the non-timeous action if there has been C any delay."

When Nhuta registered the arbitral award with this court in September 2012 it must have become obvious to the applicants that his next step would be execution. Indeed, he did execute. Therefore, when the Finance No. 2 Act was promulgated in 2012, and if the applicants should have thought that the legislation applied to them, they would necessarily have had to act then. They D would have applied that their assets be declared exempt from attachment. They did not. And neither the certificate of urgency nor the founding affidavit explains this delay. Instead, there has been an attempt to mislead. It was not disclosed in the application that the parties had entered into some payment arrangement. What then triggered the urgent application was not the re- E attachment of the assets in April 2013, but rather Air Zimbabwe Holding's own default of the agreed payment arrangement.

In *Kuvarega's* case *supra* the delay between the need to act and when the application was eventually filed was some 8 days. The court said that there had been no explanation until the very last working day of the day F of reckoning. *In casu*, even if I were to accept the applicants' contention that the need to act had arisen only in April 2013 when the re-attachment happened, and not in December 2012 when the Finance No. 2 Act came into operation, there is still the problem that the applicants' deponent has not been truthful in the founding affidavit on yet another point. It was false to say that the re-attachment was on 13 April 2013. Actually, the first attempt at G re-attachment had been on Air Zimbabwe. That had been on 10 April 2013. Apparently Air Zimbabwe

had flagged the Finance No. 2 Act to the Deputy Sheriff. The Deputy Sheriff had retreated. But he had then come back for Air Zimbabwe Holdings. That had been on 12 April 2013. All this is borne out by the Deputy Sheriff's returns which were attached to Nhuta's opposing H papers. In the founding papers no explanation was given why such precious

time was wasted and why action was taken only some 12 days later, and on A the very day of reckoning.

During argument, Ms *Rupapa*, for the applicants, proffered the explanation that the applicants are large corporations and that it was not feasible to assemble their boards to pass the necessary resolutions. This is unacceptable. The applicants had been seized with Nhuta's litigation since 2010. Furthermore, B attached to the applicants' founding papers was an extract of a resolution by Air Zimbabwe on 13 November 2012, among other things, authorising the deponent to sign all legal documents and to do any legal acts on its behalf to safeguard its interests in the dispute between Air Zimbabwe Holdings and Nhuta. If Air Zimbabwe had felt that it was its assets that had been re-attached, as was contended, why did it wait? C

Ms *Rupapa* dismissed *Kuvarega's* case *supra* on the basis that it was wrongly decided. I did not agree. That case has withstood the test of time. It was decided in 1998. It has been referred to with approval in several subsequent cases. I was satisfied that there was no urgency in the matter and that if there was any, it was demonstrably self-created. I also dismissed the application D for lack of merit. Section 8(1) of the Finance No. 2 Act inserted a new s 9A into the Repeal Act. The new section reads:

> "9A Legal proceedings against Corporation or successor company
>
> "The State Liabilities Act [*Chapter 8: 14*] applies with necessary changes to legal proceedings against the Corporation or any successor company."

Subsection 2 of s 8 of the Finance No. 2 Act then reads as follows: E

> "(2)Subject to subsection (3), the amendment effected by subsection (1) applies to all legal proceedings against the Corporation or successor company (as those terms are defined in section 2 of the Air Zimbabwe Corporation (Repeal) Act (No. 4 of 1998)), that were commenced or completed before the date of commencement of this Act."

In terms of the State Liabilities Act, [*Chapter 8: 14*], state property is immune F from attachment and execution. Therefore, by the aforesaid amendment the same immunity was being extended to the property of the Air Zimbabwe Corporation (hereinafter referred to as "the Corporation") or any successor company. By virtue of subs (3) of s 8 of the Finance No. 2 Act. that immunity is to last until 1 January 2015.

The crux of the matter before me in the urgent chamber application was G whether it was correct that *any* company formed by ". . . the shareholder or board of the National Airline," as it was put to me, would automatically enjoy the same immunity provided by the amendment above. Furthermore, was Air Zimbabwe Holdings, not Air Zimbabwe, also such a successor company to the Corporation as would enjoy the same immunity? H

A I do not accept that it was the intention of the legislature to extend such immunity to an indeterminate number of companies some shareholders or Board somewhere could think of floating. I do not see the provisions of the amending section aforesaid as granting the power to anybody, let alone some shareholder or board of directors somewhere, to create a successor company, let alone several of them, to the defunct Corporation. The words B used in the amendment are ". . . or any successor company". The word "company" is used in the singular. I do not accept the applicants' argument that the use of the pronoun "any" before the noun "company" transformed the word "company" from the singular to "companies" in the plural. A reading of the whole amendment leaves me in no doubt that it was intended C to refer to one successor company. If it was meant to refer to more than one company, the legislature could have easily used plurals so that that portion of the amendment would have read ". . . or *all* successor compan*ies*", or ". . . or any *of* the successor compani*es*".

The *Oxford Advanced Learner's Dictionary* shows that the pronoun "any" D can be used not only with uncountable or plural nouns to refer to an amount or number of something, however large or small, but also with *singular countable nouns to refer to one of a number of things or of people when it does not matter which one* (my emphasis). I am satisfied that, given the wording of that amendment, the use of "any" was meant to refer to a singular countable noun, i.e. "company".

E A reading of the Repeal Act as a whole militates against the construction that more than one successor company to the Corporation was envisaged. For example, in terms of s 5 of that Act, the Minister is empowered to transfer the assets and liabilities of the Corporation to the successor company. In terms of the other sections, the successor company inherits the rights and F obligations of the Corporation, including contracts of employment in terms of s 8. If it was meant to refer to more than one successor company it would mean that any person against whom the Corporation had any cause of action could be faced with an indeterminate number of suits from an indeterminate number of creditors, all claiming to be successor companies. Likewise, a creditor of the former Corporation could be placed in the same dilemma of G determining the particular successor company that would have to meet his or her claim. Such an absurdity was obviously never intended.

The matter does not end there. The power to declare a successor company to the defunct Corporation in terms of the Repeal Act was not given to all and sundry. It was not given even to the shareholders or Board of that H defunct entity. The power is that of the Government through the Minister

of Transport. The Repeal Act defines "successor company" as the company A referred to in s 3. Section 3 reads:

> "3 Formation of successor company
>
> Subject to this section, the Minister shall take steps as are necessary under the Companies Act [*Chapter 24:03*] to secure the formation of *a company* limited by shares, which shall be *the successor company* to the Corporation for the B purposes of this Act:
>
> Provided that, if *such a company has* been incorporated for the purpose before the date of commencement of this Act, the Minister may, by notice to the Corporation, direct that *that company* shall be *the successor company* to the Corporation for the purposes of this Act" (my emphasis).

The preamble to the Act gives the purpose of the Act as being to provide C for the dissolution of the Corporation and the transfer of its functions, assets, liabilities and staff to *a company* formed for the purpose. Plainly, such wording, by itself, does not admit of more than one company all being successor companies to the defunct Corporation.

The matter goes further. The proviso to s 3 of the Repeal Act envisages that the company that the Minister could nominate or direct as being the D successor company could be one already in existence prior to the Act. Thus if the Minister did not want to form a new company he had a choice to nominate a pre-existing one. Air Zimbabwe was already in existence when the Repeal Act became law. The Form CR 14 attached to Nhuta's papers shows that it was incorporated sometime in 1997. In the judgment by Kudya E J in *Shah v Air Zimbabwe Corporation* 2010 (2) ZLR 94 (H) it was noted that Air Zimbabwe was incorporated on 20 November 1997. It was held, in that judgment, that Air Zimbabwe was the successor company to the Corporation. This the Minister did by means of a legal instrument, namely General Notice No 120A of 2000.

On the other hand, Air Zimbabwe Holdings appears to have been formed F sometime in 2005, according to the CR 14 form in Nhuta's papers. Other than a declaration from the bar by Ms *Rupapa* that Air Zimbabwe Holdings was formed by the Minister also as a successor company to the Corporation, nothing was presented before me to that effect. On the contrary, we have the legislation analysed above and the judgment of this court aforesaid, both G militating against such a construction. In the premises, I rejected the contention that Air Zimbabwe Holdings is a successor company to the Corporation.

There is one more point. The applicants alleged that the attached assets did not belong to Air Zimbabwe Holdings, against which Nhuta had a judgment, but belonged to Air Zimbabwe, which not only was not indebted to Nhuta but also the assets for which are immune from attachment. However, not H

Mafusire J

A a shred of evidence was placed before me that the assets belonged to Air Zimbabwe. During argument it was contended from the bar that the evidence of ownership was in the interpleader proceedings. It will be remembered that, until I had requested a copy of the pleadings in those proceedings, none had been placed before me. No case reference number had been given. Nonetheless, having perused those papers, I find that Air Zimbabwe laid B claim to 20 out of 29 of the attached vehicles and to one motor cycle. As proof of ownership of those vehicles some registration books were copied and attached. From those registration books about six of the vehicles are in the name of "Air Zimbabwe Corporation", which could be either or both of the applicants, according to their argument that both are successor companies. The rest of the vehicles are in the name of "Air Zimbabwe", which again C could mean either or both of the applicants. At any rate, emblazoned on every registration book is a "WARNING" that reads "This registration book *is not proof of legal ownership*" (my emphasis).

At the end of the day, I was satisfied that the urgent chamber application was D an abuse of the court process. I therefore dismissed it with costs.

Mutumbwa Mugabe & Partners, applicants' legal practitioners

E *Matsikidze & Muchenje,* first respondent's legal practitioners

© 2015 Juta and Company (Pty) Ltd.

Document 50 of 73

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2013/Volume 1/AFRICAN BANKING CORPORATION OF ZIMBABWE LTD v PWC MOTORS (PVT) LTD & ORS 2013 (1) ZLR 376 (H)

AFRICAN BANKING CORPORATION OF ZIMBABWE LTD v PWC MOTORS (PVT) LTD & ORS 2013 (1) ZLR 376 (H)

Citation	2013 (1) ZLR 376 (H)
Case No	HH-123-13
Court	High Court, Harare
Judge	Mathonsi J
Heard	3 April 2013; *CAV*
Judgment	8 May 2013
Counsel	*I E G Musimbe,* for the applicant *R Goba,* for the respondents
Case Type	Civil application
Annotations	No case annotations to date

Flynote

Practice and procedure – *summary judgment – application for – supporting affidavit – applicant a corporate body – company employee deposing to affidavit – whether resolution authorising deponent to represent company must be*

produced D

Practice and procedure – *summary judgment – principles – when summary judgment may be granted – what respondent must show to avoid grant of summary judgment*

Headnote

In an application for summary judgment brought by a company against E the respondents, the applicant's head of credit stated that the facts, set out in the supporting affidavit to which he attested, were within his personal knowledge and that he was duly authorised to depose to the affidavit on behalf of the applicant. The respondents took issue with the applicant's failure to attach a resolution showing that the head of credit was authorised to represent the applicant and consequently did not have F *locus standi* to bring the action.

Held that, in terms of r 64(2) of the High Court Rules 1971, an application for summary judgment must be supported by "an affidavit made by the plaintiff or by any other person who can swear positively to the facts set out therein, verifying the cause of action and the amount claimed, if G any, and stating that, in his belief, there is no *bona fide* defence to the action". While there is authority for demanding that a company official must produce proof of authority to represent the company in the form of a company resolution, that form of proof is not necessary in every case, as each case must be considered on its own merits. All the court is required to do is satisfy itself that enough evidence has been placed H

A before it to show that it is indeed the applicant which is litigating and not an unauthorised person. Where the deponent of an affidavit states that he has the authority of the company to represent it, there is no reason for the court to disbelieve him unless evidence is shown to the contrary. Where no such contrary evidence is produced, the omission of a company resolution cannot be fatal to the application.

B Summary judgment is an extraordinary and drastic remedy which is allowed where a plaintiff has an unanswerable case and ought not be put to the expense and delay of a trial. An affidavit filed by or on behalf of an applicant in summary judgment proceedings must verify the cause of action as set out in the summons and aver a belief that the appearance C to defend entered by the respondent is not *bona fide* but was entered for the purpose of delaying the proceedings. On the other hand, for a respondent to successfully oppose summary judgment, he must show a good *prima facie* defence to the applicant's claim. The respondent must allege facts which, if proved at the trial, would entitle him to succeed. The defence tendered by the respondent must be valid at law and must D not be inherently unconvincing.

Cases cited

Bubye Minerals (Pvt) Ltd & Anor v Rani International Ltd 2007 (1) ZLR 22 (S)

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

Industrial Equity Ltd v Walker 1996 (1) ZLR 269 (H)

Intercontinental Trading (Pvt) Ltd v Nestlé Zimbabwe (Pvt) Ltd 1993 (1) ZLR 21 (H)

Kingstons Ltd v L D Ineson (Pvt) Ltd 2006 (1) ZLR 451 (S)

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

F *SA Allied Workers' Union & Others v de Klerk NO & Ors* 1990 (3) SA 425 (EC).

SA Milling Company (Pty) Ltd v Reddy 1980 (3) SA 431 (SEC)

Legislation considered

G High Court Rules 1971 (RGN 1047 of 1971), r 64(2)

Case information

I E G Musimbe, for the applicant

R Goba, for the respondents

Judgment

Mathonsi J: This summary judgment application graphically illustrates that H a trend is fast developing among business people in this country to borrow

---

2013 (1) ZLR p378

Mathonsi J

huge sums of money from financial institutions and when the time to pay A comes, to pay as little as possible or, better still, not to pay at all. A pattern is manifesting itself where business people will stop at nothing in avoiding to pay legitimate claims and in the process play havoc to investor confidence.

Bartlett J put it very succinctly in *Industrial Equity Ltd v Walker* 1996 (1) ZLR 269 (H) at 308C when he said:- B

> "Things that go round come round. Walker has had a merry dance. But he would, to my mind, be well advised to realise that the music has stopped and the time has come to pay the piper. Although with Walker's determination to divest himself of all things executable, I fear that the dance is not yet over – and that it won't be long before the pipes are calling again and the last waltz begins."

On 19 July 2011 the applicant extended an overdraft facility to the first C respondent which was signed for by the second and third respondents in terms of which the first respondent would be advanced a sum not exceeding US$50 000. The second, third and fourth respondents signed unlimited guarantees binding themselves as sureties *in solidum* for the due and punctual repayment on demand of all sums of money due by the first respondent.

Although money was drawn in terms of the facility to the tune of $51 500.45, D the first respondent failed to service it resulting in the applicant terminating the facility and demanding immediate payment of the amount due. In response to the demand the first respondent, again represented by the second, third and fourth respondents, wrote two letters acknowledging indebtedness. In the letter of 5 March 2012 they stated: E

> "REF: BancABC FACILITY NUMBER A13766 FOR USD 50 000
>
> We acknowledge the above facility and would want you to note that PWC Motors p/l is willing to and able to pay US$1 000 (one thousand United States dollars) per month towards the balance that we owe BancABC."

The respondent wrote another letter acknowledging the debt on 12 March F 2012. They stated as follows:-

> "REF: BancABC FACILITY NUMBER A13766 FOR USD 50 000
>
> We acknowledge the above facility and would like to assure you of our commitment to pay it off as urgently as we can. Our Managing Director has put up his residential property (with deeds) for sale and proceeds from that will be used to offset our debt with the bank. We are very keen to maintain our business with BancABC G and we will channel all our transactions through them. We thank them for their continued support and we apologise for our account's non-performance but we trust that they will be patient with us regarding this matter.
>
> Yours faithfully
>
> P. Mare – Managing Director
>
> W. Mare – Director
>
> C. Mare – Director" H

2013 (1) ZLR p379

Mathonsi J

A It would appear that the respondents underwent some dramatic metamorphosis from the position proclaimed in the above correspondence because when the applicant issued summons claiming the outstanding sum of $47 460, they promptly entered appearance to defend and requested a whole array of further particulars.

B Believing that the respondents did not have a *bona fide* defence to the claim in light of the provisions of the facility document they signed and the obviously unequivocal acknowledgement of indebtedness contained in the letters I have cited above, the applicant filed this court application for summary judgment.

In his founding affidavit, Luckson Pfukwa, the head of credit of the applicant, stated that the facts are within his personal knowledge and that he is duly C authorised to depose to the affidavit on

behalf of the applicant. He confirmed the cause of action as being the overdraft facility and the mortgage bond registered against stand 5246 Mutare Township. The application is opposed by the respondents. They took issue with the applicant's failure to attach a resolution showing that Luckson Pfukwa is authorised to represent the D applicant. On the merits, they insisted that there are material disputes of fact which should be determined at the trial. They demanded that the applicant must prove the actual amount due, the legality of the interest claimed and also justify the fees levied. The respondents also insisted that certain amounts of money were paid to the applicant which were not taken into account in E arriving at the amount claimed. They attached receipts totalling $830 for payments of $100 instalments made between 2 March and 31 March 2012.

At the hearing of the application Mr Goba, for the respondents, took a point *in limine* that the deponent of the founding affidavit has not shown that he has authority to represent the applicant. He submitted that Luckson Pfukwa F does not have *locus standi* to bring the action.

A summary judgment application is made in terms of r 64 of the High Court Rules 1971. The requirement for a supporting affidavit is contained in subr (2) of r 64 which provides:

> "A court application in terms of subrule (1) shall be supported by an affidavit made by the plaintiff or by any other person who can swear positively to the G facts set out therein, verifying the cause of action and the amount claimed, if any, and stating that in his belief there is no *bona fide* defence to the action."

To my mind, the affidavit of Pfukwa meets all the requirements of r 64 and he fell within the category of persons who could swear positively to the facts: *Bubye Minerals (Pvt) Ltd & Anor v Rani International Ltd* 2007 (1) ZLR 22 (S) H 25B.

Mathonsi J

I am aware that there is authority for demanding that a company official A must produce proof of authority to represent the company in the form of a company resolution: *South African Milling Co (Pvt) Ltd v Reddy* 1980 (3) SA 431 (SEC) *; South African Allied Workers' Union & Others v de Klerk NO & Ors* 1990 (3) SA 425 (EC). However, it occurs to me that that form of proof is not necessary in every case, as each case must be considered B on its own merits. *Mall (Cape) (Pvt) Ltd v Merino Ko-operasie Bpk* 1957 (2) SA 347 (C). All the court is required to do is satisfy itself that enough evidence has been placed before it to show that it is indeed the applicant which is litigating and not an unauthorised person.

To my mind the attachment of a resolution has been blown out of proportion and taken to ridiculous levels. Where the deponent of an affidavit states that C he has the authority of the company to represent it, there is no reason for the court to disbelieve him unless it is shown evidence to the contrary. Where no such contrary evidence is produced the omission of a company resolution cannot be fatal to the application. I therefore reject the point *in limine*.

On the merits, the applicant is standing on firm ground, having produced D the facility document signed by the respondents and the mortgage bond which is itself an acknowledgement of debt. In addition, letters written by the respondents admitting liability have been produced.

In order to succeed in defeating a summary judgment application the respondents must disclose a defence and material facts upon which that defence is based with sufficient clarity and completeness so as to persuade E the court that if proved at the trial such facts will constitute a defence to the claim: *Hales v Doverick Investments (Pvt) Ltd* 1998 (2) ZLR 235 (H) at 239 A-B. As stated by Ziyambi JA in *Kingstons Ltd v L D Ineson (Pvt) Ltd* 2006 (1) ZLR 451 (S) at 458 F-H and 459A:

> "Not every defence raised by a defendant will succeed in defeating a plaintiff's F claim for summary judgment. Thus what the defendant must do is to raise *a bona fide* defence – a 'plausible case' – with 'sufficient clarity and completeness to enable the court to determine whether the affidavit discloses a *bona fide* defence'. He must allege facts which, if established 'would entitle him to succeed.' See *Jena v Nechipore* 1986 (1) ZLR 29 (S); *Mbayiwa v Eastern Highlands Motel (Pvt) Ltd S*-139-86; *Rex v Rhodian Investments Trust (Pvt) Ltd* 1957 R & N 723 (SR). G
>
> If the defence is averred in a manner which appears in all circumstances needlessly bald, vague or sketchy, that will constitute material for the court to consider in relation to the requirement of *bona fides.* See *Breitenbach v Fiat SA (Edms) Bpk* 1976 (2) SA 226 (T) at 228D-E.
>
> The defendant must take the court into his confidence and provide sufficient information to enable the court to assess his defence. He must not content H

Mathonsi J

> himself with 'vague generalities and conclusory allegations not substantiated by solid facts'. See *District Bank Ltd v Hoosain & Others* 1984 (4) SA 544 (C) at 547G-H; *Mbayiwa v Eastern Highlands Motel (Pvt) Ltd supra; Hales v Doverick Investments (Pvt) Ltd* 1998 (2) ZLR 235 (H)."

The respondents do not even begin to satisfy the criteria set out above. All that they have done in the opposing affidavit of the second respondent is place in issue, without more, the actual amount claimed and indeed the penalty fees. Yet all the claims have been supported by documentation including the facility document and the *in duplum* schedule showing how the amount claimed is arrived at. The respondents signed an agreement allowing the applicant to charge the interest that is being claimed. Without disputing the terms of the instrument of debt, the respondents want the interest rate to be referred to trial. They do not show why they should not be bound by what they agreed. These are the same respondents who wrote two letters acknowledging the debt and asking for time to pay. In my view, no defence whatsoever has been shown by the respondents.

Mr *Musimbe* for the applicant made reference to the remarks of Robinson J in *Intercontinental Trading (Pvt) Ltd v Nestle Zimbabwe (Pvt) Ltd* 1993 (1) ZLR 21 (H) 37, which I subscribe to, where the learned judge said:-

> "Businessmen beware. If you fail to honour your contracts then don't start crying if, because of your failure, the other party comes to court and obtains an order compelling you to perform what you undertook to do under your contract."

I find it utterly deplorable that business people are very quick to receive money from banks undertaking to repay on certain terms. When they have expended the money and enjoyed the benefits they cry foul when the lender demands its dues. We cannot allow a situation where business people grab loans and then refuse to pay. As they say, the time to pay the piper has come. I have taken into account the sum of $830 paid after computation of the debt.

In the result I make the following order; that

1. Summary judgment be and is hereby entered in favour of the applicant against the respondents, jointly and severally, the one paying the others to be absolved, in the following;-
   (a) the sum of US$46 630 being the balance on the overdraft facility entered into between the parties on 19 July 2011.
   (b) interest on the sum of US$46 630 at the rate of 44% per annum from 5 June 2012, the date of service of summons to date of payment.
   (c) costs of suit on the legal practitioner and client scale, together with collection commission, to the extent that such commission is permissible in terms of the Law Society of Zimbabwe By-Laws.

Mathonsi J

2. The immovable property known as stand 5246 Mutare Township situate in the District of Umtali registered in the name of the first respondent be and is hereby declared specially executable.

Bere Brothers, applicant's legal practitioners

Makombe & Associates, respondent's legal practitioners

© 2015 Juta and Company (Pty) Ltd.

Document 51 of 73

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2013/Volume 1/CRISTAL MOTOR SPARES (PVT) LTD v SOUTH AFRICAN AIRWAYS 2013 (1) ZLR 382 (H)

CRISTAL MOTOR SPARES (PVT) LTD v SOUTH AFRICAN AIRWAYS 2013 (1) ZLR 382 (H)

Citation	2013 (1) ZLR 382 (H)
Case No	Judgment No. HH-135-13
Court	High Court, Harare
Judge	Mathonsi J
Heard	4 April 2013; *CAV*
Judgment	8 May 2013
Counsel	*L Uriri*, for the plaintiff *S Bhebhe*, for the defendant
Case Type	Plea in abatement
Annotations	No case annotations to date

Flynote

Aviation – *air carrier – liability of carrier for delayed consignment of freight – need for plaintiff to make written complaint within 21 days of freight being placed at consignor's disposal – claim for damages – need for* D *summons to be served within two years of date when freight ought to have arrived – failure in either respect fatal*

Headnote

The plaintiff sent a consignment of sculptures which were to be displayed at an exhibition in Brazil. The defendant airline was the carrier. It was E made clear to the carrier what the dates of the exhibition were and when the consignment needed to get to its destination. The consignment only reached its destination over a month later, too late for the exhibition. The plaintiff brought an action for damages, claiming that it had suffered various itemised losses due to the non-arrival of the consignment.

Nearly two years later, the plaintiff issued summons (which was not served F until over four months later). The claim was said to be in terms of the Warsaw Convention, as read with the Carriage by Air Act [*Chapter 13:04*]. The Warsaw Convention provides the sole and exclusive cause of action and remedy for a passenger who claims for loss, injury and damages sustained in the course or arising out of his international carriage by air, or for the consignor of cargo whose cargo is destroyed, G lost or delayed. The Convention (as amended by the Hague Protocol of 1955), as well as the Supplementary Guadalajara Convention of 1961, have been domesticated into Zimbabwean law by the Act, s 3 of which provides that the Conventions shall, so far as they relate to the rights and liabilities of carriers, carriers' agents, passengers, consignors, H consignees and other persons, and subject to the provisions of the Act,

have the force of law in Zimbabwe in relation to any carriage by air A to which the Conventions apply, irrespective of the nationality of the aircraft performing the carriage.

The defendant filed a plea in abatement to the plaintiff's summons, on two grounds: (a) that the plaintiff's claim was bad at law by reason of failure to submit a written complaint to the carrier within 21 days from the date B on which the freight was placed at its disposal, as provided for in art 26 of the Warsaw Convention and (b) that the claim was prescribed in terms of art 29 of the Convention, as read with s 8 of the Act. Article 29(1) provides that the right to damages shall be extinguished if an action is not brought within two years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, C or from the date on which the carriage stopped. The plaintiff argued that the claim was one for restitution, rather than damages, so the prescriptive periods provided by the Convention were not applicable.

Held, that it was necessary for the plaintiff to make the averment that art 26 was complied with. A claim brought in terms of the Convention must D certainly contain an averment that the requirements of the Convention for bringing such a claim, in this case art 26, have been complied with. It is critical to plead the cause of action. No such averment was made.

Held, further, that it was a distinction without a difference to say that the claim was for restitution rather than damages.

Held, further, that although the summons might have been issued within E the two years provided for in the Convention, it was necessary for the summons to be served within that time as well. Under art 29(2), the method of computing the prescriptive period is determined by the law of the court seized of the case. That law, in Zimbabwe, is the Prescription Act [*Chapter 8:11*], s 7(1) of which provides that the running of prescription F is only interrupted by the *service* of process.

Cases referred to

Alesp Entprs (Pvt) Ltd v Natural Stone Export Co (Pvt) Ltd HB-59-04

Chifamba v Mutasa & Ors HH-16-08

Senior Svcs (Pvt) Ltd v Nyoni 1986 (2) ZLR 293 (S) G

UPS Supply Chain Solutions Inc v Qantas Airways Ltd DC No CV-06-07267-DSF

Legislation considered

Carriage by Air Act [*Chapter 13:04*], ss 3, 8 H

A Convention for the Unification of Certain Rules Relating to International Carriage (the Warsaw Convention), arts 1(2), 26 & 29

Prescription Act [*Chapter 8:11*], s 7(1)

Case information

L Uriri, for the plaintiff

B *S Bhebhe*, for the defendant

Judgment

Mathonsi J: The plaintiff is a Zimbabwean registered company which deals in art and craft products. The defendant is an international airline carrier which, although constituted in South Africa, is licenced to operate in Zimbabwe and has offices in Harare.

C On 3 May 2010, the plaintiff instituted summons action against the defendant out of this court seeking relief in the form of what it termed "special damages" of US$13 765.29 and "general damages" of US$47 000. The plaintiff also sought interest on both sums and costs of suit. The plaintiff's summons and declaration was only served upon the defendant on 21 September 2010, D whereupon the defendant entered appearance to defend.

In its declaration, the plaintiff pleaded in relevant part as follows:

> "3. Plaintiff's claim is in terms of the Convention for the Unification of Certain Rules Relating to International Carriage by Air ('Warsaw Convention') as read with the Carriage by Air Act [*Chapter 13:04*]. The Warsaw Convention provides the sole and exclusive cause of action and sole remedy for a E passenger who claims for loss, injury and damages sustained in the course or arising out of his international carriage by air.
>
> 4. On or about 22 April 2008, the plaintiff contracted the defendant to carry the plaintiff's cargo from Harare to Porto Alegre in Brazil via Johannesburg, for an arts and craft exhibition scheduled for 2 May 2008 under air waybill number 083-8384 4740 and 083-8384 4736. The plaintiff handed in its F consignment to the defendant an air carrier on 22 April 2008 and two air waybills number 083-8384 4740 and 083-8384 4736 were executed on the same date. The defendant confirms the plaintiff's bookings and at no time did the defendant explain anticipated delays to freight on flights to Brazil. The carriage by air of the plaintiff from Harare to Porto Alegre in Brazil via Johannesburg constituted international carriage within the meaning of G Article 1(2) of the Convention for the Unification of Certain Rules Relating to International Carriage, by Air ('Warsaw Convention') as incorporated into

Zimbabwean law by s 2 of the Carriage by Air Act [*Chapter 13:04*]. The Warsaw Convention is incorporated as a schedule to the Act. The Carriage by Air Act is a piece of legislation designed to enable effect to be given to the Warsaw Convention of 1929, as amended by the Hague Protocol of H 1955, concerning internal carriage by air.

Mathonsi J

5. The requested flight date was 23 May. The cargo that the defendant was A contracted to transport consisted of mainly pieces of sculpture of diverse shapes and sizes.
6. The plaintiff paid the necessary payments and airfares and the defendant agreed to carry the plaintiff's consignment. In terms of both Air Waybill number 083-8384 4740 and 083-8384 4736 the waybills were marked and endorsed "URGENT CARGO FOR EXHIBITION MUST FLY AS B BOOKED PSE NOTIFY CONSIGNEEE UPON ARRIVAL OF THE CARGO EXHIBITION TO BE HELD ON THE 2ND (*SIC*) OF MAY 2008'.
7. In breaching of the agreement between the plaintiff and the defendant, the defendant failed and or delayed to deliver the plaintiff's cargo in time for the exhibition scheduled for 2 May 2008 and the cargo only arrived on 10 C June a period of one month and ten days after the exhibition to the prejudice of the plaintiff.
8. The exhibition would have enabled the plaintiff to display, show case and sell its wares. In anticipation of the business at the exhibition the plaintiff paid for accommodation, booked and paid rentals for exhibition stands among other things.
9. The delay in the delivery of the plaintiff's consignment occasioned D patrimonial loss and or financial prejudice and or actual and special damages to the plaintiff in the sum of US$13 765.29 broken down as follows:-

AIRWAY BILL NOS 083-8384 4740 AND 083-8384 4736	
Duty and tax paid	US$4 000.00
Air tickets for 2 from Harare to Brazil	US$2 998.00 E
Top up fees for fares	US$ 340.00
Transport from Salvado to Sao Paulo	US$ 402.30
Accommodation	US$1 902.30
Tickets from Port Alegree to Cutitiba	US$ 172.41
Immigration	US$ 96.55
Rentals for exhibition stands	US$3 568.98
Airfare from Johannesburg South Africa to?	US$ 150.00 F
Penalty fee for change of ticket	US$ 134.75
Total	US$1 3 765.29

10. As a result of the breach of contract by the defendant, the plaintiff suffered further general damages in the form of loss of business in the sum of US$30 000.00 (later amended to US$51 845.00).
11. The defendant lost part of the plaintiff's cargo valued at US$17 000 (later G deleted).

12. Despite demand, the defendant has failed and or neglected to pay the plaintiff its, loss in the sum of US$13 765.29 in respect of special damages and US$51 845 in respect of general damages.

WHEREFORE the plaintiff prays for:-

(a) Special damages in the sum of US$13 765.29 H

2013 (1) ZLR p387

Mathonsi J

(b) General A damages in the sum of US$51 845

(c) Interest *a tempore morae*

(d) Costs of suit".

The defendant duly filed a plea in abatement to the plaintiff's summons which is two-pronged namely that the plaintiff's claim was bad at law by B reason of failure to submit a written complaint to the carrier within the 21 days provided for in art 26 of the Warsaw Convention (the Convention) and that the claim is prescribed in terms of art 29 of the Convention as read with s 8 of the Carriage By Air Act [*Chapter 13:04*] ("the Act").

Although r 126 of the High Court of Zimbabwe Rules 1971 entitles the C plaintiff to respond to a plea in abatement, the plaintiff did not do so and the matter was set down without any replication from the plaintiff.

Mr *Bhebhe*, for the defendant, submitted that, in terms of the plaintiff's declaration, the scheduled date of arrival of the consignment was 23 May 2008 but the cargo only arrived in Brazil on 10 June 2008. For the plaintiff's D claim to be sustained it was required by art 26(2) of the Convention to lodge a written complaint within 21 days, which it did not do. For that reason, Mr *Bhebhe* argued, the plaintiff's claim was bad at law.

It is common cause that the plaintiff's claim is premised on the Convention as read with the Act through which the Convention was incorporated into E our municipal law. Section 3 of the Act provides:

> "The Convention, a translation of which is set out in the First Schedule, and the Supplementary Convention, a translation of which is set out in the second schedule, shall, so far as they relate to the rights and liabilities of carriers, carriers' agents, passengers, consignors, consignees and other persons, and subject to the provisions of this Act, have the force of law in Zimbabwe in relation to any F carriage by air to which those Conventions apply, irrespective of the nationality of the aircraft performing the carriage".

Clearly, therefore, the Convention has been domesticated into Zimbabwean law. The plaintiff's declaration also makes it clear in para 3 that the claim is made in terms of the Convention. Indeed it is the Convention which provides G an exclusive cause of action and sole remedy for a party seeking damages for loss arising from international carriage.

Article 1 of the Convention makes it also abundantly clear that it applies to all international carriage of persons, baggage or cargo performed by aircraft for reward.

H Article 26 of the Convention provides:

2013 (1) ZLR p388

Mathonsi J

> "(1) Receipt by the person entitled to delivery of baggage or cargo without A complaint is *prima facie* evidence that the same has been delivered in good condition and in accordance with the document of carriage.
>
> (2) In the case of damage, the person entitled to delivery must complain to the carrier forthwith after the discovery of the damage, and, at the latest, within seven days from the date of receipt in the case of baggage and fourteen days from the date of receipt in the case of cargo. *In the case of delay the complaint* B *must be made at the latest within twenty one days from the date on which the baggage or cargo has been placed at his disposal.*
>
> (3) *Every complaint must be made in writing* upon the document of carriage or by separate notice in writing dispatched within the times aforesaid.
>
> (4) *Failing complaint within the times aforesaid, no action shall lie against* C *the carrier*, save in the case of fraud on his part" (the emphases are mine).

The plaintiff's claim is based on delayed delivery which led to loss of business, as well as expenses for travel and bookings. In terms of para 7 of the declaration, the cargo only arrived in Brazil on 10

June 2008 instead of the scheduled date, that is, 23 May 2008. The plaintiff was therefore required by art 26 to submit a written complaint to the defendant no later than 21 D days from 10 June 2008.

The plaintiff's pleadings are silent on whether the requisite complaint was made. Indeed, upon being requested by the defendant to particularise whether such complaint was made, the plaintiff was evasive, electing to only state in the further particulars, para 3, that: E

"Yes, the plaintiff filed a complaint and the defendant has the complaint letter."

Even after the defendant placed the filing of the complaint in issue in its plea, the plaintiff was content with not filing any replication.

In an effort to breathe some life into the plaintiff's case, Mr *Uriri*, appearing for the plaintiff, in the true spirit of advocacy, submitted that upon receipt of F such inadequate particulars the defendant should have requested further and better particulars. To the extent that it did not, the issue of whether a written complaint was made or not is now a matter of evidence to be determined at the trial.

One can only sympathise with Mr *Uriri* who, in spite of his ingenuity, clearly G has got a bad case. If indeed the plaintiff was aware that there was compliance with art 26, it was for the plaintiff to plead that position. The plaintiff had an opportunity to do so in the declaration, but it allowed that opportunity to slip away because the declaration is silent on such necessary averment. When the plea was filed, the plaintiff still had a chance to replicate in terms of r 126 and include the written complaint. It did not do so. H

Mathonsi J

A I therefore have no hesitation in concluding that no written complaint was made in terms of art 26. For that reason, art 26(4), which provides that failing complaint within the times given, no action shall lie against the carrier, kicks in.

It was necessary for the plaintiff to make the averment that art 26 was complied B with. A claim brought in terms of the Convention must certainly contain an averment that the requirements of the Convention for bringing such a claim, in this case art 26, have been complied with. It is critical to plead the cause of action: *Chifamba v Mutasa & Ors* HH-16-08; *Alesp Enterprises (Pvt) Ltd v Natural Stone Export Co (Pvt) Ltd* HB-59-04.

The defendant also relies on the issue of prescription in seeking to defeat the C plaintiffs claim. Mr *Bhebhe* for the defendant cited art 29 of the Convention which provides:

> "(1) The right to damages shall be extinguished if an action is not brought within two years reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which D the carriage stopped.
>
> (2) The method of calculating the period of limitation shall be determined by the law of the court seized of the case".

Mr *Bhebhe* submitted that, as the plaintiff has alleged that the cargo was supposed to arrive in Brazil on 2 May 2008 (or is it 23 May 2008?), the prescriptive period of 2 years expired on 2 May 2010 (or 23 May 2010), E and in order to interrupt the running of prescription the plaintiff should have not only issued but served summons upon the defendant by 2 May 2010 or 23 May 2010. Having failed to do so, the plaintiff's claim is prescribed.

Mr *Uriri* for the plaintiff challenged that argument from essentially three fronts. In the first, he took the view that only one right is extinguished by F Article 29, namely the claim for damages. As part of the plaintiff's claim was for expenses incurred, it was not extinguished, since it was a claim for restitution. He referred me to the United States Court of Appeal decision in *UPS Supply Chain Solutions Inc v Qantas Airways Ltd* DC No CV-06-07267-DSF in which that court reasoned that, although the original claim had been for damages to an aircraft engine while in transit from New Zealand G to the United States, UPS's third party action against Qantas did not seek compensation for damage sustained to the engine but rather that UPS, as a contracting carrier, was seeking indemnification and contribution from Qantas having met the original damages claim. It ruled that the claim did not fall under the "right to damages" referred to in art 35 of the Montreal H Convention, similar to art 29 of the Warsaw Convention.

Mathonsi J

In my view, although that case is persuasive authority, it is clearly A distinguishable from the present in which the plaintiff clearly avers in its declaration that it seeks "special damages" and "general damages". To my mind, to suggest that a claim for compensation of loss suffered by the plaintiff on its tryst to Brazil in the form of travel and accommodation expenses as well as loss of business, is a claim for restitution as opposed to damages, is an B unnecessary splitting of hairs, the proverbial distinction without difference.

Mr *Uriri*, in the second front, argued that the Convention makes use of words which are not provided for in the Prescription Act [*Chapter 8:11*] and as such the interpretation in the Prescription Act has no application to this case. The running of prescription should not be reckon as in that Act because art 29 C uses the phrase "if an action is not brought within two years".

I do not agree. In fact a cursory look at art 29 proves the fallacy of that argument. Article 29(2) specifically provides that the method of computing the prescriptive period is determined by the law of the court seized of the case. That law is the Prescription Act, s 7(1) of which provides that the running of prescription is only interrupted by the service of process. D

It is also instructive to defer to the provisions of s 8(3) of the Carriage by Air Act [*Chapter 13:04*], the legislation which domesticates the Convention. That section, although dealing with referral to arbitration is useful in appreciating the intention of the legislature. It provides:

> "(3) Subsections (1) and (2) and Article 29 of the Convention shall have E effect as if references in those provisions to an action included reference to an arbitration; and for the purpose of this subsection an arbitration shall be deemed to be commenced when one party to the arbitration *serves on the other party or parties a notice requiring him or them to appoint an arbitrator* . . .." (my italics).

By parity of reasoning, it must follow that the legislative intent was always that only service of process would interrupt prescription. F

On the third front, Mr *Uriri* submitted that the defendant is estopped from relying on the Convention because, in correspondence which exchanged hands between the parties before the action was instituted, the defendant had led the plaintiff to believe that it would not rely on the provisions of the Convention to defeat the plaintiff's claim. The misrepresentation caused G prejudice to the plaintiff by lulling it into a false sense of security that the defendant was not relying on the Convention as it had disregarded it. He argued that the long silence and inaction of the defendant misled the plaintiff.

While it is true that the plaintiff's case may have been compromised badly by its failure to file a replication, I am unable to find any misrepresentation on the part of the defendant. The requirements for estoppel were set out H

Mathonsi J

A in *Senior Services (Pvt) Ltd v Nyoni* 1986 (2) ZLR 293 (S) at 305 by Dumbutshena CJ as:

> "1. A representation by words or conduct which might reasonably be expected to mislead;
> 2. The misleading of the representee;
> 3. The inducement of the representee to alter his position on the faith of such B representation;
> 4. The representor must have intended that the representation should be acted upon by the representee though this is normally presumed."

It is inconceivable that the plaintiff would have been misled by the defendant's refusal to meet its claim. At no point did the defendant even suggest a remote C willingness to pay. In my view, the requirements of estoppel are not met and that doctrine cannot set it.

I therefore conclude that the plaintiff's claim is hereby dismissed with costs.

D *v Nyemba & Associates*, plaintiff's legal practitioners

Kantor & Immerman, defendant's legal practitioners

© 2015 Juta and Company (Pty) Ltd.

Document 52 of 73

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2013/Volume 1/S v AFRICAN CONSOLIDATED RESOURCES (PVT) LTD 2013 (1) ZLR 392 (H)

S v AFRICAN CONSOLIDATED RESOURCES (PVT) LTD 2013 (1) ZLR 392 (H)

Citation	2013 (1) ZLR 392 (H)
Case No	Judgment No. HH-145-13
Court	High Court, Harare
Judge	Musakwa J and assessors
Heard	15 November 2010; 16 November 2010; *CAV*
Judgment	10 May 2013
Counsel	*J Samukange*, for the applicant *C Mutangadura*, for the respondent
Case Type	Criminal trial
Annotations	No case annotations to date

Flynote

Criminal procedure – *charge – exception to – grounds on which exception may be made – charge calculated to prejudice or embarrass accused in his defence – allegation that accused involved in litigation on same matter, decision on which was awaited – not a ground for quashing indictment – prejudice or embarrassment must relate to accused's ability* D *to formulate a defence*

Headnote

The accused, a mineral exploration company, was charged with fraud, alternatively various offences under the Precious Stones Trade Act [*Chapter 21:06*]. It was alleged that sometime in April 2006 the accused E sought to obtain diamond mining claims in the Marange area in favour of the non-existent companies, which were only incorporated after they had obtained certificates of registration of mining claims from the Ministry of Mines. After securing mining licences through these alleged misrepresentations of the legal status of the companies, the company was alleged to have failed to keep records of diamonds recovered from F the mining claims. Following several enquiries from the Ministry of Mines concerning its activities at the mining location, the company claimed that no mining was taking place. To the contrary, the State alleged, mining activities were taking place and the company was also purchasing diamonds from illegal miners. Upon cancellation of the G mining permits, the company maintained that no mining activity ever took place. However, upon a search being conducted the company was found in possession of diamonds that had been mined and purchased without being accounted for.

The accused excepted to the indictment in terms of s 178 of the Criminal Procedure and Evidence Act [*Chapter 9:07*], contending that the H

A indictment was likely to prejudice and embarrass it because the company was involved in civil litigation on the same subject matter. In 2009 the company had obtained a declaratory order from the High Court to the effect that the claims it held were valid, but a year later the same judge rescinded his order on the grounds that the company had misled the court as to the status of the subsidiary companies in whose names the B licences were obtained. An appeal was noted against this ruling, but at the date of the current trial had yet to be determined. The accused argued that, if the appeal against the rescission judgment were to be upheld, it would be entitled to raise the defence of claim of right, the claim companies being the valid holders of the claims. If the appeal failed, C it would be entitled to raise the defence of lack of *mens rea*, in that at all times it had the *bona fide* belief that the claim companies had been validly incorporated at the time of registration of the claims, and that title to the claims was valid at the time of possession of the diamonds.

The State argued that a motion to quash an indictment can only be made D where the charge preferred is imprecise and ambiguous, hence where it embarrasses or prejudices an accused person in the formulation of a defence.

Held, that it was clear from the application made on behalf of the accused that the issue was not about formal defects in the indictment. There was also no question about the indictment not disclosing any offences. The E issue was about the accused contending that it could not properly plead to the charges because it awaited the Supreme Court's determination of its appeal relating to the same subject matter. Under s 178 of the Criminal Procedure and Evidence Act, an exception can be raised when a charge discloses no offence or when there are imperfections in the F way the charge is drafted.

Held, further, that the crucial question was whether a criminal prosecution could be instituted from the same facts giving rise to a civil suit and whether it was impermissible to have a parallel process where the conduct of an accused person gives rise to both criminal prosecution and civil litigation.

G *Held*, further, that there was no question of the charges lacking clarity by way of omission of some essential averments, nor of the accused being charged with a non-existent offence. The accused seemed to raise a claim of right and lack of intention. That meant that it was able to plead to the indictment. Prejudice or embarrassment must relate to the accused's H inability to formulate a defence on account of imperfections in the charge

---

and accompanying facts. If the indictment and facts are well understood, A there can be no prejudice or embarrassment.

Held, further, that the fact that out of the same set of facts civil litigation and criminal prosecution had arisen could not be a ground for excepting to an indictment, any more than it could if out of the same conduct a criminal charge, disciplinary/misconduct proceedings and a delictual B suit arose. An accused could not claim to be unable to defend himself because a decision was awaited in the other matters.

Held, further, that the accused's remedy might have been to seek a stay of proceedings pending the outcome of the appeal.

Cases referred to C

R v Mahlatse 1949 (4) SA 455 (O)

R v Mlothswa 1968 (2) RLR 172 (G); 1968 (3) SA 360 (R)

S v Smith 1975 (2) RLR 77 (A)

R v van Meerdervoort 1957 (2) S.A. 23 (SR)

Legislation considered D

Criminal Procedure and Evidence Act [*Chapter 9:07*], ss 146 & 178

Case information

J Samukange, for the applicant

C Mutangadura, for the respondent

Judgment

Musakwa J: Having been indicted on a charge of fraud or alternatively, contravening the Precious Stones Trade Act [*Chapter 21:06*], the accused applied to quash the charges on the basis that they do not disclose an offence.

Having heard arguments from respective counsel, I subsequently directed they file relevant authorities in support of their arguments. This is because they had simply made submissions which were not supported by any law.

In light of the argument advanced by the accused, I had initially thought it prudent that the court awaits the outcome of the appeals the accused noted to the Supreme Court in respect of related litigation touching on the same subject matter. In view of the passage of time without the appeals having been determined, I resolved to dispose of the matter without waiting for that outcome.

The indictment is framed as follows:

> "That African Consolidated Resources (Private) Limited whose last know address is number 9 Birchenough Road, Alexandra Park, Harare (hereinafter called the accused) represented by Ian Harold Harris who is hereby cited in terms of

Musakwa J

> s 385(3) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] is guilty of the crime of: FRAUD
>
> In that on a date unknown to the prosecutor but during the period extending from April 2006 and June 2006 and at the Mining Commissioner's Office in Mutare African Consolidated Resources (Private) Limited misrepresented to the Ministry of Mines and Mining Development, that Heavy Stuff Investments, Olibile Investments (Pvt) Ltd and Possession Investment Services Limited were companies qualified to obtain Mining Claims thereby causing prejudice to the Ministry of Mines and Mining Development by unlawfully obtaining Certificates of Registration in terms of the attached schedule hereto referred to as Annexure "A" when in actual fact the accused person knew that the said purported companies had not yet been duly incorporated as companies.
>
> Alternatively
>
> POSSESSING PRECIOUS STONES WITHOUT A LICENCE OR PERMIT IN CONTRAVENTION OF SECTION 3(1) AS READ WITH SECTION 3(2) OF THE PRECIOUS STONES TRADE ACT [*CHAPTER 21:06*].
>
> In that on 15 January 2007 and at number 9 Birchenough Road, Alexander (*sic*) Park, Harare, the accused person, African Consolidated Resources unlawfully possessed 129 031.87 carats of diamonds without a valid licence or a permit.
>
> Or Alternatively
>
> UNLAWFULLY DEALING IN PRECIOUS STONES IN CONTRAVENTION OF SECTION 3(1) AS READ WITH SECTION 3(2) OF THE PRECIOUS STONES TRADE ACT [*CHAPTER 21:06*].
>
> In that on a date to the prosecutor unknown but between April 2006 and 23 September 2006 the accused, African Consolidated Resources unlawfully dealt in precious stones. That is to say the accused person purchased diamonds from illegal artisanal miners in Marange South near the village of Chiyadzwa in Mutare.
>
> Or Alternatively
>
> CONTRAVENING SECTION 6 (1) AS READ WITH SECTION 6(2a)(a) OF THE PRECIOUS STONES TRADE ACT [*CHAPTER 21:06*].
>
> In that between the period extending from April 2006 and January 2007 the accused person failed to enter in respect of diamonds recovered from its mining location such details relating to the amount of diamonds recovered during each preceding month and the amount of diamonds held by it at the end of each preceding month in contravention of the Act."

At the hearing the accused's counsel filed an exception to the charge, the basis of which I will revert to shortly. In light of the arguments advanced in support of the exception, it is pertinent to summarise the facts alleged against the accused.

The summary of the State case alleges that the accused is a mineral exploration company. Sometime in April 2006 the accused sought to obtain diamond mining claims in Marange in favour of non-existing companies, namely Heavy

Musakwa J

Staff Investments Company, Olibile Investments (Pvt) Ltd and Possession A Investment Services Ltd. These companies were only registered after they had obtained certificates of registration of mining claims from the Ministry of Mines and Mining Development. Possession Investment Services Ltd obtained the certificates of registration of mining claims on 4th and 19th April 2006 as well as on 1 June and 1 July 2006. As of those dates the company B was non-existent as it was only registered on 19 July 2006.

On the other hand, Heavy Staff Investments Company obtained certificates of registration of mining claims on 19 April 2006 and 1 June 2006. The company was subsequently incorporated on 19 July 2006.

Olibile Investments (Pvt) Ltd obtained certificates of registration of mining C claims on 10 April 2006. It was subsequently incorporated on 21 July 2006.

After securing mining licences through these misrepresentations of the legal status of the companies, the accused is alleged to have failed to keep records of diamonds recovered from the mining claims. Following several enquiries from the Ministry of Mines and Mining Development concerning its activities at the mining location, the accused claimed that no mining was D taking place. To the contrary, mining activities were taking place and the accused was also purchasing diamonds from illegal miners.

Upon cancellation of the mining permits, the accused maintained that no mining activity ever took place. However, upon a search being conducted the accused was found in possession of diamonds that had been mined and E purchased without being accounted for.

The State has lined up nine State witnesses to testify in the matter.

The accused filed a written application in which it excepted to the indictment in terms of s 178 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. It was contended that the indictment is likely to prejudice and embarrass the F accused. This is because the accused is involved in civil litigation on the same subject matter that has been criminalised.

In support of the application the applicant annexed two judgments by Hungwe J and another judgment by the Supreme Court. In HC 6411/07 the accused sought a declaratory order on the validity of mining claims that were issued G to its subsidiaries, Heavy Staff Investments Company, Olibile Investments (Pvt) Limited and Possession Investment Services Ltd. The order granted by Hungwe J on 24 September was to the following effect:

"1. The African Consolidated Resources (Pvt) Ltd claims issued to the third, fourth, fifth and sixth applicants within the area previously covered by Extension Prospecting Order 1523 held by Kimberlitic Searches (Pvt) H

Musakwa J

A Ltd are valid and have remained valid since the date they were originally pegged.

2. The right granted to the third respondent by virtue of the Special Grant shall not apply in respect of the African Consolidated Resources (Pvt) Ltd claims area as indicated on annexure "B" to the papers. In that regard it is hereby ordered that third respondent cease its prospecting and diamond B mining activities in the said area.

IT IS FURTHER ORDERED AS FOLLOWS

3. That second respondent return to the applicants' possession the 129 400 carats of diamonds seized from applicants' offices in Harare on 15 January 2007.
4. The second respondent return to the applicants all diamonds acquired by C second respondent from the African Consolidated claims area using the register kept by the second respondent in compliance with the Kimberley Process Certification Scheme.
5. That fourth respondent be and is hereby ordered to direct Police to cease interfering with the applicants 'prospecting and mining activities.
6. That first, second and third respondents pay applicants' costs on a legal D practitioner and client scale, the one paying the other to be absolved.
7. Any appeal noted against this order shall not suspend the operation of the order."

Zimbabwe Mining Development Corporation and Minerals Marketing Corporation filed a chamber application with the Supreme Court wherein E they sought the setting aside of the order by Hungwe

J. In setting aside the order by Hungwe J the Chief Justice in his judgment in case no. SC 1/10 also ordered that the diamonds in contention be surrendered to the Reserve Bank of Zimbabwe for safekeeping, pending the outcome of the appeal noted to the Supreme Court. Whilst allowing Zimbabwe Mining Development Corporation and Minerals Marketing Corporation to remain in occupation F of the disputed claims, the Chief Justice ordered that they cease all mining operations.

In a subsequent judgment delivered by Hungwe J on 6 September 2010[1], the order granted on 24 September 2009 was set aside. In setting aside the earlier order Hungwe J held that African Consolidated Resources and others G never acquired any rights as Heavy Staff Investments Company, Olibile Investments (Pvt) Ltd and Possession Investment Services Ltd did not exist when the Mining Commissioner purported to issue them mining rights. In H addition, Hungwe J also held that the applicants had misled the court when

---

Musakwa J

they claimed to have acquired mining rights. The effect of the order of 6 A September 2010 was to dismiss the application by the applicants.

The accused noted an appeal against the decision of 6 September 2010 and the appeal is yet to be determined. In essence, the accused contends that by virtue of having noted an appeal, the *status quo ante* was restored. Hence the earlier order of 24 September 2009 prevails. B

It is the accused's contention that, until the appeals before the Supreme Court are determined, it will be prejudiced or embarrassed in its defence to the criminal charges as follows:

> "(a) If the appeal against the rescission judgment is upheld then the accused will be entitled to raise the defence of claim of right, the claim companies C being the valid holders of the claims;
>
> (b) If both the appeal against the rescission judgment and the claim in case no. HC 6411/07 are dismissed, then the accused will be entitled to raise the defence of lack of *mens rea*, in that at all times it had the *bona fide* belief that the claim companies had been validly incorporated at the time of registration of the claims, and that title to the claims was valid at the D time of possession of the diamonds."

In its opposing submissions the State argued that a motion to quash an indictment can only be made where the charge preferred is imprecise and ambiguous, hence where it embarrasses or prejudices an accused person in the formulation of a defence. Reference was made to *S v Smith* 1975 (2) RLR 77 (A). E

Mr *Mutangadura* also argued in his submissions that a charge can also be quashed where it fails to disclose an offence. He made an analogy of a civil claim which discloses no cause of action. Reference was also made to *R v Mahlatse* 1949 (4) SA 455 (O) and *R v Mlothswa* 1968 (2) RLR 172 (G).

The State also contends that the multiplicity of counts is permissible in terms F of s 145 of the Criminal Procedure and Evidence Act.

Section 178 of the Procedure and Evidence Act provides:

> "(1) The accused may, before pleading, apply to the court to quash the indictment, summons or charge on the ground that it is calculated to prejudice or embarrass him in his defence. G
>
> (2) Upon an application in terms of subsection (1), the court may quash the indictment, summons or charge or may order it to be amended in such manner as the court thinks just or may refuse to make any order on the application.
>
> (3) If the accused alleges that he is wrongly named in the indictment, summons or charge, the court may, on being satisfied by affidavit or otherwise of the error, order it to be amended." H

Musakwa J

A The essential requirements of an indictment or charge are set out in s 146 as follows:

> "(1) Subject to this Act and except as otherwise provided in any other enactment, each count of the indictment, summons or charge shall set forth the offence with which the accused is charged in such manner, and with such particulars as to the alleged time and place of committing the offence and the person, if B any, against whom and the property, if any, in respect of which the offence is alleged to have been committed, as may be reasonably sufficient to inform the accused of the nature of the charge.

(2) Subject to this Act and except as otherwise provided in any other enactment, the following provisions shall apply to criminal proceedings in any court, that is to say –

(a) the C description of any offence in the words of any enactment creating the offence, or in similar words, shall be sufficient; and

(b) any exception, exemption, proviso, excuse or qualification, whether it does or does not accompany in the same section the description of the offence in the enactment creating the offence, may be proved by the accused, but need not be specified or negatived in the indictment, summons or charge, and, if so specified or negatived, no proof in relation to the matter so specified D or negatived shall be required on the part of the prosecution.

(3) Where any of the particulars referred to in this section are unknown to the prosecutor, it shall be sufficient to state that fact in the indictment, summons or charge.

(4) Where a person is charged with a crime listed in the first column of the Second Schedule to the Criminal Law Code, it shall be sufficient to charge him E or her with that crime by its name only.

(5) No indictment, summons or charge alleging the commission of a crime mentioned in subsection (4) shall be held to be defective on account of a failure to mention the section of the Criminal Law Code under which the crime is set forth."

It is clear from the application made on behalf of the accused that the issue F is not about formal defects in the indictment. There is also no question about the indictment not disclosing any offences. It is about the accused contending that it will not properly plead to the charges because it awaits the Supreme Court's determination of its appeal relating to the same subject matter.

In this respect, some of the authorities cited by respective counsel are not germane to the issue at hand. In my view, the first issue to determine is what G is excipiable under s 178. In my respectful view, an exception can be raised when a charge discloses no offence or when there are imperfections in the way the charge is drafted. That is why, in terms of s 178(2), the court may order that the charge be amended.

The crucial question before me is whether a criminal prosecution can be H instituted from the same facts giving rise to a civil suit. In other words, is it

---

impermissible to have a parallel process where the conduct of an accused A person gives rise to both criminal prosecution and civil litigation?

It is trite that the burden of proof in a civil case rests on a balance of probabilities and is lower than that in a criminal trial. In respect of a criminal trial the degree of proof is beyond a reasonable doubt. In this respect see s 18 of the Code. B

The Code also provides for various defences and mitigating factors which an accused may raise. These are provided for under Chapter XIV. The important thing to note is that these are general defences as s 214 states that –

"The defences and mitigating factors which an accused may successfully raise are not limited to those set out in this Chapter."

In the present matter, I do not see how the applicant is prejudiced or embarrassed C in the conduct of its defence to the charges. There is no question of the charges lacking clarity by way of omission of some essential averments. There is no question of the accused being charged with a non-existent offence. The accused, in challenging the indictment, has postulated on what may or may not be its possible defences. From the argument raised by the accused, it seems D to raise a claim of right and lack of intention. That means that the accused is able to plead to the indictment. In my view, prejudice or embarrassment must relate to an accused's inability to formulate a defence on account of imperfections in the charge and accompanying facts. If the indictment and facts are well understood there can be no prejudice or embarrassment. In this respect see *R v van Meerdervoort* 1957 (2) SA 23 (SR). E

That out of the same set of facts civil litigation and criminal prosecution has arisen cannot be a ground for excepting to an indictment. By way of analogy, out of the same conduct may arise a criminal charge and disciplinary/misconduct proceedings. The same conduct may further spawn a delictual suit. In the event that an accused in such a situation faces a delictual suit F or disciplinary proceedings first and is subsequently charged with a crime arising from the same conduct, can they claim they are unable to defend themselves because a decision is awaited in the other matters?

The remedy for the accused may well have been to seek a stay of proceedings whilst awaiting the outcome of the appeals. However, that is not the issue G before me. Accordingly, the exception is hereby dismissed.

Venturas & Samukange, accused's legal practitioners

Attorney-General's Office, legal practitioners for the state H

1 See *Min of Mines & Ors v African Consolidated Resources plc & Ors* 2010 (2) ZLR 307 (H). – *Editor.*

© 2015 Juta and Company (Pty) Ltd.

Document 53 of 73

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2013/Volume 1/ECONET WIRELESS (PVT) LTD & ORS v SANANGURA 2013 (1) ZLR 401 (S)

ECONET WIRELESS (PVT) LTD & ORS v SANANGURA 2013 (1) ZLR 401 (S)

2013 (1) ZLR p401

Citation	2013 (1) ZLR 401 (S)
Case No	Judgment No. S-52-13
Court	Supreme Court, Harare
Judge	Malaba DCJ, Ziyambi JA & Patel AJA
Heard	13 May 2013
Judgment	13 May 2013
Counsel	*T Mpofu*, for the appellants *C Chikono*, for the respondent
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

C **Delict** – *actio injuriarum – malicious prosecution – when committed – "malice" – meaning – genuine belief in plaintiff's guilt based on reasonable grounds – defendant not liable*

Headnote

The delict of malicious prosecution or proceedings is committed when one D person maliciously and without reasonable and probable cause brings legal proceedings against another.

Every citizen has a right to use legal proceedings legitimately for the purpose of upholding and protecting his rights, but does not have the right to abuse the legal process for the purpose, not of upholding and furthering E his rights, but instead solely for the purpose of causing harm to another because he has malice towards that person. The term "malice" does not here mean spite or ill-will or a spirit of vengeance; it has a wider connotation. It includes any motive different

from that which is proper for the institution of criminal proceedings, which is to bring an offender to justice and thereby aid in the enforcement of the law. In order for F one to succeed in an action for malicious prosecution, one must prove four requirements, namely: that the prosecution was instigated by the defendant; it was concluded in his favour; there was no reasonable and probable cause for the prosecution; and that the prosecution was actuated by malice. Placing of information and facts before the police does not in itself amount to instigating prosecution. It would amount G to instigation if besides giving information the defendant proceeds to lay a charge or overbears on the police to institute proceedings which they would not otherwise commence or institute. The defendant must have been actively instrumental in setting the law in motion. Simply giving a candid account, however incriminating, to the police is not the H equivalent of launching a prosecution: the critical decision to prosecute

---

Musakwa J

not being his, the stone set rolling is a stone of suspicion only. But if A besides giving information, he proceeds to lay a charge, this amounts to an active instigation of proceedings which he cannot shrug off by saying that they were in the last resort initiated at the discretion of the public authority.

A defendant will not be liable if he held a genuine belief in the plaintiff's B guilt founded on reasonable grounds. In effect, where reasonable and probable cause for the arrest or prosecution exists, the conduct of the defendant in instigating it is not wrongful. The requirement of reasonable and probable cause is a sensible one, since it is of importance to the community that persons who have reasonable and probable cause for a prosecution should not be deterred from setting the criminal law in C motion against those whom they believe to have committed offences, even if in so doing they are actuated by indirect and improper motives.

There can be said to be "reasonable and probable cause for a prosecution" if there exists an honest belief in the guilt of the accused based on a full conviction, founded upon reasonable grounds, of the existence of a state D of circumstances which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man, placed in the position of an accuser, to the conclusion that the person charged was probably guilty of the crime imputed.

Judgment of Kudya J in *Sanangura v Econet Wireless (Pvt) Ltd & Ors* 2012 (2) ZLR 304 (H) E reversed.

Cases referred to

Amin v Bannerjee [1947] AC 322 (PC)

Bande v Muchinguri 1999 (1) ZLR 476 (H)

Brown v Hawkes [1891] AC 718

Davies v Premier Finance Group Ltd HH-235-10 F

Gellman v Min of Safety & Security 2008 (1) SACR 446 (W)

le Roux v Minister of Safety & Security & Anor 2009 (4) SA 491 (N); 2009 (2) SACR 252 (KZN)

Mabona v Min of Law & Order 1988 (2) SA 654 (SE)

Min of Justice v Moleko [2008] 3 All SA 47; 2009 (2) SACR 585 (SCA) G

Relyant Trading (Pty) Ltd v Shongwe & Anor [2007] 1 All SA 375 (SCA)

Case information

T Mpofu, for the appellants

C Chikono, for the respondent H

Malaba DCJ

Judgment

A **Malaba DCJ:** At the end of hearing argument for both parties the court allowed the appeal with costs. It was indicated at the time that reasons for the decision to allow the appeal would follow in due course. These are they.

On 12 August 2011 the respondent issued out summons in the High Court claiming damages for malicious prosecution against the first and second B appellants and damages for defamation against the third appellant. After a full trial the court *a quo* awarded the respondent the sum of US$20 000 for general damages for malicious prosecution with interest and the sum of US$2 000 for defamation damages with interest.

The first appellant is a company registered in terms of the laws of Zimbabwe dealing in the business of production and sale of airtime recharge cards and C the second appellant is employed by the first appellant as a loss control and investigating officer. The third appellant is a company registered in terms of the laws of Zimbabwe carrying out the business of providing electronic recharge cards to dealers through terminals that it supplies and services in terms of a dealership contract. It is a subsidiary of the first appellant.

D On 10 February 2009, the third appellant entered into a dealership contract with a company called Flamsrock Trading (Pvt) Ltd in terms of which the latter would buy prepaid electronic airtime vouchers at a discount from the first appellant for resale through the third appellant. The company was represented by the respondent who is its Chief Executive Officer. On 24 E March 2009, the first appellant discovered that recharge cards which, had been prepared for Innscor and OK Zimbabwe but subsequently withdrawn before being supplied were being sold in the open market at very low prices ranging between $4 and $4.30. After the recharge cards had been withdrawn they were expected to have been deactivated before they could be supplied to interested customers.

F It appears that the responsible persons within the first appellant who had access to the relevant computer did not deactivate. An employee within the first appellant who had access to the computer, using a flash stick, managed to retrieve information regarding the recharge cards.

The second appellant was tasked with investigating the theft of the recharge G cards. He started by having all the affected recharge cards deactivated. The action resulted in an outcry from the people who had purchased the cards. As a result of the inquiries, he was led to one David Chimbiriri, who was involved in the sale of cards in Makoni area of Chitungwiza. When asked about the source of the cards, David Chimbiriri indicated that he got the cards H from the respondent. At that time, 150 cards were recovered.

Malaba DCJ

The respondent was asked about the cards found in possession of David A Chimbiriri. He admitted having given them to him. He indicated that he got the cards from a person called Tony whom he said he met once at his Internet Café. He said he recorded the name of the person and his Telecel number in a book. The cellphone number which the respondent gave to the third appellant is 023 414 444. When the second appellant dialled the number, B it was not in use. Investigations with Telecel revealed that the number was false and non-existent.

The respondent could not give full details of the particulars of Tony. When he was cross-examined in court he said he did not have the book in which he had recorded Tony's particulars. The second appellant gave the respondent the benefit of doubt at the time, believing as a dealer he would assist the C first appellant to identify and apprehend Tony or the person who had stolen the recharge cards. The respondent was given a week within which to look for Tony, whom he had said would come to the shop to collect the money for the 150 recharge cards.

During that week the second appellant received a call from Detective D Assistant Inspector Dhlodhlo of Gweru police who indicated that they had apprehended one Joice Nyamakandi who was due to collect money from people who were selling recharge cards belonging to Econet at low prices. The people were complaining that the cards had been deactivated. The second appellant indicated to the police that he was handling a case of theft E of those recharge cards. On the basis of an arrangement with the police, he drove to Gweru and met with Joice Nyamakandi who had been arrested by the police. Joice Nyamakandi indicated that she had been given authority to collect money by her boyfriend, one Caleb Majiri who resided in Harare.

The police, the second appellant and Joyce Nyamakandi drove to Harare where Caleb Majiri was arrested. He indicated that he had been given 100 recharge F cards by the respondent. The police

and the second appellant approached the respondent at his internet cafe in the absence of Caleb Majiri. When asked about the recharge cards, the respondent again insisted he had obtained 150 recharge cards from one Tony.

It was after he was confronted with the information that he had given the G recharge cards to Caleb Majiri that the respondent admitted to having obtained 450 more recharge cards from Tony. He denied giving Caleb Majiri 600 recharge cards. At that time Tony still had not come to collect the money from the respondent, suggesting that he was non-existent. On the basis of the unreliable information on the identity of Tony, the false Telecel number which he gave, the insistence that he had obtained only 150 cards from Tony H

A and the denial of having given the 600 recharge cards to Caleb Majiri, the Police decided to charge the respondent with the offence of theft.

The respondent was detained at Rhodesville police station in Harare on the orders of D/Sgt Mazenyere, the investigation officer. The next day he was taken to Gweru in one of the first appellant's cars, since the police had no B transport.

A statement was recorded from the second appellant at Gweru police station. The respondent appeared at Gweru magistrates court charged with the offence of the theft of the recharge cards from the first appellant on 6 April 2009. He applied for bail which was opposed by the State. He was granted bail on 8 April 2009. He was placed on remand on the ground that there was C reasonable suspicion that he had committed the offence. The charge was withdrawn before plea on 17 August 2009 and the recharge cards recovered as exhibits were released into the custody of the respondent.

The first and the second appellants were not happy with the withdrawal of the charge. The investigation officer had not been consulted by the public D prosecutor. The first appellant was of the view that the respondent, on the facts, had a case to answer, for receiving stolen property, the possession of which he had failed to explain. The first appellant wrote to the Director of Public Prosecution expressing dissatisfaction with the withdrawal of the charge.

On 28 April 2010, the Director of Public Prosecution wrote to the first E appellant's legal practitioners in the following terms:

> "I have communicated with our Gweru office and are proceeding to have the accused Sanangura and another prosecuted by way of Summons as charges had already been withdrawn.
>
> The accused persons have a case to answer and we are therefore resuscitating the matter.
>
> F I have therefore directed that the accused be summoned and taken to court for prosecution as soon as possible."

When the respondent was brought to court, he was acquitted at the end of the State case. The reasons for the acquittal are not known. The first appellant was unhappy with the respondent's acquittal because it believed that there was failure to place appropriate weight on the facts showing that G the respondent had received stolen property for which he failed to give a satisfactory explanation.

In the meantime, the third appellant had on 12 May 2009 written a letter to Flamsrock Trading (Pvt) Ltd terminating the contract for supply of prepaid airtime which the parties had entered into. The letter of termination reads H as follows:

> "This letter serves to advise you that your contract with Transaction Payment A 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.
>
> We regret that our relationship had to be prematurely terminated under such B circumstances."

After the acquittal, the respondent issued summons claiming damages for malicious prosecution and defamation. He alleged that the first and the second appellant instigated his prosecution when they had no reasonable cause to do so.

He alleges that there was no evidence that he had stolen recharge cards from C the first appellant. He was not employed there and had no access to passwords to the computer where those cards were stored. He said that his prosecution was instituted because of malice. He further alleged that there was bad blood between his family and that of the second appellant. He however did not give reasons for the alleged sour relationship. He only stated the nature D of the relationship was that his mother and the second appellant shared the same totem. Needless to say, the second appellant denied the allegation of a family relationship going beyond the mere fact that the respondent's mother shared the same totem with him. The second appellant had indicated that he had met the respondent when he was investigating another case of theft of recharge cards at Econet. The said charge was later withdrawn against E the respondent.

The respondent said the second appellant had threatened that he would rot in jail if he did not admit the theft of the recharge cards. Although the respondent tried to use these allegations to prove the element of malice, the second appellant denied them. The second appellant said if indeed there was F malice, he would not have let the respondent go free after the first interview when he admitted receiving stolen property belonging to the first appellant.

On the question of lack of reasonable cause for the institution of the prosecution, the respondent said that it was instituted when the prosecutor in Gweru had made up his mind to withdraw the charge. He also said that G his acquittal at the end of the State case proved that the first and the second appellant had no case against him.

On the second claim the respondent alleged that the letter terminating the contract was addressed to him. He said the reason given for the termination was that there had been fraudulent activities on the account. He said the letter was written at the time allegations of theft of recharge cards were being H

Malaba DCJ

A levelled against him. The letter was suggesting he was a fraudster. He felt the letter was defamatory of him.

The court *a quo* found that the respondent had not established the existence of a sour relationship between his family and that of the second appellant. The allegation of malice had not been proved. Notwithstanding that finding the court *a quo* held that the first and the second appellants instigated the B prosecution of the respondent.

The court *a quo* concentrated its mind on the question whether there was evidence produced by the appellants of the respondent having stolen the recharge cards from the first appellant. It found that the recharge cards could have been stolen by an employee of the first appellant because the C respondent had no access to the computers. On that ground the court came to the conclusion that the prosecution had no reasonable cause.

On the second cause of action, the court *a quo* came to the conclusion that the letter was defamatory of the respondent. The court said that allegations of fraudulent activity on Flamsrock Trading (Pvt) Ltd's account portrayed the respondent as a fraudster. It found that the letter was written on the D recommendations of the second appellant. The court said:

> "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 own account E that had prejudiced the first defendant. In my view, an ordinary reasonable 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."

The law on the delict of malicious prosecution is clear. In *Davies v Premier* F *Finance Group Ltd* HH-235-10, Patel J (as he then was) said at pp 10-11:

> "According to Feltoe *A Guide to the Zimbabwean Law of Delict* (2006), the delict of malicious prosecution or proceedings is committed:
>
> > 'When D maliciously and without reasonable and probable cause brings legal proceedings against another. Every citizen has a right to use legal proceedings legitimately for the purpose of upholding and protecting his rights. He or she does not, however, have the right to abuse the legal G process for the purpose, not of upholding and furthering his or her rights, but instead solely for the purpose of causing harm to P because he or she has malice towards P.

. . . As regards malicious prosecution, the case of *Bande v Muchinguri* (1999) points out that the term "malice" did not here mean spite or ill-will or a spirit of vengeance; it had a wider connotation. It included any H motive different from that which is proper for the institution of criminal

---

2013 (1) ZLR p408

Malaba DCJ

proceedings, which is to bring an offender to justice and thereby aid in the A enforcement of the law.'"

In order for one to succeed in an action for malicious prosecution, one must prove four requirements, namely: that the prosecution was instigated by the defendant; it was concluded in his favour; there was no reasonable and probable cause for the prosecution; and that the prosecution was actuated by B malice. See *Amin v Bannerjee* [1947] AC 322 (PC) at 330; *Minister of Justice & Constitutional Development v Moleko* [2008] 3 All SA 47 (SCA) para 8.

Placing of information and facts before the police does not in itself amount to instigating prosecution. It would amount to instigation if, besides giving information, the defendant proceeds to lay a charge or overbears on the police to institute proceedings which they would not otherwise commence C or institute.

In *Bande v Muchinguri* 1999 (1) ZLR 476 (H) at 484 I said:

"The question is whether Mr Muchinguri instigated the institution of the prosecution against the plaintiff. J G Fleming *The Law of Torts* 7 ed at p 582 states that:

'The defendant must have been actively instrumental in setting the law in D motion. Simply giving a candid account, however incriminating, to the police . . . is not the equivalent of launching a prosecution: the critical decision to prosecute not being his "the stone set rolling [is] a stone of suspicion only". *But if besides giving information he proceeds to lay a charge, this amounts to an active instigation of proceedings which he cannot shrug off by saying that they were in the last resort initiated at the discretion of the* E *public authority*' (the emphasis is mine).

In *Baker v Christine* 1920 WLD 14, Bristowe J said the 'test' 'is whether the defendant did more than tell the detective the facts and leave him act on his own judgment'. The principle that giving an honest statement of fact to the police on which the prosecution is then instituted is not 'instigating' a prosecution was referred to with approval by Price J in *Madnitsky v Rosenberg* 1949 (1) PH J5 at pp 15-16. See also *Waterhouse v Shields* 1924 CPD 155 at 160; *Prinsloo &* F *Anor v Newman* 1975 (1) SA 481 (A)."

Although the court *a quo* found that the first and the second appellants instigated the prosecution of the respondent, the finding is not supported by evidence. The second appellant was called upon by the police in Gweru to give them a statement after they had decided upon their own investigation G that there was a reasonable suspicion of the respondent having had committed the offence. The facts, in any case, show that any reasonable person faced with the same facts would have believed that the respondent had committed the offence of receiving stolen property. He had been found in possession of property belonging to the first appellant and had given a patently false statement of how he had acquired the property. H

2013 (1) ZLR p409

Malaba DCJ

A The finding by the court *a quo* that the first and the second appellant instigated the resuscitation of the charge withdrawn is contrary to the letter of the Director of Public Prosecutions. In the letter, she shows that she exercised her independent mind to have the charge resuscitated. She clearly states that she believed that the respondent had a case to answer. There is no doubt therefore that the first and the second appellants strongly believed on the B facts that the respondent had a case to answer, at least on the allegation of receiving stolen property.

They did not have to produce evidence which would prove the respondent's guilt beyond reasonable doubt. It is sufficient for the test of reasonable and probable cause that the respondent was placed on remand by the Gweru C magistrates court on the ground that there was a reasonable suspicion of him having committed the offence.

The phrase "reasonable and probable cause for a prosecution" refers to an honest belief in the guilt of the accused based on a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances which, assuming them to be true, would reasonably lead any ordinarily prudent and D cautious man, placed in the position of an accuser, to the conclusion that the person charged was probably guilty of the crime imputed.

The judgment in *Relyant Trading (Pty) Ltd v Shongwe & Anor* [2007] 1 All SA 375 (SCA) is instructive in this regard. Malan AJA said at para 5:

> "Malicious prosecution consists in the wrongful and intentional assault on the E dignity of a person comprehending also his or her good name and privacy. The requirements are that the arrest or prosecution be instigated without reasonable and probable cause and with 'malice' or *animo iniuriarum*. Although the expression 'malice' is used, it means, in the context of the *actio iniuriarum*, *animus iniuriandi*. In *Moaki v Reckitt & Colman (Africa) Ltd and Anor* 1968 (3) SA 98 (A) at 104B-C Wessels JA said:
>
> > 'Where relief is claimed by this *actio* the plaintiff must allege and prove that F the defendant intended to injure (either *dolus directus* or *indirectus*). Save to the extent that it might afford evidence of the defendant's true intention or might possibly be taken into account in fixing the *quantum* of damages, the motive of the defendant is not of any legal relevance.'"

The acquittal of the respondent was not in the circumstances evidence of G lack of ground for his prosecution. As explained by Malan AJA in *Relyant Trading case supra*, a defendant will not be liable if he/she held a genuine belief in the plaintiff's guilt founded on reasonable ground. In effect, where reasonable and probable cause for the arrest or prosecution exists, the conduct of the defendant in instigating it is not wrongful. The learned acting judge of appeal said that the requirement of reasonable and probable cause "is a H sensible one" since "it is of importance to the community that persons who

have reasonable and probable cause for a prosecution should not be deterred A from setting the criminal law in motion against those whom they believe to have committed offences, even if in so doing they are actuated by indirect and improper motives".

The finding that the first and the second appellants had reasonable cause to institute the prosecution against respondent establishes absence of malice B on their part. In *Mabona v Minister of Law and Order* 1988 (2) SA 654 (SE) at 658E Jones J held that the person claiming malicious arrest or malicious prosecution must not only allege but must go further to prove that the defendant acted maliciously and without probable cause. See also *Gellman v Minister of Safety & Security* 2008 (1) SACR 446 (W) para 72; *le Roux v Minister of Safety & Security & Anor* 2009 (4) SA 491 (N); 2009 (2) SACR 252 (KZN) C at 498 (para 24).

In *Bande v Muchinguri supra* at 487E-G it was said:

> "Has the plaintiff proved that the defendant was actuated by malice? The plaintiff does not have to prove spite or ill-will on the part of the defendant. The fact that the defendant had no reasonable and probable cause for the prosecution may, in D an appropriate case, justify an inference that he was actuated by malice in the sense of being driven by an improper or indirect motive.
>
> *Fleming op cit* at p 590 states that:
>
> > 'At the root of it (malice) is the notion that the only proper purpose for the institution of criminal proceedings is to bring an offender to justice and thereby aid in the enforcement of the law and that a prosecutor who is E primarily animated by a different aim steps outside the pale if the proceedings also happen to be destitute of reasonable cause. "Malice" has therefore a wider meaning than spite, ill-will or a spirit of vengeance and includes any other improper purpose, such as to gain a private collateral advantage.'
>
> In *Brown v Hawkes* [1891] AC 718 at 722 Cave J said:
>
> > 'Now malice, in its widest and vaguest sense, has been said to mean any F wrong or indirect motive and malice can be proved, either by showing what the motive was and that it was wrong, or by showing that the circumstances were such that the prosecution can only be accounted for by imputing some wrong or indirect motive to the prosecutor.'"

This is particularly the case, since the court *a quo* found that the allegation by the respondent of the existence of a sour relationship between families G was unfounded. The respondent failed to prove that the first and the second appellants acted without reasonable and probable cause or that their conduct was actuated by malice or improper motive.

On the second cause of action it is clear that the court *a quo* misdirected itself. The letter written by the third appellant concerned the termination of rights and obligations of the relationship it had with Flamsrock Trading (Pvt) Ltd. H

Malaba DCJ

A The third appellant had no contractual relationship with the respondent in his personal capacity. The reasons it gave of fraudulent activities on the account related to the termination of relationship with Flamsrock Trading Ltd. The letter does not say that the fraudulent activities were committed by the respondent. It could have been anyone. In the plain terms of the letter, it is clear that the relationship which gave rise to the allegation was that B between the third appellant and its customer. It was therefore necessary on these facts for the respondent to plead the cause of action based on defamation by imputation. The declaration does not plead defamation by imputation. The court *a quo* overlooked this important point.

For these reasons, the appeal was allowed with costs and the judgment of C the court *a quo* set aside and substituted with the order that the claims be dismissed with costs.

ZIYAMBI JA and PATEL AJA concurred.

Mtetwa & Nyambirai, appellant's legal practitioners

D *Ngarava, Moyo & Chikono,* respondent's legal practitioners

© 2015 Juta and Company (Pty) Ltd.

Document 54 of 73

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2013/Volume 1/S v MATUTU 2013 (1) ZLR 412 (S)

S v MATUTU 2013 (1) ZLR 412 (S)

Citation	2013 (1) ZLR 412 (S)
Case No	Judgment No. S-34-13
Court	Supreme Court, Harare
Judge	Malaba DCJ, Ziyambi JA and Patel AJA
Heard	13 May 2013
Judgment	13 May 2013
Counsel	Applicant in person *E Nyazama*, for the respondent
Case Type	Constitutional application
Annotations	No case annotations to date

Flynote

Constitutional law – *Constitutional of Zimbabwe 1980 – Declaration of Rights – s 18(2) – right to fair hearing within a reasonable time – delay in prosecuting a criminal charge – failure by applicant to lead any evidence in support thereof – such failure fatal to application – referral by magistrate to Supreme Court – referral in such circumstances improper* D

Headnote

The appellant was charged with an offence under the Public Order and Security Act [*Chapter 11:17*]. When the charge was put to him at his trial before the magistrate, he forthwith sought a permanent stay of prosecution in terms of s 18(2) of the Constitution of Zimbabwe, on the basis that his right to a fair trial within reasonable time had been E violated. While proffering no affidavit nor leading any evidence, and without providing the State with any prior notice, the appellant informed the court that there had been a delay of seven years in prosecuting the charge against him. After hearing representations from both the appellant and the prosecutor, the magistrate referred the matter to the Supreme Court in terms of s 24(2) of the Constitution. F

Held, that the referral by the magistrate was improper. Before permitting an accused person to raise the question of not having been brought to trial within a reasonable time, the lower court should be satisfied that ample written notice has been given to the State, with a copy filed of record, of the intention to advance the complaint. The prosecution is entitled G to be afforded the time and opportunity to investigate the cause of the delay and to be ready to adduce evidence as to the reasons therefor, if it is considered necessary to do so. The magistrate must hear evidence from the applicant and the prosecutor must be given an opportunity to cross examine the applicant and to lead any evidence it considers necessary, after which the magistrate must make a ruling based on the H

A evidence. If there are disputes of fact which needed to be resolved, it is the function of the referring court to resolve such disputes.

Held, further, dismissing the application, that in any event, the applicant's failure to lead any evidence, either or affidavit or *viva voce* was a fundamental omission and fatal to the success thereof. While a seven year delay in prosecuting a criminal charge would generally speaking B trigger an enquiry into the constitutionality of the proceedings, his failure to lead evidence prevented the court from deciding whether the delay had caused him prejudice and amounted to a violation of his right to a fair trial.

Cases cited C

S v Banga 1995 (2) ZLR 297 (S)

S v Nkomo & Anor S-52-06

Legislation considered

D Constitution of Zimbabwe 1980, ss 18(2) and 24(2)

Case information

Applicant in person

E Nyazama, for the respondent

Judgment

Ziyambi JA: At the end of the hearing the application was dismissed and E it was indicated that reasons for the decision would follow in due course. These are the reasons.

This matter was referred to the Supreme Court by the magistrate in terms of s 24(2) of the Constitution of Zimbabwe, which provides as follows:

> "24 Enforcement of protective provisions
>
> (1) . . . F
>
> (2) If in any proceedings in the High Court or in any court subordinate to the High Court any question arises as to the contravention of the Declaration of Rights, the person presiding in that court may, and if so requested by any party to the proceedings shall, refer the question to the Supreme Court unless, in his opinion, the raising of the question is merely frivolous or vexatious".

G The referral came about in the following manner. On 8 February 2012, the applicant, who is a registered legal practitioner, appeared before the magistrates court in Gweru in response to a summons to answer a charge of contravening s 16(2) (b) of the Public Order and Security Act

[*Chapter 11:17*]. The offence was allegedly committed on 25 June 2005. When the H charge was put to him, the applicant did not plead to it but instead made an

Ziyambi JA

application for the matter to be referred to the Supreme Court in terms of A s 24(2). It was his intention to seek an order –

> "For a permanent stay of prosecution in terms of the Constitution of Zimbabwe in Section 18(2) on the basis that my right to a fair trial, within reasonable time has been violated".

He alleged that the charges emanated from an incident which occurred on 25 B June 2005 in Zaka and that a warned and cautioned statement was recorded in July of the same year. The delay in bringing him to trial amounted to six years and eight months. The allegation was that the delay was attributable to the conduct of the State because he resides in Masvingo and has never removed himself from the jurisdiction of the courts. He averred that nothing could have been done by him to assert his rights, especially as the matter C was not brought to court on a remand hearing.

He alleged further that "the only [State] witness who is available" had his statement recorded on 26 June 2005. According to him, the investigations were then complete and the prosecution ought to have taken place at the latest in December 2007 when authority was granted by the Attorney-General D to prosecute. He alleged that the failure by the State to bring him to trial within a reasonable period constituted a violation of his constitutional right enshrined in s 18 of the Constitution.

The prosecutor in response submitted that the delay "was not a deliberate act by the State". In the first place, one of the State witnesses had died. E Secondly, there was, on record, a letter dated 10 August 2008, wherein the applicant had requested that he be prosecuted by a person who did not know him; and thirdly, the applicant is a Deputy Minister tasked with national duties and the police were having difficulties in effecting personal service of the summons on him. After the authority to prosecute was granted by the F Attorney-General in 2007, there was a shortage of resources and transport.

The prosecutor further alleged that when the matter was due to be heard, the Director of Public Prosecutions directed that the trial be heard in Gweru and not Masvingo. Most of the court officials declined to deal with the matter because they knew the applicant on professional grounds and, even on the date of the hearing, two court officials refused to entertain the matter on G professional grounds. Accordingly the delay could not be wholly attributable to the State.

No evidence, whether on affidavit or *viva voce*, was led by the applicant in support of his allegations. This is totally unacceptable. In *S v Banga* 1995 (2) ZLR 297 (S) at 300G this court remarked as follows: H

Ziyambi JA

> A "Regrettably, the manner in which the legal practitioner requested the referral was totally misconceived. It was wholly insufficient to make a statement from the bar, and then to point solely to the length of the delay. He was obliged to call the applicant to testify to the extent to which, if at all, the cause of the delay was his responsibility; to whether at any time before 16 August 1994, he had asserted his right to be tried within a reasonable time; and, even more importantly, to B whether any actual prejudice had been suffered as a result of the delay.
>
> Such a fundamental omission on the part of the defence is fatal to the success of the application."

The magistrate was satisfied that the raising of the question of the violation of the applicant's constitutional right was not frivolous. He referred the matter to this court. The referral was improper. This court has so stated time and C time again. As far back as 1995, in the *Banga* case *supra* it was said at 302:

> "It seems to me, also, that before permitting an accused person to raise the question of not having been brought to trial within a reasonable time, the lower court should be satisfied that ample written notice has been given to the State, with a copy filed of record, of the intention to advance the complaint. The prosecution is entitled to be afforded the time and opportunity to investigate the cause of D the delay and to be ready to adduce evidence as to the reasons therefor, if it is considered necessary to do so".

The prosecutor must be given written and adequate notice of the accused person's intention to make the application. The magistrate must hear evidence from the applicant and the prosecutor must be given an opportunity to cross E examine the applicant and to lead any evidence it considers necessary after which the magistrate must make a ruling based on the evidence. However this was not done. At the hearing before this court, it was glaringly apparent that there were disputes of fact which needed to be resolved. It is the function of the referring court to resolve disputes of fact.

F It goes without saying that a delay of seven years in prosecuting a criminal charge is presumptively prejudicial and would, generally speaking, trigger an inquiry by this court into the constitutionality of the delay. See *S v Nkomo & Anor* S-52-06

However, the applicant has placed no evidence before the court from which it can be concluded that the delay in bringing him to trial is totally attributable G to the State, has caused him prejudice and is a violation of his right to a fair trial. I stress here that the absence of evidence is fatal to the application. In the *Banga* case *supra* at 301 it was held that the absence of *viva voce* evidence could be fatal to an applicant's case because it

> "completely disables findings to be made that the long delay has been the cause H of mental anguish and disruption to the business and social activities of the

Ziyambi JA

> accused, . . . and that it has impaired his ability to exonerate himself from the A charge due to death, disappearance or forgetfulness of potential witnesses".

The application *in casu*, having no evidential basis, is fatally defective.

MALABA DCJ and PATEL AJAconcurred. B

Attorney General's Office, respondent's legal practitioners

© 2015 Juta and Company (Pty) Ltd.

Document 55 of 73

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2013/Volume 1/TAPVICE ENTERPRISES (PVT) LTD v SINO ZIMBABWE COTTON HOLDINGS (PVT) LTD 2013 (1) ZLR 417 (H)

TAPVICE ENTERPRISES (PVT) LTD v SINO ZIMBABWE COTTON HOLDINGS (PVT) LTD 2013 (1) ZLR 417 (H)

Citation	2013 (1) ZLR 417 (H)
Case No	Judgment No. HH-156-13
Court	High Court, Harare
Judge	Mafusire J
Heard	18 March 2013; 22 March 2013; 27 March 2013; *CAV*
Judgment	16 May 2013
Counsel	*B Mufadza*, for the plaintiff *C Maunga*, for the defendant
Case Type	Civil application
Annotations	No case annotations to date

Flynote

Contract – *breach – damages – assessment – special or extrinsic damages – when such damages are recoverable – need for parties to foresee that breach would result in type of loss claimed for*

Headnote

D The parties were both dealers in cotton. They entered into a written agreement in terms of which the defendant, as agent of the plaintiff, would buy seed cotton from cotton farmers around the country for delivery to ginneries of the plaintiff or a third party. The seed cotton would be processed into E lint and cotton seed. The plaintiff claimed that the defendant breached the contract, in that it failed to deliver all the seed cotton for which the plaintiff had paid it. It claimed an order for specific performance or, alternatively, damages. For specific performance the plaintiff sought an order that the defendant deliver to it 85.57 tonnes of processed lint. In the alternative, it claimed as damages an amount of $2 160 per tonne F of lint, plus interest.

Held, that the general principle governing the assessment of compensation for breach of contract is that the wronged party should be placed in the position he would have occupied had the contract been performed, so far as that can be done by the payment of money, and without undue hardship to the defaulting party. The reinstatement cannot invariably be complete, G for it would be inequitable and unfair to make the defaulter liable for special consequences which could not have been in his contemplation when he entered into the contract.

Held, further, that damages for breach of contract are not calculated in the same way as damages for delict. Delictual damages are intended to H compensate the innocent party for what he has lost, whereas damages

for breach of contract are intended to compensate the innocent party for A what he should have gained had the breach not occurred. The measure of such damages is limited to the general or intrinsic damages that flow naturally and generally from the breach of the contract in question. Special or extrinsic damages are recoverable only if, in the special circumstances attending the conclusion of the contract, the parties actually or presumptively contemplated that they would probably result from the breach of the contract. In general, it is those damages which the innocent party might suffer from the non-performance of the contract in respect to the particular thing which is the object of it which he is entitled to recover, and not such damages in respect to his other affairs as may have been incidentally occasioned by the breach. Under the "contemplation" C principle followed in this country, the innocent party should recover if the contracting parties actually or presumptively foresaw that the breach of contract in question would result in the type of loss being sued for. Whether a particular loss constitutes special or extrinsic damages or was within the contemplation of the parties at the time of making the D contract is a question of fact.

Cases cited

Esso Standard SA (Pty) v Katz 1981 (1) SA 964 (A)

Hersman v Shapiro & Co 1926 TPD 367

United Air Charters (Pvt) Ltd v Jarman 1994 (2) ZLR 341 (S) E

Victoria Falls & Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd 1915 AD 1

Case information

B Mufadza, for the plaintiff

C Maunga, for the defendant F

Judgment

Mafusire J: The parties in this matter are dealers in cotton. On 17 August 2011 they entered into a written agreement in terms of which the defendant, as plaintiff's agent, would buy, from the cotton farmers around the country, seed cotton for delivery to the plaintiff's ginnery or other ginneries chosen by the defendant and approved by the plaintiff. The seed cotton would be G processed into lint and cotton seed. The plaintiff would provide an initial amount of US$120 000 in two phases, which the defendant would utilise for the purchase of 205 tonnes of seed cotton. The agreement would operate on a revolving basis until terminated by either party. The preamble recorded that the plaintiff went into the deal with the defendant because of the defendant's extensive infrastructure throughout the country. The agreement H

Mafusire J

A also acknowledged that the parties' common goal was the creation of wealth through the co-ordination and combining of technical skills, expertise and funds. Among other things, the price at which the plaintiff would buy the seed cotton from the defendant was agreed upon.

In this action the plaintiff claims that the defendant breached the contract in that it failed or neglected to deliver all the seed cotton for which the plaintiff B had paid it. The plaintiff therefore claims an order for specific performance or damages in the alternative. For specific performance, the plaintiff sought an order directing the defendant to deliver to it 85.57 tonnes of processed lint. In the alternative, the plaintiff claimed as damages an amount of US$2 160 per tonne of lint, plus interest on that amount at the prescribed C rate from the date of summons to the date of payment in full. The plaintiff's rate of damages at US$2 160 per tonne was arrived at on the basis that it had confirmed orders for the lint from a South African customer, that the defendant was aware, or ought to have been aware, of this fact at the time of the conclusion of the contract and that the plaintiff had lost that market as a result of the defendant's breach.

D The defendant's position is that the contract did not oblige it to deliver processed lint but seed cotton, that it had no facilities to process seed cotton into lint, that its obligation was to deliver seed cotton to selected ginneries and that it had delivered all the lint that had been processed from the plaintiff's seed cotton, after taking into account all the ginnery losses and packaging E costs and that therefore it owed nothing to the plaintiff. The defendant gave no figures. At the trial it called no witness and therefore gave no evidence. It was not explained to whom it had allegedly delivered all the lint. On the other hand, not only did the plaintiff give evidence of the defendant's breach of contract through its managing director, Mr Donzwa, but also comprehensive documentation was produced showing, among other things, that of the amounts F paid by the plaintiff to the defendant for the procurement of the seed cotton in terms of the agreement, there was a shortfall of the seed cotton delivered by the defendant amounting to the equivalent of 85.57 tonnes of lint.

Amongst the plaintiff's bundle of documents was a letter from Mr Donzwa to the defendant, dated 6 December 2011, which is a concise summary-cum- G reconciliation of the transactions between the parties since the inception of the contract. It appears from that letter that the total amount paid to the defendant in terms of the agreement was US$1 490 652, which included an amount of US$30 652 paid for transport. The summary gives the breakdown of the costs of procuring the seed cotton, the ginning costs, including the percentage margin of loss, the amount of lint output expected and the amount H of lint actually collected. The balance of the lint was 85.57 tonnes.

Mafusire J

In the bundle there are receipts and other documents, such as vouchers from A the bank, to show the payment by the plaintiff to the defendant of the sum of US$1 490 652 aforesaid. There are also vouchers and statements for the transport costs, goods received and samples of directives, in the form of memoranda from the defendant to the various ginneries, for the release of various quantities of lint to the plaintiff. Furthermore, there are copies of B orders from the plaintiff's South African based customer, Branson Marketing, for the purchase of cotton at prices ranging from 91.50 to 94.50 US cents per pound. In evidence. Mr Donzwa explained that those prices converted to US$2 104 per tonne of lint. He also explained that the price of cotton lint was controlled internationally, and that those were the prevailing rates at the time of the defendant's breach. Cross-examination of Mr Donzwa did C not dwell on such specifics. Furthermore, the defendant called no witness. Thus the plaintiff's version went uncontroverted.

I was satisfied that the plaintiff proved its case for specific performance in respect of the 85.57 tonnes of lint. The defendant's obligation was not only to deliver seed cotton to the ginneries. From the various release notes D issued by the defendant it is evident that it was also obliged to ensure that the plaintiff received or collected the lint equivalent of the seed cotton that it would have paid for.

The plaintiff's alternative claim for damages requires investigation. If the defendant is unable to deliver, or to cause to be delivered, to the plaintiff the 85.57 tonnes of lint then the plaintiff should be entitled to damages. It E is the measure of such damages that requires to be ascertained. The plaintiff claimed the sum of US$2 160 per tonne of lint, on the basis that the cotton that it was procuring through the defendant's agency was being processed into lint for export at a profit, and that the rate of US$2 160 per tonne was already a confirmed rate, as the plaintiff had confirmed orders from a Durban-based customer. The question is whether or not, at the time of making of F the contract, it was actually or presumptively within the contemplation of the parties that, in the event of a breach, the defendant would be liable for such loss of profit.

In *Victoria Falls & Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd* 1915 AD 1 at 22 Innes CJ acknowledged that the assessment of G compensation for a breach of contract is a most difficult question of fact. He formulated the general principles governing the investigation as follows:

> "The sufferer by such a breach should be placed in the position he would have occupied had the contract been performed, so far as that can be done by the payment of money, and without undue hardship to the defaulting party. The reinstatement cannot invariably be complete, for it would be inequitable and H

> A unfair to make the defaulter liable for special consequences which could not have been in his contemplation when he entered into the contract."

R H Christie *Business Law in Zimbabwe* 2 ed p 124 points out that damages for breach of contract are not calculated in the same way as damages for delict. Delictual damages are intended to compensate the innocent party B for what he has lost, whereas damages for breach of contract are intended to compensate the innocent party for what he should have gained had the breach not occurred.

However, even though the damages for a breach of contract are intended to compensate the injured party for the loss that he would have gained had the breach not occurred, the measure of such damages is limited to the general C or intrinsic damages that flow naturally and generally from the breach of the contract in question. Special or extrinsic damages are recoverable only if, in the special circumstances attending the conclusion of the contract, the parties actually or presumptively contemplated that they would probably result from the breach of the contract. In general, it is those damages which D the innocent party might suffer from the non-performance of the contract in respect to the particular thing which is the object of it which he is entitled to recover, and not such damages in respect to his other affairs as may have been incidentally occasioned by the breach. See Farlam & Hathaway *Contract Cases, Materials and Commentary* 3 ed at p 625.

E To help illuminate the distinction between the general or intrinsic damages and the special or extrinsic damages I quote two examples from two different texts. The one is by Farlam & Hathaway *loc cit*, reproduced from Pothier's *Obligations* para 161:

> ". . . suppose I sell a person a horse which I am obliged to deliver in a certain time, and I cannot deliver it accordingly: if in the meantime horses have increased in F price, whatever the purchaser is obliged to pay more than he would have given for mine, in order to procure another of the like quality, is a damage for which I am obliged to indemnify him, because it is a damage *propter rem ipsam non habitam,* and which only relates to the thing that was the object of the contract, and which I might have foreseen; the price of horses like that of all other things being subject to variation. But if this purchaser was a canon, who for want of G having the horse that I had engaged to deliver to him, and not having been enabled to get another, was prevented from arriving at the place of his benefice in time to be entitled to his revenue; I should not be liable for the loss which he sustained thereby, although it was occasioned by the non-performance of my obligation; for this is a damage which is foreign to the obligation, which was not contemplated at the time of the contract, and to which it cannot be supposed H that I had any intention to submit."

Mafusire J

The other example is from Schulze *et al General Principles of Commercial* A *Law* 6th ed at para 11.4.3, p 135:

> "Danie sells a watch to Gugu. For some time the watch runs perfectly, but one day it suddenly stops owing to a defect. As a consequence of this, Gugu misses her train and cannot keep a very important business appointment. As a result she loses a considerable amount of money, and is declared insolvent. Among B other things she is unable to pay for the education of her children as a result of this. It would not be fair to hold Danie liable for all these consequences, despite the fact that it may be argued that they were all caused by Danie's breach of contract."

In *United Air Charters (Pvt) Ltd v Jarman* 1994 (2) ZLR 341 (S) the Supreme Court rejected the "convention" principle as a test for deciding whether C special or extrinsic damages are recoverable from a breach of contract and adopted the "contemplation" principle. Under the convention principle, it is not enough that the type of loss was within the contemplation of the parties; the defaulting party would only be liable if he had entered into a contractual undertaking with the plaintiff that he would be liable for such D damage if he breached the contract. However, under the contemplation principle, the innocent party should recover if the contracting parties actually or presumptively foresaw that the breach of contract in question would result in the type of loss being sued for.

In the *United Air Charters* case *supra*, the respondent was the appellant's former employee. The respondent had prematurely terminated his two-year E contract of employment as a pilot. In terms of that contract the respondent would undergo training during that two year period. Following his breach, the respondent undertook to pay a *pro rata* portion of the costs of his training. The appellant wanted more in special damages. These were said to comprise the revenue that the appellant would lose during the period it would take to F replace the respondent with someone suitably qualified. Gubbay CJ rejected the claim for such special damages on the basis that the parties had not foreseen or contemplated that type of loss as being a result of the breach in question.

In *Hersman v Shapiro & Co* 1926 TPD 367 the parties were both dealers in corn. The defendant had contracted to sell and deliver to the plaintiff at a G specified date a certain quantity and quality of the corn at a specified price. On the strength of his contract with the defendant the plaintiff had re-sold the corn to markets in London. Unfortunately, there was a massive failure of the crop. The defendant failed to deliver. The plaintiff sued. The defendant pleaded a supervening impossibility. That defence failed. In assessing the plaintiff's damages the court had this to say at 373-374: H

Mafusire J

> A "The first thing one has to observe is that neither the plaintiff nor the defendant are consumers or producers of kaffir corn. Both are merchants or dealers in corn. They are both apparently people who make their living by buying and selling produce; and people who buy and sell any commodity with a view to making their living intend to buy in a cheap market and sell in a dear: in making these contracts a degree of speculation is necessarily involved, and they take the risk of variations in prices when buying or selling for forward delivery."

B The remarks of Stratford J in *Hersman's* case *supra* apply with equal force. In this case, neither the plaintiff nor the defendant was a consumer of the seed cotton. They both were merchants or dealers for profit. During cross-examination of the plaintiff's witness, the defendant's counsel alluded to the fact that, at some stage during the subsistence of the contract, the seed C cotton seed had become unavailable from the farms. However, it was never suggested that the defendant was pleading a supervening impossibility of performance. Therefore I have not concerned myself with this aspect, which was the central defence in the *Hersman's* case *supra*. I am satisfied that it must have been obvious to the defendant, if it actually did not know, that the plaintiff required the lint for its markets and that it would enter into forward D contracts with those markets on the basis of its contract with the defendant.

Therefore, whether a particular loss constitutes special or extrinsic damages or was within the contemplation of the parties at the time of making the contract is a question of fact. In the present case, clearly the plaintiff lost its South African deal as a result of the defendant's breach. The question that E I have to decide is whether, at the time of the making of the contract, the defendant actually or presumptively foresaw the plaintiff losing its forward contracts or end market if it breached the contract. I am of the view that the defendant did. It was the essence of the parties' contract, as captured in the preamble, that they were coming together to combine their skills,

expertise and funds for the mutual purpose of creating wealth for themselves. Clause F 3 of that preamble reads as follows:

> "3. AND WHEREAS, the parties have agreed to enter into this agreement as a framework through which they would co-ordinate, combine their technical skills, expertise and funds in order to pursue their common goals of creating wealth through co-operation in their investments and activities."

Thus there can be no question that the defendant appreciated, or should be G presumed to have appreciated, that the reason why the plaintiff was buying the seed cotton for ginning was so that it could sell the processed cotton or lint to the end market. Furthermore, in its summons and declaration the plaintiff expressly stated the basis and the rate at which it was claiming its damages. It was explained in those pleadings that the plaintiff was selling a H tonne of lint to the end market for $2 160 and it then claimed that amount per

---

Mafusire J

tonne as damages. In response to that the defendant just made a bare denial. A It stated in its plea: "The defendant denies that a tonne of processed lint is sold by the plaintiff to the end market for two thousand one hundred and sixty US dollars (US$2 160)". Furthermore, in evidence, Mr Donzwa testified that, in order to mitigate the situation, they would, at times, go directly to the farmers to buy the seed cotton and hand it over to the defendant to help B it meet its obligations, and that on those occasions it was impressed upon the defendant that the plaintiff was anxious to maintain its good relations with its end market. As previously stated, the defendant gave no evidence. Thus the plaintiff's case was not refuted.

The plaintiff is plainly entitled to its special or extrinsic damages. I am satisfied that these flow naturally from the defendant's breach. The actual C quantum of the defendant's damages needs further investigation. Attendant on the right of the innocent party to claim damages for breach of contract from the defaulting party is the duty to mitigate such damages. In this case, I am satisfied that the plaintiff did all that it could to mitigate its loss. Firstly, there was evidence that even as the defendant was malperforming it unilaterally and D arbitrarily raised its procurement charges. Although the plaintiff protested, it nonetheless paid the increased charges in order to maintain the flow of the seed cotton to the ginneries. Secondly, the plaintiff would also pay the defendant's transporters, despite the fact that all such costs would have been paid up-front. Thirdly, as has already been mentioned, the plaintiff would at times go to the farmers directly to procure the seed cotton, all in an effort E to keep the ginneries running, in order that it would not lose its end market. Therefore, there can be no question that the plaintiffs made effort to mitigate its damages. At any rate, given the nature of the defendant's defence, this was not an aspect that could possibly have been put in issue.

On the actual assessment of damages the court, in *Hersman's* case *supra*, F quoting a passage from *Halsbury's Laws of England* Vol X p 333 para 610, had this to say at p 379:

> "When the seller fails to deliver and there is no market, the buyer is entitled to be awarded an amount which represents the value of the goods *to him at the date when delivery should have been made, and the profit which he would have made on a contract of subsale which he had entered into is evidence of such* G *value, though the seller had no notice of such contract*" (my own emphasis).

In this case it was not made clear whether the quoted prices of 91.50 and 94.50 US cents per pound (which the plaintiff said translated to US$2 160 per tonne) of lint were gross or net. The plaintiff would not be entitled to gross amounts, which would include such aspects as, for example, costs of freight, which in this case it did not incur. This aspect was not canvassed. H

Mafusire J

A The nature of the defendant's contracts with its end market was not explored. However, in evidence the actual amount per tonne was said to be US$2 104 and not US$2 160, admittedly a small difference.

In a claim for damages, the loss claimed does not need to be established with mathematical exactitude or precision. In *Esso Standard SA (Pty) Ltd v Katz* 1981 (1) SA 964 (A) it was noted that, in some types of cases, damages are B difficult to estimate, but the fact that they cannot be assessed with certainty or precision will not relieve the wrong doer of the obligation to pay damages for his breach of duty. The plaintiff is entitled and required to adduce the best evidence reasonably

available to him. Relying on *Hersman* and *Esso Standard supra*, Farlam & Hathaway *op cit* at p 602 state the principle as follows:

> C "Failure to establish loss will therefore result in no award being made. *Loss does not, however, have to be established with mathematical precision. A plaintiff who has suffered a loss and has produced all the evidence reasonably available is entitled to an award, even one based on an estimate on the available evidence"* (my emphasis).

I am satisfied that the forward contract which the plaintiff produced to show D its loss was sufficient to enable an estimate of its damages to be made. In the circumstances the plaintiff is entitled to an award of damages in the alternative in the sum of US$2 104 per tonne of the 85.57 tonnes of lint due by the defendant.

In the final result, I make the following orders:

(1) the E defendant shall deliver, or cause to be delivered, to the plaintiff at a place to be advised by the plaintiff to the defendant in writing, eighty five point five seven (85.57) tonnes of cotton lint within seven days of the date of handing down of this judgment;

(2) in the event that the defendant is unable to deliver as aforesaid, the defendant shall pay the plaintiff damages in respect of the said 85.57 F tonnes of cotton lint at the rate of two thousand one hundred and four United States dollars (US$2 104) per tonne, thus amounting to one hundred and eighty thousand and thirty nine United States dollars and twenty eighty cents (US$180 039-.8);

(3) the defendant shall pay the plaintiff's costs of suit.

G *Mufadza & Associates,* plaintiff's legal practitioners

Maunga, Maanda & Associates, defendant's legal practitioners

© 2015 Juta and Company (Pty) Ltd.

Document 56 of 73

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2013/Volume 1/CHOMBO v PARLIAMENT OF ZIMBABWE & ORS 2013 (1) ZLR 426 (S)

CHOMBO v PARLIAMENT OF ZIMBABWE & ORS 2013 (1) ZLR 426 (S)

Citation	2013 (1) ZLR 426 (S)
Case No	S-5-13
Court	Supreme Court, Harare
Judge	Chidyausiku CJ, Ziyambi JA, Garwe JA, Gowora JA, Omerjee AJA
Heard	24 January 2013; *CAV*
Judgment	20 May 2013
Counsel	*T Hussein,* for the applicant *S J Chihambakwe,* for the respondents
Case Type	Constitutional application
Annotations	No case annotations to date

Flynote

Constitutional law – *Constitution of Zimbabwe 1980 – application to Supreme Court – application – locus standi – Minister challenging right of members to introduce private member's bill into Parliament – bill affecting Minister's powers and responsibilities – Minister having locus standi* D

Constitutional law – *Constitution of Zimbabwe 1980 – Parliament – bills – private member's bill – subject matter of bill – limitation on what matters may be dealt with in private member's bill – Inter-Party Agreement incorporated into Constitution as Schedule 8 – effect on right to introduce private member's bill* E

Headnote

Members of Parliament sought to introduce a private member's bill into Parliament, the purpose of the Bill being to reduce the powers of the Minister of Local Government over municipal and town councils. The applicant, the Minister in question, took the view that the introduction of F such a private member's bill was incompetent, being inconsistent with ss 18, 18(1a) and Article 20.1.2. of the 8th Schedule of the Constitution of Zimbabwe 1980. The respondents questioned the applicant's *locus standi* to bring the application, as well as averring that it was competent in terms of Schedule 4 of the Constitution for a private member's bill to be introduced. They argued that since the applicant had brought G this application in his capacity as a Cabinet Minister and member of Parliament, no rights that relate to him personally had been infringed; consequently he had no *locus standi* to bring the application. They also submitted that the relevant Constitutional provisions had not curtailed the rights of members to introduce private bills save "where policies and programmes of the National Executive are concerned". Lastly, they H

A submitted that the applicant, being a Minister and therefore part of the State, could not sue Parliament, which is also another arm of the State.

Held, that an applicant approaching the Supreme Court in terms of s 24(1) of the Constitution must show that his individual rights have been infringed or, to put it another way, that there has been a contravention of the Declaration of Rights in relation to himself. He has no right to B seek redress on behalf of the general public or anyone else. In this case, the applicant, as the Minister of Local Government, was assigned the responsibility of administering various pieces of legislation that govern the activities of local government institutions, in particular the Urban Councils Act [*Chapter 29:15*]. The rationale for the introduction of the C Bill was stated in the memorandum to the Bill as the need to reduce the powers of central government over municipal and town councils, which suggests that the real intention was to reduce the powers of the applicant as Minister of Local Government over municipal and town councils. The applicant clearly had an interest in this matter, as it was his powers as Minister which the Bill intended to proscribe. In a case, such as the D present, where it was suggested that the process of introducing the Bill that sought to reduce such powers was unconstitutional, the applicant would certainly be entitled to the protection of the law and thus entitled to approach the Supreme Court and demand that the respondents act in accordance with the law. It would follow that, in an appropriate case, a E cabinet minister can have *locus standi* to sue another arm of the State.

Held, further, that under Schedule 4 of the Constitution, it is clear that any member of Parliament is at liberty to introduce a bill into Parliament. Where, however, the proposed Bill by a member makes provision for the introduction or increase of any tax or charge on the Consolidated Revenue Fund or other public funds, or where the Bill makes provision F for the compounding or remitting of any debt due to the State, or condoning any failure to collect taxes, or the raising of any loan by the State or condoning unauthorised expenditure, Parliament shall not introduce a debate on such a Bill, except on the recommendation of a Vice President, Minister or Deputy Minister. However, this situation changed with the introduction in 2009 of Schedule 8 of the Constitution G which incorporated the Interparty Political Agreement between ZANU (PF) and the two MDC formations. Schedule 8 provides that during the subsistence of the Interparty Political Agreement, Article XX of that agreement shall prevail notwithstanding anything to the contrary in the Constitution. The intention must have been to ensure that for H the duration of the Inter-Party Political Agreement, what is contained

in Article XX of the agreement would override any provisions in the A Constitution inconsistent with it. In clause 20.1.2 of Article XX, the Cabinet was specifically given the responsibility (a) to

evaluate and adopt all government policies and consequential programmes (b) to allocate the financial resources necessary for the implementation of such policies and programmes and, most importantly (c) to prepare and B present to Parliament all such legislation and other instruments as may be necessary to implement such policies and programmes. Whilst the drafting of the Interparty Political Agreement could have been refined and the agreement itself more elegantly worded, particularly when it was decided to incorporate it into the Constitution, it was clear that the use of the word "responsibility" was intended to give the power of C formulating government policies and programmes and the necessary legislation only to Cabinet. Accordingly, where such policies and programmes were concerned, the formulation and presentation of Bills were the responsibility of Cabinet and no-one else.

Held, further, that whilst a private member has no right to introduce a private D Bill that deals with government policies and programmes during the subsistence of the Inter-Party Political Agreement, he is still empowered to do so in two situations. The first is where he introduces a Bill that does not deal with such policies or programmes. The second is where the Bill that he seeks to introduce, in addition to the requirement that it must not deal with government policies and programmes, deals with E issues of a financial nature that are covered by s 1(4) of Schedule 4 of the Constitution and is supported by a Vice President, Minister or Deputy Minister.

Held, further, that the purpose of the Bill was to reduce the powers of the applicant as Minister of Local Government. That the Bill intended to amend current government policies was not in dispute. Accordingly, the F Bill should not have been introduced or debated.

Cases cited

Biti & Anor v Min of Justice & Anor 2002 (1) ZLR 177 (S)

Capital Radio (Pvt) Ltd v Broadcasting Authority of Zimbabwe & Ors G 2003 (2) ZLR 236 (S)

Law Soc of Zimbabwe v Min of Justice & Anor 2006 (2) ZLR 19 (S)

Retrofit (Pvt) Ltd v PTC & Anor 1995 (2) ZLR 199 (S),

United Parties v Minister of Justice, Legal and Parliamentary Affairs & Ors 1997 (2) ZLR 254 (S)

Legislation considered H

A Constitution of Zimbabwe 1980, ss 18, 18(1)(a), 24(1); Schedule 4, s 1; Schedule 8, Art 20.1.2

Case information

T Hussein, for the applicant

S J Chihambakwe, for the respondents

Judgment

B **Garwe JA:** This is an application brought in terms of s 24(1) of the Constitution of Zimbabwe in which the applicant seeks an order declaring the introduction of the Urban Councils Amendment Bill HB5 2011 ("the Bill") to be null and void on account of it being inconsistent with ss 18, 18(1a) and Article 20.1.2. of the Eighth Schedule of the Constitution of Zimbabwe.

C **Background**

In October 2011, the fifth and sixth respondents, who are members of Parliament for the Buhera Central and Highfield West constituencies respectively, brought a motion in Parliament to introduce a private member's Bill. Thereafter debate ensued in Parliament on the motion. The motion was accepted and D consequent thereto the Bill was introduced into Parliament in early 2012. It is not in dispute that the purpose of the Bill was to reduce the powers of the Minister of Local Government over municipal and town councils. In March 2012 the applicant wrote to the second and third respondents expressing his view that it was incompetent for private members to introduce the Bill and E that the responsibility to do so now lay with Cabinet. The fourth respondent wrote back expressing the view that it was still permissible for a Member of Parliament to introduce a private Bill and that such responsibility was not solely the responsibility of Cabinet. He further advised that

Parliament was to continue with the necessary procedures for debating the Bill, prompting F the applicant to make the present application.

The basis of the application

In his papers the applicant says he brings this application in his capacity as a citizen of Zimbabwe, a duly elected Member of Parliament and a Cabinet Minister of the Government of Zimbabwe. He also submits that, G regard being had to the provisions of Schedule Eight of the Constitution, it is legally improper for a private member to introduce a Bill in Parliament and that only Cabinet can do so. In particular, he argues that since the right of the individual Member of Parliament conflicts with the responsibility of Cabinet to present legislation to Parliament, the provisions of Article 8 must, H as a corollary, take precedence.

Garwe JA

The respondents' position A

The respondents, on the other hand, argue that since the applicant has brought this application in his capacity as a Cabinet Minister and Member of Parliament, no rights that relate to him personally have been infringed. Consequently he has no *locus standi* to bring the present application. The respondents also submit that the relevant Constitutional provisions have B not curtailed the rights of members to introduce private bills save "where policies and programmes of the National Executive are concerned". Lastly, the respondents have submitted that the applicant, being a Minister and therefore part of the State, cannot sue Parliament which is also another arm of the State. C

Issues for determination

On a careful reading of the papers before this court, it seems to me that there are two issues for determination. The first is whether the applicant has *locus standi* to bring this application. Allied to this issue is the question whether, as a Cabinet Minister, the applicant can institute proceedings against another arm of the State. The second is whether a private member can lawfully D introduce a Bill in Parliament.

Locus standi

In his application, the applicant makes it clear that he brings the application in his capacity as a Cabinet Minister, Member of Parliament and citizen of Zimbabwe. As a Cabinet Minister, he does so in his capacity as Minister E of Local Government, Rural and Urban Development and not on behalf of Cabinet. This is not a case, therefore, where the Cabinet is suing Parliament, but rather one where a Minister is suing in his capacity as such.

That an applicant approaching this court in terms of s 24(1) of the Constitution must show that his individual right or rights have been infringed or, put F another way, that there has been a contravention of the Declaration of Rights in relation to himself, is now settled. He has no right to seek redress on behalf of the general public or anyone else. In this regard attention is drawn to the decisions of this court in *United Parties v Minister of Justice, Legal and Parliamentary Affairs & Ors* 1997 (2) ZLR 254 (S) at 254 F; *Capital Radio (Pvt) Ltd v Broadcasting Authority of Zimbabwe & Ors* 2003 (2) ZLR 236 (S) at 276B-C; G *Retrofit (Pvt) Ltd v PTC & Anor* 1995 (2) ZLR 199 (S) at 207G-H; *Law Soc of Zimbabwe v Min of Justice & Anor* 2006 (2) ZLR 19 (S) at 30H-31A.

In this case, the applicant is the Minister of Local Government, Rural and Urban Development. In this capacity he is assigned the responsibility of administering various pieces of legislation that govern the activities of local H

Garwe JA

A government institutions. In particular, he is charged with the responsibility of administering the Urban Councils Act [*Chapter 29:15*]. The rationale for the introduction of the Bill is stated in the memorandum to the Bill as the need to reduce the powers of central government over municipal and town councils. Municipal and town councils are local government institutions that fall under the

aegis of the Ministry of which the applicant is Minister and are B accountable to the Minister for the way in which they carry out their activities. The Minister exercises considerable powers under the Act that enable him to control the management of these institutions. The stated intention to reduce the powers of central government suggests that the real intention was to reduce the powers of the applicant as Minister of Local Government, Rural and Urban Development over municipal and town Councils.

C In my view, the applicant clearly has an interest in this matter as it is his powers as Minister which the Bill intended to proscribe. In a case such as the present, where it is suggested that the process of introducing the Bill that seeks to reduce such powers is unconstitutional, the applicant would certainly be entitled to the protection of the law. He would be entitled to approach D this court and demand that the respondents act in accordance with the law. I conclude therefore that, in his capacity as Minister of Local Government, Rural and Urban Development, the applicant has the same rights as everyone else where his fundamental rights are violated and consequently has the *locus standi* to approach this court under s 24 (1) of the Constitution. It follows E from this that in an appropriate case a Cabinet Minister can have *locus standi* to sue another arm of the State.

Whether the applicant would have *locus standi* to sue in his other capacities as Member of Parliament and citizen of Zimbabwe is an issue that becomes unnecessary to decide in view of the conclusion that I have reached above.

F **Whether a private member can lawfully introduce a bill in Parliament**

The real issue before this court is whether or not a private member can lawfully move a private Bill in Parliament. To answer this question one must of necessity construe the intention of Parliament from the words used in both Schedule Four and Schedule Eight of the Constitution.

G Section 1 of Schedule Four of the Constitution provides for the introduction of Bills, motions and petitions into Parliament. Section 1 states, in relevant part, as follows:

"1 Introduction of Bills, motions and petitions

(1) . . .

(2) . . . H

Garwe JA

(3) Subject to the provisions of this Constitution and Standing Orders – A

(a) . . ..

(b) any member of the House of Assembly may introduce any Bill into or move any motion for debate in or present any petition to the House of Assembly;

(c) a Vice-President, Minister or Deputy Minister may introduce any Bill into or move any motion for debate in or present any petition to Parliament. B

(4) Except on the recommendation of a Vice-President, Minister or Deputy Minister, Parliament shall not –

(a) proceed upon any Bill, including any amendment to a Bill, which, in the opinion of the President of the Senate or the Speaker, as the case may be, makes provision for any of the following matters –

(i) imposing or increasing any tax; C

(ii) imposing or increasing any charge on the Consolidated Revenue Fund or other public funds of the State or varying any such charge otherwise than by reducing it;

(iii) compounding or remitting any debt due to the State or condoning any failure to collect taxes;

(iv) authorizing the making or raising of any loan by the State; D

(v) condoning unauthorized expenditure;

(b) proceed upon any motion, including any amendment to a motion, the effect of which, in the opinion of the President of the Senate or the Speaker, as the case may be, is that provision should be made for any of the matters specified in subparagraph (a); or

(c) receive any petition which, in the opinion of the President of the Senate or E Speaker, as the case may be, requests that provision be made for any of the matters specified in subparagraph (a).

(5) The provisions of subparagraph (4) shall not apply to any Bill introduced, motion or amendment moved or petition presented by a Vice President, Minister or Deputy Minister."

The above provisions are clear and allow of no ambiguity. Any Member of F Parliament is at liberty to introduce a Bill into Parliament. Where, however, the proposed Bill by a member makes provision

for the introduction or increase of any tax or charge on the Consolidated Revenue Fund or other public funds, or where the Bill makes provision for the compounding or remitting of any debt due to the State, or condoning any failure to collect G taxes, or the raising of any loan by the State or condoning unauthorised expenditure, Parliament shall not introduce a debate on such a Bill, except on the recommendation of a Vice President, Minister or Deputy Minister. In the light of the above provisions, the clear intention must have been to proscribe the right of members to introduce a private Bill that carries financial implications, except where such Bill is supported by the Executive. H

2013 (1) ZLR p433

Garwe JA

A That this has been the legal position in our law is clear. However, the situation changed with the introduction in 2009 of the Eighth Schedule of the Constitution which incorporated the Interparty Political Agreement between ZANU (PF) and the two MDC formations.

The Eight Schedule provides in Article 1 as follows:

> B "Framework for a New Government
>
> 1 For the avoidance of doubt, the following provisions of the Interparty Political Agreement, being Article XX thereof, shall, during the subsistence of the Interparty Political Agreement, prevail notwithstanding anything to the contrary in this Constitution –
>
> 20. Framework for a new Government
>
> C Acknowledging . . .
>
> 20.1. The parties hereby agree that:
>
> 20.1.1 Executive Powers and Authority
>
> . . .
>
> 20.1.2 The Cabinet
>
> (a) shall have the responsibility to evaluate and adopt all government policies D and the consequential programme;
>
> (b) shall, subject to approval by Parliament, allocate the financial resources for the implementation of such policies and programmes;
>
> (c) shall have the responsibility to prepare and present to Parliament, all such legislation and other instruments as may be necessary to implement the policies and programmes of the National Executive;
>
> (d) (g) . . .." E (emphasis added)

The above provisions clearly indicate the intention of Parliament. That intention is that during the subsistence of the Interparty Political Agreement, Article XX of that agreement shall prevail notwithstanding anything to the contrary in the Constitution. The intention must have been to ensure that F for the duration of the Interparty Political Agreement, what is contained in Article XX of the agreement would override any provisions in the Constitution inconsistent with it.

In clause 20.1.2 of Article XX, the Cabinet has specifically been given the responsibility (a) to evaluate and adopt all government policies and consequential programmes (b) to allocate the financial resources necessary for G the implementation of such policies and programmes and, most importantly (c) to prepare and present to Parliament all such legislation and other instruments as may be necessary to implement such policies and programmes.

The issue before this court is one of interpretation. As stated by Chidyausiku CJ in *Capital Radio (Pvt) Ltd v Broadcasting Authority of Zimbabwe* & *Ors* H 2003 (2) ZLR 236 (S) at 246E-F:

2013 (1) ZLR p434

Garwe JA

> "It is trite that in interpreting statutes, including the Constitution, the golden A rule is that in order to ascertain the intention of the legislature, the words of a statute or legislation are to be given their ordinary or primary meaning. It is only where that primary meaning of the words is obscure or leads to absurdity that other principles of interpretation are invoked to assist in the ascertainment of the intention of the legislature."

The wording of clause 20.1.2. is clear. It is Cabinet that has the responsibility B to formulate all government policies and programmes and to fund such programmes. It is Cabinet that has the

responsibility to prepare and present to Parliament legislation, including subordinate, as may be necessary, to implement such policies and programmes.

Whilst I am prepared to accept that the drafting of the Interparty Political C Agreement could have been refined and the agreement itself more elegantly worded, particularly when it was decided to incorporate it into the Constitution, it is clear that the use of the word "responsibility" was intended to give the power of formulating government policies and programmes and the necessary legislation only to Cabinet. The suggestion made during oral submissions that the "responsibility" is shared is certainly not borne out by the wording. D

In the result, I find that, where government policies and programmes are concerned, the formulation and presentation of Bills is the responsibility of Cabinet and no-one else. Indeed Mr *Chihambakwe* has conceded as much. In para. 3.2 of his heads he has stated that:

> ". . .where policies and programmes of the National Executive are concerned, E the Cabinet has the responsibility to prepare and present to Parliament such legislation and other instrument."

I would agree with the submission by Mr *Hussein* that what was intended was to get legislation thrashed out and agreed to at Cabinet level and the polished product presented by a Cabinet member in Parliament. I also agree with his submission that since the country was going through a transitional period F which was to be steered by three political groupings, the intention was that private members would not be permitted to upset the inclusivity of decisions. I would only qualify these remarks by emphasising that the prohibition is restricted only to proposed legislation that deals with government policies and programmes. The corollary to this, therefore, is that whilst a private G member has no right to introduce a private Bill that deals with government policies and programmes during the subsistence of the Inter-Party Political Agreement, he is however still empowered to do so in two situations. The first is where he introduces a Bill that does not deal with such policies or programmes. The second is where the Bill that he seeks to introduce, in addition to the requirement that it must not deal with government policies H

A and programmes, deals with issues of a financial nature that are covered by s 1(4) of Schedule Four of the Constitution and is supported by a Vice President, Minister or Deputy Minister. It is not correct therefore that a private member's right to introduce private bills has been removed completely. It has only been restricted to the extent just shown.

What remains to be considered is whether the Urban Councils Amendment B Bill is one that the fifth and sixth respondents could competently introduce into Parliament. To answer this question one must look at the purpose of the Bill. The explanatory notes to the Bill indicate the purpose is to:

> "Amend the Urban Councils Act [*Chapter 29:15*] by reducing powers of central government over municipal and town councils, thereby encouraging democracy C at local level. . ."

Clearly the purpose of the Bill is to reduce the powers of the applicant as Minister of Local Government, Rural and Urban Development. That the Bill intends to amend current government policies is not in dispute. That being the position, there can be no doubt that the respondents had no right D in law to allow the introduction and debate of this Bill. The introduction and subsequent debate was therefore unlawful as it was prohibited by the Constitution.

Disposition

The position is now settled that Parliament can only do what is authorised E by law and specifically by the Constitution: *Biti & Anor v Min of Justice & Anor* 2002 (1) ZLR 177 (S) at 192F-G and 193C. In terms of s 18(1a) of the Constitution, the second, third and fourth respondents have a duty to exercise their functions in accordance with the law and to observe and uphold the rule of law. Where they act contrary to the law, as they did in this case, then their conduct becomes illegal.

F In his draft order the applicant seeks an order declaring the introduction of the Bill to be null and void. The applicant also seeks an order of costs. I see no reason why both cannot be granted.

In the result therefore I make the following order:

1. The introduction of the Urban Councils Amendment Bill HB.5.2011 G before either House of the first respondent is declared to be inconsistent with the provisions of ss 18(1) and 18(1a) of the

Constitution in that it is *ultra vires* clause 20.1.2. of the Eighth Schedule of the Constitution of Zimbabwe and therefore null and void.

2. The respondents shall pay the costs of this application jointly and H severally, the one paying, the others to be absolved.

2013 (1) ZLR p436

Garwe JA

CHIDYAUSIKU CJ, ZIYAMBI JA, GOWORA JA & OMERJEE AJA A concurred.

Hussein Ranchod & Co., appellant's legal practitioners

Chihambakwe, Mutizwa & Partners, respondents' legal practitioners B

© 2015 Juta and Company (Pty) Ltd.

Document 57 of 73

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2013/Volume 1/AFRICAN BANKING CORPORATION OF ZIMBABWE LTD v PAUL EDWARDS SHIPPING (PVT) LTD & ORS 2013 (1) ZLR 437 (H)

AFRICAN BANKING CORPORATION OF ZIMBABWE LTD v PAUL EDWARDS SHIPPING (PVT) LTD & ORS 2013 (1) ZLR 437 (H)

2013 (1) ZLR p437

Citation	2013 (1) ZLR 437 (H)
Case No	Judgment No. HH-168-13
Court	High Court, Harare
Judge	Zhou J
Heard	13 February 2013; *CAV*
Judgment	28 May 2013
Counsel	*T Mpofu,* for the applicant *T Thandhlanga*, for the respondent
Case Type	Civil application
Annotations	No case annotations to date

Flynote

Practice and procedure – *summary judgment – principles – when summary judgment may be granted – what respondent must show to avoid the grant of summary judgment*

Headnote

D Summary judgment is an extraordinary and drastic remedy which is allowed where a plaintiff has an unanswerable case and ought not to be put to the expense and delay of a trial. An affidavit filed by or on behalf of an applicant in summary judgment proceedings must verify the cause of E

action as set out in the summons and aver a belief that the appearance to defend entered by the respondent is not *bona fide* but was entered for the purpose of delaying the proceedings. On the other hand, for the respondent to oppose summary judgment successfully, he must show a good *prima facie* defence to the applicant's claim. The respondent must allege facts which, if proved at the trial, would entitle him to succeed. F The defence tendered by the respondent must be valid at law and must not be inherently unconvincing.

Cases cited

Central Africa Building Society v Ndahwi 2010 (1) ZLR 91 (H)

Chindori-Chininga v National Council for Negro Women 2001 (2) ZLR 305 (H) G

de Aguiar v de Almeida 1989 (2) ZLR 165 (H)

Fawcett Security Operations (Pvt) Ltd v Director of Customs & Excise & Ors 1993 (2) ZLR 121 (S)

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

Jena v Nechipote 1986 (1) ZLR 29 (S) H

Zhou J

Kingstons Ltd v LD Ineson (Pvt) Ltd 2006 (1) ZLR 451 (S) A

Majoni v Min of Local Govt 2001 (1) ZLR 143 (S)

Niri v Coleman & Ors 2002 (2) ZLR 580 (H)

Pitchford Invstms (Pvt) Ltd v Muzari 2005 (1) ZLR (1) (H)

Stationery Box (Pvt) Ltd v Natcon (Pvt) Ltd & Anor 2010 (1) ZLR 227 (H)

Legislation considered B

High Court Rules 1971 (RGN 1047 of 1971), r 73

Case information

T Mpofu, for the applicant

T Thandhlanga, for the respondent

Judgment

Zhou J: This is an application for summary judgment. The applicant, a C commercial bank, issued summons against the respondents claiming payment of a sum of US$280 961.94 as the balance outstanding in terms of a loan facility availed to the first respondent in May 2011. The summons was issued on 28 March 2012. The other four respondents are cited on the basis that they executed deeds of surety-ship in favour of the applicant for the due D fulfilment of the obligations owed to the applicant by the first respondent. In addition to the claim for the amount stated above and interest at a rate of 40% per annum the applicant prays that certain immovable property described in the declaration be declared to be executable. The applicant also claims that certain items which were acquired and given to the first respondent in E terms of the facility and were the subject of a lease finance agreement be delivered to it. Finally, the applicant claims costs on a legal practitioner and client scale together with collection commission. The respondents entered appearance to defend. The applicant responded by instituting the instant application for summary judgment. The background to the dispute may be F summarised as follows:

In May 2011 the applicant granted a facility to the respondent of up to US$300 000. In its particulars of claim the applicant attached a copy of a facility agreement dated 9 May 2011 and averred that that is the date on which the facility was offered. The affidavit filed in support of the application for summary judgment relies on the same agreement. The respondents on the other G hand attached to their opposing affidavits an agreement dated 24 May 2011 which they said replaced the first memorandum of 9 May 2011. Mr *Mpofu* conceded that the correct agreement is embodied in the memorandum of 24 May 2011. He, however, argued that nothing turns on the two documents other

than the question of the security tendered and the liability of the fourth and fifth respondent. He pointed out that the amount of the facility remained H

Zhou J

A the same and that the first respondent accessed the money loaned in terms of the facility on 11 May 2011 before the memorandum of 24 May 2011 was written. He further submitted that the amount of US$280 961.94 which is being claimed by the applicant is not disputed by the respondents.

The respondents oppose the claim on the following grounds;

(a) that B the written agreement of 9 May 2011 relied upon by the applicant was substituted by the one dated 24 May 2011;

(b) that the debt is not yet due, as the facility was for a period of twenty-four months up to May 2013;

(c) that in terms of the agreement of 24 May 2011 the fourth and fifth C respondents did not guarantee the liability of the first respondent to the applicant; and

(d) that in terms of the agreement of 24 May 2011 properties described as Remaining Extent of Subdivision B of Lots 15, 16, 30, 31, 32 and 37 of Block C of Hatfield Estate and Stand 636 Ruwa were not tendered D as security, and the title deeds for these properties were returned to the respondents.

The respondent further submits that the applicant is not entitled to claim the property which was being leased under the lease finance as well as the amount loaned in terms of the facility. The applicant did not seek leave to file an answering affidavit in response to the factual averments made in the E opposing affidavit. In *Fawcett Security Operations (Pvt) Ltd v Director of Customs & Excise & Ors* 1993 (2) ZLR 121 (S) at 127F, McNally JA said:

> "The simple rule of law is that what is not denied in affidavits must be taken to be admitted."

I will, therefore, proceed, as I should, on the basis that the factual averments F made in the opposing affidavit are admitted. In any event, the agreement of 24 May 2011 speaks for itself as to the guarantors and the security given.

Summary judgment is an extraordinary and drastic remedy which is allowed where a plaintiff has an unanswerable case and ought not be put to the expense and delay of a trial: *Majoni v Minister of Local Government* 2001 (1) ZLR 143 (S) at 144A-B*; Central Africa Building Society v Ndahwi* 2010 (1) ZLR 91 (H) G at 94F-G; *Pitchford Investments (Pvt) Ltd v Muzari* 2005 (1) ZLR 1 (H) at 3D-E. An affidavit filed by or on behalf of an applicant in summary judgment proceedings must verify the cause of action as set out in the summons and aver a belief that the appearance to defend entered by the respondent is not *bona fide* but was entered for the purpose of delaying H the proceedings. See *de Anguiar v de Almeida* 1989 (2) ZLR 165 (H) at

Zhou J

168C-E; *Chindori-Chininga v National Council for Negro Women* 2001 (2) ZLR 305 (H) A at 309C-D. On the other hand, for a respondent to successfully oppose summary judgment he must show a good *prima facie* defence to the applicant's claim. The respondent must allege facts which, if proved at the trial, would entitle him to succeed. See *Kingstons Ltd v L D Ineson (Pvt) Ltd* 2006 (1) ZLR 451 (S) at 458F-G; *Hales v Doverick Investments (Pvt)* B *Ltd* 1998 (2) ZLR 235 (H) at 238D-239B; *Jena v Nechipote* 1986 (1) ZLR 29 (S) at 30D-E.

The defence tendered by the respondent must be valid at law and must not be inherently unconvincing. See *Stationery Box (Pvt) Ltd v Natcon (Pvt) Ltd & Anor* 2010 (1) ZLR 227 (H) at 233B; *Niri v Coleman & Ors* 2002 (2) ZLR 580 (H) C at 585A-B.

The admission by the applicant that the operative agreement was that of 24 May 2011 makes its claim answerable to the extent that the facility letter of that date contains matters which affect the relief being sought by the applicant. While the amount availed under the facility was the same, there D are significant differences in the terms contained in the two agreements and have a bearing on the relief being sought by the applicant. In the draft order filed the applicant persists with its claim against the fourth and fifth respondents notwithstanding the allegation by the respondents that

the two did not bind themselves as sureties under the agreement of 24 May 2011. Also, the applicant insists on an order declaring the Ruwa property and the E Hatfield property to be executable, yet the respondents' averment in the opposing affidavit that those properties were not part of the security given for the loan was not disputed by the applicant. The respondents attached to the opposing affidavit a letter from the applicant dated 30 May 2011 confirming the release of title deeds in respect of 51 Saint Andrews, Hatfield, 636 Ruwa F Township, and Stand 41 Inyanga Township.

Given the above facts, the applicant has not established a case for summary judgment against the fourth and fifth respondents. Also, the applicant's claim for the property referred to in para(s) (ii), (iii) and (iv) of its draft order to be declared executable is not unanswerable. G

As for the claim for the sum of US280 961.94 and interest at the rate of 40 per cent *per annum*, the respondents contend that the amount is not yet due. The amount outstanding and the rate of interest are not disputed. According to the respondents the amount would only become due in May 2013 "since the facility was for a period of 24 months". The respondents rely for that contention on clause 4 of the memorandum signed which states: H

Zhou J

> A "The lease facility and working capital amount shall be made available for a period of 24 (twenty four) and 12 (twelve) months from date of drawdown respectively."

It is clear that the above statement relates to the period of availability of the funds availed in terms of the facility and not to the repayment of the B amounts withdrawn. The respondents cannot genuinely argue that the facility agreement only obliged them to repay the money after a period of 24 months. At the time that the summons was issued they had paid a sum of US$67 488.74, thereby reducing the debt to the amount being claimed. In any event, the respondents do not explain why they have not repaid the portion of the facility which relates to working capital which had a stated C period of twelve months if they understood clause 4 to mean that the debt only became due after the period stated. In my view, the respondents' defence on this claim is seriously and inherently unconvincing. It is certainly not a "plausible case" to suggest that a financial institution would give a facility and allow a drawdown on it without any repayments being made until after D a period of twenty-four months. See *Kingstons Ltd v L D Ineson (Pvt) Ltd (supra)* at 458F.

The applicant also claims the return to it of motor vehicles and trailers which were leased to the first respondent in terms of the facility agreement. The respondents oppose that claim on the basis that the applicant cannot claim E the return of the leased property while at the same time claiming payment of the balance outstanding in terms of the facility agreement. That argument is not valid at law. The motor vehicles are to be recovered because the first respondent failed to pay the rent for them. They belong to the applicant. The first respondent was leasing them.

F Order 10 Rule 73 of the Rules of this court provides as follows:

> "If on the hearing of an application made under this Order it appears –
>
> (a) that a defendant is entitled to leave to defend and some other defendant is not so entitled; or
>
> (b) that a defendant is entitled to leave to defend as to part of the claim;
>
> the G court may –
>
> (i) give leave to defend to a defendant so entitled thereto and give judgment against a defendant not so entitled; or
>
> (ii) give leave to defend to the defendant as to such part of the claim, and enter judgment against the defendant as to the balance of the claim;
>
> or H make both orders mentioned in (i) and (ii)."

Zhou J

This is an appropriate case for the application of the above rule, as the A respondents have shown that they do have good *prima facie* defences in respect of some of the applicant's claims.

I do not think that the applicant is entitled to claim collection commission in circumstances where it recovers costs on an attorney-client scale. B

In the result, it is ordered as follows:

1. Summary judgment be and is hereby granted in favour of the applicant against the first, second and third respondents jointly and severally, the one paying the others to be absolved for payment of a sum of US$280 961.94, together with interest thereon at the rate of 40 per cent *per annum* from 1 April 2012 to the date of payment in full. C
2. The claim for summary judgment against the fourth and fifth respondents is dismissed, and the two respondents are given leave to file their plea to the applicant's claim within ten days from the date of this order.
3. Summary judgment is refused in respect of the applicant's prayer to have the properties described as Stand 636 Ruwa, Stand 41 Inyanga D Township, and the Remaining Extent of Subdivision B of Lots 15, 16, 30, 31, 32 and 37 of Block C of Hatfield Estate to be declared executable. The respondents are given leave to defend this claim by filing their plea within ten days from the date of this order.
4. The first respondent shall deliver to the applicant the following trailers E and motor vehicles:
   (a) trailer with registration number ABJ9701 and chassis number TLHU849;
   (b) Paramount trailer with registration number AAS7778 and chassis number AA9G227MA4AKA1843; F
   (c) Daf LF45-170 with registration number ABS5822, engine number 565972 and chassis number XLRAE48BFOL248943;
   (d) Volvo FM7 box with registration number ACE0349, engine number 110983 and chassis number XA290898;
   (e) Volvo horse with registration number ABS5658, engine number G 12019471 and chassis number IN259241;
   (f) Volvo 660 horse with registration number ABS5553, engine number 1201764 and chassis number IN311541;
   (g) International truck with registration number ABQ4664, engine number 11863266 and chassis number C047320; and H

Zhou J

   (h) Kenworth A truck with registration number ABS5539, engine number 3055280 and chassis number J858327DOD.
5. The costs of this application shall be paid by the first, second and third respondents jointly and severally, the one paying the others to be absolved.

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

Thondhlanga & Associates, respondents' legal practitioners

© 2015 Juta and Company (Pty) Ltd.

Document 58 of 73

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2013/Volume 1/TROJAN NICKEL MINE LTD v RESERVE BANK OF ZIMBABWE 2013 (1) ZLR 444 (H)

TROJAN NICKEL MINE LTD v RESERVE BANK OF ZIMBABWE 2013 (1) ZLR 444 (H)

Citation 2013 (1) ZLR 444 (H)

Case No Judgment No. HH-169-13

Court High Court, Harare

Judge Mathonsi J

Heard 23 May 2013; *CAV*

Judgment 29 May 2013

Counsel *L Uriri,* for the plaintiff
T Chitapi, for the defendant

Case Type Civil trial

Annotations No case annotations to date

Flynote

Contract – *breach – breach induced by third party – plaintiff having delictual claim against third party*

Delict – *interference with contractual rights – inducing breach of contract – an actionable wrong* D

Revenue and public finance – *Reserve Bank of Zimbabwe – powers and duties – directive to banks to lodge with it foreign currency held in corporate accounts into – breach of contract between banker and its client thereby induced – Reserve Bank liable to client* E

Headnote

The plaintiff, a public company, sued the defendant for payment of a little over US$1 million, together with interest and costs of suit, being the plaintiff's money appropriated by the defendant from the plaintiff's bank in pursuance of a monetary policy statement issued in terms of s 46 of the Reserve Bank Act [*Chapter 22:15*] and a directive issued F to banks in terms of s 35(1) of the Exchange Control Regulations 1996 (SI 109 of 1996). The defendant, which was established in terms of s 4 of the Act, was charged with, *inter alia*, the regulation of Zimbabwe's monetary system, the supervision of banking institutions and the smooth operation of the payment system, as well as acting as banker and financial advisor to, and fiscal agent of, the State. In the discharge of those duties, G the defendant issued a monetary policy statement on 1 October 2007, centralising all foreign currency accounts and directing the lodgement with it of all corporate foreign currency balances held by authorised dealers. One such authorised dealer was the bank where the plaintiff maintained a foreign currency account. The plaintiff's bank complied with this directive. The plaintiff, being unable to access its money, sued H

A the defendant to recover the money. The defendant contested the action, averring that there was no causal nexus between the parties, given that the plaintiff and the defendant did not enjoy any banking relationship and that the plaintiff should have proceeded against its own bank, and not against the defendant.

The plaintiff argued that it had a cause of action against the defendant because B the defendant wrongfully procured a breach of the contract between the plaintiff and its own bank, such an action existing in our law for the intentional and wrongful interference with contractual rights. In addition, the plaintiff was entitled to recover from the defendant the procured money on the basis of unjust enrichment, it having been enriched at the C expense of the plaintiff.

Held, that it is well established that the intentional inducement of a breach of contract is an actionable wrong. After appropriating the plaintiff's money, the defendant did not return that money and had not even begun to give any indication as when, if at all, it would repay the money. It contented itself with hiding behind the non-existence of a contractual D relationship between it and the plaintiff. Quite how and why the defendant could come to the conclusion that it could just acquire the money and refuse to repay it to the owner was unfathomable. The right to private property is sacrosanct. The plaintiff should be protected against the arbitrary deprivation of its equity deposited at its bank, which institution E was powerless against the defendant's directive and was now unable to perform its contractual obligations, namely, paying the money to the plaintiff on demand.

Held, further, that the directive which led to the appropriation of the plaintiff's foreign currency balance at its own bank constituted a wrongful interference with contractual rights. While the defendant was F the monetary authority charged with the management of the banking sector and the formulation of banking rules, no authority was cited which entitled the defendant to proscribe the release of deposits to depositors or indeed to interfere with bankers' obligations to pay balances to their clients on demand. In any event, on the basis of unjust enrichment, the G defendant could not escape liability.

Cases referred to

China Shougang Intl v Standard Chartered Bank Zimbabwe Ltd 2011 (2) ZLR 456 (H)

Dantex Investments Holdings (Pty) Ltd v Brenner & Ors NNO 1989 (1) SA 390 (A) H

Mathonsi J

Executive Officer of the Financial Services Board v Dynamic Wealth Ltd & Ors 2012 (1) SA 543 (SCA) A

Industrial Equity v Walker 1996 (1) ZLR 269 (H)

Roux v Hattingh 2012 (6) SA 428 (SCA)

Legislation considered

Reserve Bank Act [*Chapter 22:15*], ss 4 & 46 B

Case information

L Uriri, for the plaintiff

T Chitapi, for the defendant

Judgment

Mathonsi J: It is Wallis JA, with Harms AP, van Heerden and Malan C JJA and Petse AJA all concurring, who waxed lyrical in *Executive Officer of the Financial Services Board v Dynamic Wealth Ltd & Ors* 2012 (1) SA 543 (SCA) when he said:

> "Ever since the bursting of the South Sea Bubble in 1720 governments have recognised the need, in the interests of the investing public, for regulation of D the financial services industry".

The plaintiff, a public company registered in Zimbabwe sued the defendant for payment of US$1 007 541.30, together with interest at the prescribed rate and costs of suit, being the plaintiff's money allegedly appropriated by the defendant from the plaintiff's bank in pursuance of a monetary policy statement issued in terms of s 46 of the Reserve Bank Act [*Chapter 22:15*] E ("the Act") and a directive issued to banks in terms of s 35(1) of the Exchange Control Regulations 1996 (SI 109 of 1996).

The defendant is established in terms of s 4 of the Act and is charged with, *inter alia*, the regulation of Zimbabwe's monetary system, the supervision of banking institutions and the smooth operation of the payment system, as well as acting as banker and financial advisor to, and fiscal agent of, the F State. It is salutary that the defendant performs these functions in order to regulate banking and protect the banking public.

In the discharge of its duties aforesaid, the defendant issued a monetary policy statement on 1 October 2007 centralising all foreign currency accounts and directing the lodgement, at its doorsteps, of all corporate foreign currency G balances held by authorised dealers. One such authorised dealer is Banc ABC where the plaintiff maintained a foreign currency account. In compliance with the monetary policy and a subsequent directive issued by the defendant, Banc ABC lodged the plaintiff's foreign currency balance with the defendant. That was the last time the plaintiff saw the money, as the defendant did not return it to Banc ABC, as a result of which the plaintiff was unable to H

Mathonsi J

A access that money.

The plaintiff then sued the defendant aforesaid, seeking to recover the money but the defendant contested the action, averring in its plea that there was no causal nexus between the parties, given that the plaintiff and the defendant did not enjoy any banking relationship and that the plaintiff should have proceeded against its bank, that is, Banc ABC, and not against the defendant.

B At the pre-trial conference the parties agreed on the issues for trial as:

"1.1. whether or not the plaintiff has a cause of action against the defendant.

1.2. whether or not the defendant is obliged to pay the amount claimed or any amount at all".

When the matter initially came before me for trial, the parties were of the C view that the facts were generally common cause. They then requested the deferment of the hearing to enable them firstly to agree on the facts, prepare and file a statement of agreed facts as well as heads of argument. In due course this was done and the statement of agreed facts signed and filed by the parties reads:

"1. The D plaintiff is Trojan Nickel Mine Ltd, a public company registered in accordance with the laws of Zimbabwe.

2. The defendant is the Reserve Bank of Zimbabwe. It is established in terms of the Reserve Bank of Zimbabwe Act [*Chapter 22:45*] ("the Act") with the power, amongst other things, to regulate the banking sector.

3. The plaintiff, at all material times, maintained a foreign currency account number ZWTROJ001CALUS0019 domiciled at Banc ABC, formerly the E African Banking Corporation.

4. On 1 October 2007, the Governor of the defendant, Dr G Gono, issued a monetary policy statement in terms of s 46 of the Act. The monetary policy statement provided in pertinent part as follows (the emphasis is in the original statement):

'6.2. In F order to achieve the twin objectives of boosting exporter viability and improving the economy's accountability for *total export and otherforeign currency receipts, as well as ensuring judicious allocation of the scarce foreign currency resources,* it has become necessary that the Reserve Bank introduces a new frame work where we pool our resources together without disadvantaging the generators of that foreign currency.

6.3. Within G this spirit of preserving and promoting the welfare of our generators of foreign currency, who are the geese that lay the golden eggs, it has become necessary that the *Central Bank centralises the management of FCAs, alone with the creation of an interest earning investment window that boosts exporter viability,*

6.4. What this means is that, *with immediate effect all corporate FCA* H *balances at Authorised Dealers are to be lodged at the Reserve Bank,*

---

such that each bank maintains mirror accounts for transactions tracing A *purposes'*.

5. On 2 October 2007, the defendant's Division Chief, Exchange Control, one M B Mpofu, directed a minute to the head, exchange control department, of all authorised dealers, which read(s) in pertinent part as follows:

'Dear Sir/Madam

Directive issued in terms of section 35(1) of the Exchange B Control Regulations, Statutory Instrument 109 of 1996

1. INTRODUCTION

1.1. Reference is made to the Mid-Year Monetary Policy Statement announced by the Governor on 1 October 2007. In order to operationalize the measures highlighted therein, Authorised C Dealers are accordingly directed as follows:

2. . . .

3. CENTRALISED FCA MANAGEMENT

3.1. Authorised dealers are advised that, with immediate effect, all corporate and non-governmental organisations (NGOs) FCA balances as at 1 October 2007 shall be lodged with the D Reserve Bank.

3.2. Authorised dealers shall transfer all their corporate FCA (including EPZ Companies) and NGOs balances to the Reserve Bank by close of business on 2 October 2007, as directed by International Banking and Portfolio Management Division, and submit to Exchange Control individual exporter balances E on those transfers made.

3.3. Authorised dealers are required to maintain mirror accounts for their exporting clients indicating individual entitlements for transaction tracking purposes.

3.4. Authorised dealers shall submit to the Exchange Control Inspectorate monthly foreign currency account statements for F their clients for which global balances should be consistent with holdings at the Reserve Bank's Internal Banking and Portfolio Management Division.

3.5. All special FCAs (transitory accounts) and FCAs for international organisations, embassies and individuals shall remain with authorised dealers. G

3.6. In order to ensure that exporters preserve the real value of the foreign exchange deposits under the pooled framework, all such deposits shall earn an all inclusive (interest) rate of 12% per annum in foreign currency for USD, pound, euro, pula and rand.

6. The Banc ABC was and remains an authorised dealer. H

2013 (1) ZLR p449

Mathonsi J

7. The A plaintiff alleges that it had a foreign currency balance of USD1 007 541.30 as at 1 October 2007 in its FCA aforesaid.

8. Banc ABC, pursuant to the directive in para 4 above, remitted the sum of USD1 492 516.06 to the defendant.

9. The plaintiff alleges that it has been unable to access its funds from Banc ABC despite demand.

10. The B plaintiff has sued the defendant for 'Payment of an amount of USD1 007 541.30, which amount is due and payable to the plaintiff by the defendant, which amount represents the entire balance of the money which was held by the plaintiff in a foreign currency account in African Banking Corporation Ltd which amount was appropriated by the defendant sometime in 2008 and which amount despite demand, the C defendant fails or refuses to pay'.

11. The defendant has pleaded to the summons as follows:

> 'The defendant pleads that there is no causal nexus between the plaintiff and the defendant more particularly that:
>
> (a) the plaintiff and defendant have no banking relationship and the defendant did not manage or keep a banking account of the plaintiff and owed the plaintiff no duties normally associated D with a banker and its depositor:
>
> (b) the plaintiff's claim should be against its banker and not the defendant. It is improper and there is no legal basis alleged which would entitle the plaintiff to bring a claim against the defendant.
>
> WHEREFORE the defendant prays for the dismissal of the plaintiff's claim with costs.'

12. The E parties have joined issue and agreed on the following issues for disposition:

12.1 Whether or not the plaintiff has a cause of action against the defendant.

12.2. Whether or not the defendant is obliged to pay the amount claimed or any amount at all.

13. The F parties respectfully pray that this honourable court may dispose of the agreed issues on the basis of the facts agreed herein and heads of argument to be filed by both parties.

DATED AT HARARE this 22nd day of May 2013".

The statement of agreed facts is duly signed by counsel for the parties. Mr *Uriri,* who appeared for the plaintiff, submitted that the plaintiff does have G a cause of action against the defendant, because it is the defendant which wrongfully procured a breach of the contract that exists between the plaintiff and Banc ABC. He maintained that an action exists in our law for the intentional and wrongful interference with contractual rights. In addition, the plaintiff is entitled to recover from the defendant the procured money on the basis H of unjust enrichment, it having been enriched at the expense of the plaintiff.

2013 (1) ZLR p450

Mathonsi J

Mr *Uriri* strongly argued that the directives issued to authorised dealers by the A defendant had the effect, firstly, of inducing Banc ABC to commit a breach of its contract with the plaintiff and, secondly, the directives intentionally and wrongfully interfered with contractual rights. Mr *Chitapi* for the defendant did not address himself to that argument. As far as he was concerned, there was no banker and client relationship between the parties and, for that reason, B the defendant does not

owe the plaintiff any duty. Mr *Chitapi* insisted that it is the plaintiff's bank which received the money from the plaintiff and for that reason it is the one with the obligation to pay the money to the plaintiff.

Mr *Chitapi* further argued that the plaintiff's pleadings do not allege a legal basis entitling it to bring a claim against the defendant especially as the C summons does not specify that the suit is based on either contract or delict.

He relied on the judgment of Bere J in *China Shougang International v Standard Chartered Bank Zimbabwe Ltd* 2011 (2) ZLR 456 (H), where the learned judge stated, *obiter dictum,* at 461G, that there was no privity of contract between the central bank and a depositor at a bank.

I do not think the decision in *China Shougang International* needs to detain D us at all, because it is clearly distinguishable from the present case. In that case, the depositor had sued its own bank and the present defendant was not cited as a party to the proceedings. More importantly, apart from the fact that the claim was based on a banker and depositor relationship and not on the procurement of the deposit by the present defendant, E there was also no admission by RBZ that it had indeed appropriated the depositor's money.

I agree with Mr *Uriri* that the question of wrongful procurement was not placed before the court in that matter. Therefore the case is distinguishable.

In our law, it is generally accepted, and I did not hear Mr *Chitapi* argue to F the contrary, that an action exists for intentional inducement of a breach of contract. In P Q R Boberg *The Law of Delict* Vol 1 (Juta & Co Ltd) p 38 the point is made that –

> "It is well established that the intentional inducement of a breach of contract is an actionable wrong: see *Atlas Organic Fertilisers (Pty) Ltd v Pikkewyn Ghwano* G *(Pty) Ltd* 1981 (2) SA 173 (T) at 202G, and the cases there cited."

In *Dantex Investments Holdings (Pty) Ltd v Brenner & Ors NNO* 1989 (1) SA 390 (A) at 395D Grosskopf JA also made that point in stating:

> "It is clear that an interference with contractual rights can in certain circumstances constitute a delict. What is less clear is what precisely the requirements for liability are." H

Mathonsi J

A See also *Roux v Hattingh* 2012 (6) SA 428 (SCA) and R H Christie *The Law of Contract in South Africa* 3 ed p 551.

In casu the defendant acted in terms of s 46 of the Act. That section provides:

> "In June and December of each year, the Governor shall submit to the Minister a policy statement containing –
>
> (a) a B description of the monetary policy to be followed by the Bank during the next succeeding six months, and a statement of reasons for those policies; and
>
> (b) a statement of the principles that the Bank proposes to follow in the implementation of the monetary policy; and
>
> (c) an evaluation of the monetary policy and its implementation for the last C preceding six months".

In order to implement the policy statement given in terms of s 46 to the effect that foreign currency balances were to be lodged with the defendant, a directive was also issued to banks in terms of s 35(1) of the Exchange Control Regulations SI 109 of 1996 instructing them to immediately lodge D the foreign currency balances with the defendant.

Section 35(1) of the Regulations is of peremptory application. It reads:

> "Authorised dealers shall comply with such directions as may be given to them by an exchange control authority relating to –
>
> (a) the exercise of any functions conferred on them by or under these regulations;
>
> (b) the E terms on which they are to exchange foreign currency for Zimbabwean currency;
>
> (c) the offer of foreign currency in their possession for sale to the Reserve Bank".

It was stated in *China Shougang International (supra*) that the directive F given by the Governor of the defendant was invalid for want of a ministerial approval. I do not think it is necessary to discuss that issue in this case because it is accepted that the directive was given. To that extent the

plaintiff's bank was obliged to comply with the directive in terms of the law. Doing otherwise would have resulted in dire consequences to it, if not the loss of its banking licence.

G It is common cause that, after appropriating the plaintiff's money, the defendant did not return that money and has not even begun to give any indication as when, if at all, it will repay the money. It has contented itself with hedging behind the non-existence of a contractual relationship between it and the plaintiff. The proverbial hiding behind a finger. Quite how and H why the defendant could come to the conclusion that it can just acquire the

---

money and refuse to repay it to the owner is one of the greatest unfathomable A mysteries of this world.

There can be no doubt that the right to private property is one of the sacrosanct rights protected by law. There is little doubt that the plaintiff should be protected against the arbitrary deprivation of its equity deposited at Banc ABC, which institution was powerless against the defendant's directive B and is now unable to perform its contractual obligations, namely paying the money to the plaintiff on demand.

To my mind, the defendant intentionally induced Banc ABC to breach its contract with the plaintiff. I have already stated that an intentional inducement of a breach of contract is actionable in our law.

As a corollary to that is the submission made on behalf of the plaintiff that C the directive which led to the appropriation of the plaintiffs foreign currency balance at Banc ABC constitutes a wrongful interference with contractual rights. I agree. While it is true that the defendant is the monetary authority charged with the management of the banking sector and the formulation of banking rules, I have not been directed to any authorities entitling the D defendant to proscribe the release of deposits to depositors or indeed to interfere with bankers' obligations to pay balances to their clients on demand.

As a matter of policy the security of bank deposits should forever be protected by our courts. Indeed it would be an affront to the rights of depositors if ownership of their property stored with banks and the culture of banking money E instead of keeping it under a pillow were to be rendered a serious economic hazard and a ruinous activity. Our law, which protects ownership of property, is founded on a rock of wisdom. For that reason the courts should be clear, consistent and firm in enforcing principles protecting deposits. Needless to say that the expropriation of export proceeds prior to dollarization which have not been compensated is one of the major factors inducing weak balance F sheets of businesses resulting in poor economic performance.

I am persuaded that the plaintiff does have a cause of action against the defendant, based on the twin concepts of the intentional inducement of a breach of contract and the wrongful interference with contractual rights, for wrongful it is if the monetary regulatory authority gives a directive for G the appropriation of an individual's equity in a bank and then fails to make good that equity.

Even if I am wrong in that conclusion, the defendant cannot escape liability on the basis of unjust enrichment. It is now accepted that the general enrichment action is recognised in our law. See *Industrial Equity v Walker* 1996 (1) ZLR 269 (H) where Bartlett J stated at 298B-D: H

A "I am of the respectful view that the principal requisites for a general action on enrichment can be regarded as aptly summarised by Wouter de Vos in *Verrykingsaanspreeklikheid in die Suid Afrikaanse Reg* (1958) as stated by Scholtens in the 1996 *Annual Survey of South African Law* 150 at 152 as:

(a) the defendant must be enriched;

(b) the enrichment must be at the expense of another (i.e. the plaintiff must be impoverished and there must be a causal connection between enrichment B and impoverishment);

(c) the enrichment must be unjustified;

(d) the case should not come under the scope of one of the classical enrichment actions;

(e) there should be no positive rule of law which refuses the action to the impoverished person.

Obviously these requirements can only be fulfilled if in any given case the C action is based on a defined set of circumstances."

I am satisfied that all the requirements of unjust enrichment are met in the present case. It is also not a case that would open floodgates because, rarely do we have a situation where a depositor's foreign currency balance is appropriated the way it was in this case.

D Mr *Chitapi* submitted that the plaintiff did not plead any case based on delict and that for that reason the claim should fail. I am of the view that the manner in which the plaintiff pleaded its case, predicating it mainly, on the fact that the amount claimed "was appropriated by the defendant" was wide enough to encompass the claim as it has been argued by counsel. However, I agree E that it would be inappropriate, bearing in mind the banking relationship between the parties, the defendant being "a banker of banks", to direct that the money be paid directly to the plaintiff. The correct approach would be for the defendant to return the money to Banc ABC, the plaintiff's banker.

Accordingly it is ordered that:

1. Judgment is hereby entered in favour of the plaintiff as against the F defendant in the sum of USD1 007 541.30 together with interest a *tempore morae* at the prescribed rate from the date of summons to date of payment.
2. The defendant is directed to deposit the said sum of USD1 007 541.30 into the plaintiff's Banc ABC account number ZWTROJ001CALUSD0019 G or any other account held by the plaintiff at that bank.
3. The defendant shall bear the costs of suit.

Atherstone & Cook, plaintiff's legal practitioners

H *Chitapi & Associates,* defendant's legal practitioners

© 2015 Juta and Company (Pty) Ltd.

Document 59 of 73

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2013/Volume 1/MARANGE RESOURCES (PVT) LTD v CORE MINING & MINERALS (PVT) LTD (IN LIQUIDATION) & ORS 2013 (1) ZLR 454 (H)

MARANGE RESOURCES (PVT) LTD v CORE MINING & MINERALS (PVT) LTD (IN LIQUIDATION) & ORS 2013 (1) ZLR 454 (H)

Citation	2013 (1) ZLR 454 (H)
Case No	Judgment No. HH-187-13
Court	High Court, Harare
Judge	Dube J
Heard	30 May 2013
Judgment	30 May 2013
Counsel	*F Girach* and *T Mpofu,* for the applicant *D Ochieng* and Mrs *B Mtetwa,* for the respondent
Case Type	Urgent chamber application
Annotations	No case annotations to date

Flynote

Arbitration – *arbitrator – jurisdiction – dispute about validity of contract containing arbitration clause – arbitrator entitled to determine validity of arbitration clause*

Headnote

A dispute between the applicant and the first respondent was referred D to arbitration. The applicant sought an order, *inter alia*, staying the arbitration proceedings pending the High Court's ruling on the validity or otherwise of the shareholders' agreement in terms of which the arbitration proceedings were being conducted. The applicant contended E that there was no valid shareholders' agreement and that the arbitration clause could not survive on its own. It argued that the arbitrator was not entitled to make an award as to the validity or otherwise of the contract.

Held, that in terms of article 16 of the First Schedule to the Arbitration Act [*Chapter 7:15*], the arbitrator has power and competence to determine any challenge raised in respect of his jurisdiction and any objections F with respect to the existence or validity of the arbitration agreement. The Act provides for a remedy to resolve such a dispute. Whether the arbitrator had power to deal only with the narrow issue of the validity of the arbitration clause or the validity of the whole contract was the issue that should have been taken up with him. The arbitrator invited the parties G to address him on the preliminary issues. The applicant misconstrued this invitation to make submissions on the issue of jurisdiction with the actual arbitration proceedings over the validity of the contract. The issue regarding whether the arbitrator has power to rule on whether there is an agreement has a bearing on the issue of his jurisdiction and should have been taken up with the arbitrator for his determination. The appellant had H

A not exhausted the domestic remedies provided for in the Act. It should have done so before approaching the court.

Held, further, that the arbitrator also had power to order interim measures in terms of article 17(1) and (2)(a). He also had power to grant interdicts in terms of article 17(2)(a). The arbitrator could do exactly what the court was being asked to do. If the arbitrator decided to proceed with B the actual arbitration on the merits and came out with an award not favourable to the applicant, the applicant could apply to have the award set aside by the High Court in terms of article 34(1). Any harm that might ensue was curable.

Cases cited C

Chidawu & Ors v Shah & Ors 2013 (1) ZLR 260 (S)

Croplink (Pvt) Ltd v Jesse & Ors 1996 (1) ZLR 514 (H)

Girjac Services (Pvt) Ltd v Mudzingwa 1999 (1) ZLR 243 (S)

Djordjevic v Chrmn, Practice Control Cttee, Medical & Dental Practitioners Council of Zim 2009 (2) ZLR 221 (H)

D *Graspeak Investments (Pvt) Ltd v Delta Corporation (Pvt) Ltd & Anor* 2001 (2) ZLR 551 (H)

Heyman v Darwins Ltd [1942] 1 All ER 337 (HL)

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

Mhanyami Fishing & Tpt Co-op Soc Ltd & Ors v Dir-Gen, Parks & Wildlife Mgmt Authority & Ors 2011 (1) ZLR 555 (H)

Mudzengi & Ors v Hungwe & Anor 2001 (2) ZLR 175 (H)

E *S v Marutsi* 1990 (2) ZLR 370 (S)

Scriven Bros v Rhodesia Hides & Produce Co Ltd & Ors 1943 AD 393

Sentrale Kunsmis Korporasie (Edms) Bpk v van Heerden & Ors 1972 (2) SA 729 (W)

Legislation considered F

Arbitration Act [*Chapter 7:15*], First Schedule, arts 8,16,17,18 & 34

Companies (Winding Up) Rules 1972 (RGN 841of 1972), r 196

High Court Rules 1971 (RGN 1074 of 1971), r 87

Case information

G *F Girach* and *T Mpofu,* for the applicant

D Ochieng and Mrs *B Mtetwa,* for the respondent

Judgment

Dube J: This is an urgent application for an interim interdict against the first, second and third respondents to stop them from constituting an arbitral panel and proceeding with arbitration proceedings. The applicant sought H orders in the following terms.

2013 (1) ZLR p456

Dube J

"Terms of Final Order A

1. That the arbitration proceedings between the applicant and the first respondent in this matter, currently pending before the second respondent be and are hereby stayed until the proceedings in Case No. HC 8410 of 2010 are concluded.

2. That the first respondent pays cost of suit.

Terms of Interim Order B

1. That pending final determination of Case No. HC 8410 of 10 and the criminal trial, the first, second, third and fourth respondents be and are hereby interdicted from instituting and proceeding with arbitration proceedings in terms of the Joint Venture Agreement and Shareholders Agreement between the applicant and the first respondent".

The second and third respondents did not oppose the application. The interim C interdict is being sought pending the determination of an application brought by the first respondent and currently pending before this court on the validity or otherwise of a shareholder's agreement under case no. HC 8410/10 and a criminal trial pending before Bhunu J. The salient facts of this case are briefly as follows. A Joint Venture Agreement and Shareholders Agreement was entered into on 14 August 2009 between the applicant and the Zimbabwe D Mining Development Corporation and the first respondent. A dispute arose between the parties over the participation of the first respondent in the affairs of the joint venture company. The applicant's position is that the agreement between the parties is void .Following this dispute, the first respondent filed an application under case no. HC 8410/10 seeking an order declaring the E agreement signed by the parties valid. A director of the first respondent, Lovemore Kurotwi, is being prosecuted on allegations of fraud arising out of this contract. On 10 February 2012 the first respondent was placed under a winding up order by a South African court and liquidators appointed.

Sometime in October 2010, negotiations for the appointment of an arbitrator commenced. These having failed, the third respondent, the President of the F Law Society, was approached for assistance, resulting in the appointment of retired judge, Moses Chinhengo, the second respondent, as arbitrator. On 12 April 2013 a pre-arbitration meeting was convened. The applicant boycotted this meeting. The meeting proceeded and preliminary issues were identified and an order made directing the parties to file submissions by set G dates and a date for the hearing was set. The applicant subsequently filed this application on 23 April 2013.

When the urgent chamber application was initially placed before me, I declined to entertain the application, stating that the matter was not urgent and that the applicant has other remedies available to it under UNCITRAL Model Law contained in the First Schedule to the Arbitration Act [*Chapter 7:15*] H

2013 (1) ZLR p457

Dube J

A ("the Model Law"), in that it had not exhausted domestic remedies available to it. I underscored that, although the applicant had not been present when the preliminary issues were defined, it could

still raise any other preliminary issues that it wished the arbitrator to consider. Aggrieved by this decision, the applicant requested to have audience with the court to address it on the issue of urgency. This request was duly granted. The court had not dealt with B the application on the merits and in the exercise of its discretion, I decided to hear the parties. The court was not *functus officio*.

The matter was set down and arguments on the issues commenced. There was a delay in the finalisation of this matter as, initially, the parties had indicated that they would settle. Attempts to settle having failed, the matter C was set down again for argument. In the interim, the arbitrator continued with the arbitration proceedings. The court issued an order staying proceedings pending the outcome of this urgent application.

I am grateful to the parties for filing detailed heads of argument for my consideration.

D A number of preliminary issues emerge from both the first respondent's and the applicant's submissions. These are summarised hereunder.

The first respondent's first preliminary point relates to the citation of the first respondent. Mrs *Mtetwa* submitted as follows. The first respondent has been cited as Core Mining and Minerals (Pvt) Ltd (in liquidation). The final winding E up order from the South Gauteng High Court refers to a company cited as Core Mining and Mineral Resources (Pty) Ltd. The address for service of the company is No 17 Durham Street, Raedene Estates, Johannesburg, South Africa. This application was served at Mtetwa & Nyambirai, ostensibly as representatives of the first respondent. She submitted that Core Mining and Minerals (Pvt) Ltd (in liquidation) is not a party to these proceedings and is F not represented by the said law firm. The first respondent is a South African registered company and it has been cited as Core Mining and Minerals (Pvt) Ltd (in liquidation), instead of Core Mining and Mineral Resources (Pty) Ltd. Although it is apparent from communications regarding the arbitration proceedings that the company involved is Core Mining and Mineral Resources with a (Pty), the applicant cited the company as a (Pvt) company. The first G respondent conceded that the citation of Core Mining as a (Pvt) company by the applicant was in error, and that this is a common error, as even the arbitrator made the same error in the pre-hearing meeting minutes. Mr Kurotwi, a director of the said company, made the same error in his supporting affidavit in the opposing papers, where the company is specified as a (Pvt) company. H The first respondent has no objection to having the error corrected. The

---

applicant has declined the offer to rectify its papers and amend the citation. A The first respondent submitted that the applicant has adopted the illogical position that its own self-created error in the citation of the first respondent entitles it to the relief on the basis that there is no opposition before the court. The first respondent maintained that the application is a nullity on the basis that the first respondent is a non-existent company and their intervention is B to protect their client's interests and is permissible under the rules of court.

The applicant submitted that it is erroneous to state that the application is a nullity on the basis that the first respondent is a non-existent company, yet it is the very first respondent that dragged the applicant to arbitration. If the present application is a nullity, then the proceedings before the arbitrator are a nullity as well and should be interdicted. C

The first respondent's second preliminary point relates to the issue of urgency. Its position is that this application is not urgent and it urged the court to dismiss the application. Mr *Ochieng*, for the first respondent, gave a chronicle of the events leading to the appointment of the arbitrator. The process to appoint an arbitrator commenced with the letter dated 19 October 2012 D from the first respondent to the applicant. The first respondent approached the Commercial Arbitration Centre in Harare on 27 November 2012 for the appointment of an arbitrator .The applicant became aware of this fact on 28 November 2012.If the applicant intended to stop the process, the duty to act arose from there. The court should refuse to entertain this application because the urgency is self-created, as the applicant failed to take all necessary E steps to stop that process, and no reason has been given why nothing was done until some five months later when arbitration commenced. The first respondent contended that there are three specific dates that should have triggered the present application and the applicant failed to approach this court for a remedy. The dates are as follows; F

(a)) 28 November 2012, when the matter was first brought before the Commercial Arbitration Centre in Harare and when the issue of the appointment of the arbitrator became known;

(b) 21 December 2012, when the first respondent referred the appointment of an arbitrator to the third respondent;

(c) 18 February 2013, when the third respondent appointed the second G respondent as thearbitrator.

The first respondent asserted that the cause of action has been on-going since November 2012 and the applicant conveniently chose to avoid placing this fact before the court. That the applicant has deliberately concealed and withheld material and relevant facts on the subject of the appointment of the arbitrator H

2013 (1) ZLR p459

Dube J

A from the court, giving the impression that the issue only arose in April 2013. The court was urged to frown at the applicant's attempt to snatch at relief. The first respondent submitted further that the applicant has been given an opportunity to argue the veracity or otherwise of its arguments before the second respondent and has declined to take up the offer. It asserted that this application amounts to a blatant abuse of process. The applicant has failed B to explain why nothing has been done to set down case no. HC8410/10 for argument. The first respondent contended that a litigant who has slept on its rights for a period of over two and a half years, when the rules of court offer it recourse, cannot approach the court on an urgent basis to frustrate an independent process brought by a third party, who is not even before the C court. The court was referred to the case of *Chidawu & Ors v Shah & Ors* S-12-13[1] for this approach.

In its response the applicant submitted that the first respondent had initially agreed to settle this matter. It cannot consent to the grant of the provisional order and, when the parties fail to agree on the terms, turn around and say D the matter is not urgent. It urged the court not to allow the first respondent to approbate and reprobate a step taken in the proceedings. It can only do one or the other. The applicant referred the court to the case of *S v Marutsi* 1990 (2) ZLR 370 (S) for this approach. It urged the court, in its determination of the issue of urgency, to determine whether there are *prima facie* valid arbitration proceedings, because if there are not, no other relief will be available save E the grant of the interdict.

The applicant submitted that, apart from absence of an alternative remedy available to it, the matter is urgent on the well-known principles of urgency. The approach is that a matter is urgent if it satisfies the two requirements of time and consequence. That a matter is urgent if, at the time to act, the F matter cannot wait. The applicant contended that the court cannot require the applicant to participate in a nullity. That as the first respondent is under liquidation, and has no wherewithal to meet the applicant's costs, the applicant will suffer economic harm if these proceedings go ahead. The costs cannot be recovered, particularly in view of the fact that the liquidator has not been G recognized. The applicant contended that there was no need to act before the arbitration proceedings were instituted, as there is nothing to interdict. When the matter was placed before the arbitrator and the applicant had expressed its reservations, he gave the impression that the arbitration would only proceed H after the parties had dealt with the issues of concern.

2013 (1) ZLR p460

Dube J

The issue of the jurisdiction of the arbitrator is closely linked with the issue A of urgency. The applicant submitted that there is no valid shareholders agreement and, that being the case, the so-called arbitration clause cannot survive an agreement which is void. It was argued that the arbitrator does not have any right to grant any remedy or to sit in judgment over the issue, as clause 28 is not an arbitration clause and there is no arbitration to talk about. B A clause which obliges the parties to negotiate first before they arbitrate is not an arbitration clause. The applicant insisted that, as the clause is not an arbitration clause but a negotiation clause, there is no bar to the court dealing with the application. It further submitted that, for an arbitrator to be validly appointed, the agreement in terms of which he is appointed must be a valid one and therefore he cannot make a determination on the validity of the C agreement. It also contended that the question of the validity of the agreement is never a preliminary issue that can be determined by an arbitrator in terms of the law. The court was referred to Mustill & Boyd *Commercial Arbitration* (Butterworths) for the proposition that the arbitrator cannot make a binding award as to the initial existence of the contract. The applicant argued that the arbitration clause is not wide enough to cover a dispute

relating to the D validity of the agreement. The court was also referred to *Croplink (Pvt) Ltd* 1996 (1) ZLR 514 (H); *Sentrale Kunsmis Korporasie (Edms) Bpk v van Heerden and Ors* 1972 (2) SA 729 (W); *Heyman v Darwins Ltd* [1942] 1 All ER 337 (HL) and *Scriven Bros v Rhodesia Hides & Produce Co Ltd & Ors* 1943 AD 393 at 400 where the court stated:

> "I am of the view, therefore that, where it is said a contract is voidable and has E been voided because it was induced by fraud or false misrepresentation, that dispute does not fall to be dealt with in terms of the arbitration clause unless the clause specifically says so. This must be so because if the contract is voidable on this type of ground, it is voidable *ab initio* and hence that clause falls away. The present clause, as we have seen, is very wide but its wording does not include a dispute as to the voidability *ab initio of* this contract." F

The applicant submitted that it is for the court to make a determination on the validity of an arbitration agreement in terms of article 8 of the Model Law and that is why it is important for case no. HC8410/10 to be allowed to run its full course. The court cannot pass on the responsibility to make a determination and the existence of an arbitrator cannot be a basis for holding G that the matter is not urgent.

The applicant also argued that the matter is urgent as the timetable set by the first and second respondents does not allow the applicant to approach the court by way of ordinary application. If the arbitration is allowed to continue, the arbitration will be concluded before the finalisation of case no. HC 8410/10 and the criminal proceedings before Bhunu J. The balance of convenience H

Dube J

A favours the granting of the interdict and there is no prejudice that will be suffered by the respondents if the relief sought is granted. The applicant stands to suffer irreparable harm as its rights will be made subject to an arbitration process and award wholly premised on a disputed shareholders agreement.

The applicant urged the court to determine whether there are *prima facie* valid arbitration proceedings because, if there are not, no other relief will B be available save the grant of the interdict. The applicant argued that the issue of urgency cannot be dealt with outside the consideration of the matter on the merits.

The first respondent maintained that the arbitrator has wide powers in terms of arts 17 and 18 of the Model Law to deal with preliminary issues ranging C from challenges to jurisdiction to issues of costs. The applicant is seeking to avoid submitting itself to a hearing before the arbitral tribunal.

The applicant's preliminary point is to the effect that there is no valid opposition before the court that has been filed on behalf of the first respondent and further, that there has been no appearance for the first respondent. D Consequently, that there is no one to argue in support of the urgency point. The position is simplified by Mrs *Mtetwa,* who indicated that she holds no brief from the first respondent. The applicant urged the court to treat the matter as unopposed. In support of this proposition, the applicant further submitted that there is no valid opposition in that Mr Kurotwi, a former director of the first respondent, purported to file an affidavit in opposition E to the urgent chamber application on behalf of a company that is being wound up by the court. He deposed to the affidavit on the basis that he is a shareholder and director of the first respondent, and has authority to act in place and stead of the first respondent in this matter. The applicant requested the court to determine whether Mr Kurotwi, being a former director of F the first respondent, has the right to file any opposition on behalf of the first respondent . The applicant maintained that a shareholder or director of a company that has been placed under liquidation cannot represent the company without the liquidator's authorisation. As soon as a winding up order is made, the company is no longer under the control of the directors, as control passes to the liquidator upon his appointment Mr Kurotwi does G not have the power to oppose the application, much as he has no power to institute arbitration proceedings. When a company is wound up by the court the directors are divested of all powers and control of the company passes to the liquidator upon his appointment. The applicant asserted that the first respondent has not opposed the relief sought as the purported opposition H constitutes a fatally defective pleading, incapable of cure, condonation or

---

Dube J

amendment. The applicant submitted that this is a straight forward matte A r that would resolve this application.

The first respondent submitted that the bald averment as to Mr Kurotwi's authority does not turn this matter into an unopposed application as there is no obligation for a respondent in an urgent application to file opposing papers, given the time constraints. The notice of opposition was not essential B to bring itself before the court. The first respondent submitted that whilst the averment that Mr Kurotwi had authority to depose to the affidavit may be wrong in law, that fact should not render the affidavit inadmissible. He has an interest in the criminal case just as the Attorney-General has. It would be a breach of the *audi alteram partem* rule if he was not heard. Mrs *Mtetwa* submitted that the first respondent has an interest in the application and relief C sought and is entitled to intervene to protect their client's interests.

The next point raised by the applicant in its heads of argument is whether the liquidator ought to have been cited in these proceedings. The applicant submitted that there was no need for the liquidator to be cited in these proceedings because the first respondent has not disclosed the fact that it D is under liquidation. The applicant submitted that the citation of the first respondent (in liquidation) is sufficient and that it is not the liquidator who must be cited but the company in liquidation. Further, that the applicant has cited a party which purports to be before the arbitrator. The applicant argued that even if there had been need to join the liquidator, there would be no basis for the failure of the matter. That r 87 of the High Court Rules cures E the defect. The rule provides as follows.

> "(1) No cause or matter shall be defeated by reason of the misjoinder or non-joinder of any party and the court may in any cause or matter determine the issues or questions in dispute so far as they affect the rights and interests of the persons who are parties in the cause or matter."

The applicant submitted that certain preconditions have to be met before a F foreign liquidator could be cited in proceedings. and that if these preconditions have not been met, there can be no obligation to serve the liquidator. The applicant relies for this proposition on r 19(1) of the Companies (Winding Up) Rules 1972. That requires that where a foreign company has been placed in liquidation outside Zimbabwe, the liquidator may apply for an order G recognizing his appointment and declaring that he be entitled to the sole administration of all the assets of the company in this country. The applicant submitted that this has not been done and that there is no basis upon which the applicant could be required to serve the liquidator. The applicant contends that the liquidator could not have given authority for the institution of those proceedings before his recognition. H

Dube J

A The first respondent submitted that the application is a nullity because the liquidator is not cited and the liquidator was not served with the application as the application was not directed to the registered office of the first respondent. Mrs *Mtetwa* submitted that the legal practitioners on whom service was effected have no *locus standi* and that they are entitled to intervene as they have an interest in the application and the relief sought to protect their B client's interests.

Mr *Mutangadura* raised the same concerns as the applicant regarding Mr Kurotwi's *locus standi* to bring arbitration proceedings on behalf of a company in liquidation. He also submitted that the High Court would be failing in its duties if it arrogates to a tribunal duties which it can address. He maintained C that the court has inherent jurisdiction to deal with the application despite the competence of the adjudicating authority to decide the same issues.

I have decided to deal with the point concerning the citation of the first respondent first because I have to satisfy myself that the parties are properly before me.

Citation of first respondent

D The first respondent's contention is that Core Mining and Mining Resources (Pty) Ltd was not properly cited and served. It urged the court to dismiss the application on that basis alone. Where a party to legal proceedings has not been properly cited in circumstances where the misdescription complained of does not leave in doubt the identity of the party intended to be sued, E the misdescription may be corrected by amendment at any stage of the proceedings. In *Mhanyami Fishing & Transport Co-op Society Ltd & Ors v Director General, Parks & Wildlife & Ors* 2011 (1) ZLR 555 (H), the court dismissed an application on the basis that the applicants had

brought non-existent entities before the court. The citation of the first respondent as a (Pvt) company instead of (Pty) company is a misdescription, because F the company is not correctly described, resulting in an existing company being incorrectly cited. The first respondent is cited as a "Private" company as opposed to a "Proprietary" company. The description "Proprietary" is identified with a company registered in South Africa and "Private" is with a Zimbabwe company. The citation of the company gives the impression that the company sought to be interdicted is a Zimbabwe company when in fact G the first respondent is a South African company. The court also notes that the citation does not include the "Resources" part of the company description. There is no dispute that the party intended to be cited and interdicted is Core Mining and Mining Resources (Pty) Ltd. The reality is that the applicant seeks an interdict against the company that instituted proceedings with the H arbitrator, that is the (Pty) company. This misdescription appears to be a

genuine and common mistake .It is not only the applicant which has made A the mistake. The arbitrator and even one of the directors is guilty of the same lapse. This is the sort of misdescription which can be corrected. Even though the first respondent has been incorrectly described, the applicant can not be denied the opportunity to correct the error and continue with the proceedings. Allowing the application to proceed as it is would result in an B absurdity because if an order should be granted against Core Mining and Minerals (Pvt) Ltd, the order would not be enforceable against Core Mining and Minerals Resources (Pty) Ltd or at all.

The applicant cannot benefit from its own wrongdoing. The applicant has not amended its papers despite an invitation by the first respondent to do so. This is to its detriment. I find the applicant's position that it is entitled C to the relief on the basis that there is no opposition to be both awkward and senseless. The same approach was adopted by Hlatshwayo JA in *Mudzengi & Ors v Hungwe & Anor* 2001 (2) ZLR 175 (H) at 182D-E where the learned judge expressed similar sentiments as follows:-

> "I find this to be a rather startling and unusual objection, coming as it did from D a party that had itself cited the respondents in the first place as having the *locus standi* to defend the application. Surely, an applicant who cites a party lacking in legal capacity cannot rely on that incapacity to have the matter resolved in its favour. Rather, if the applicant knowingly cites a party lacking in *locus standi*, then the matter will not be properly before the court and it must be dismissed with costs on a higher scale".

The first respondent was improperly cited, the other respondents have not E opposed the application because they have no real interest in the outcome of the application. The real dispute is between the applicant and the first respondent and consequently there is no first respondent before me as that entity does not exist. The matter is improperly before me. The applicant deserve to be mulcted with an order of costs on the higher scale. F

Assuming that I am wrong in this respect, I would still reach the same decision in respect of the question of urgency for the following reasons.

Urgency

The certificate of service is most inadequate. The application does not give the background to the matter, choosing to chronicle events from 10 G April 2013 onwards. The applicant failed to disclose, in its application, the various correspondences that took place subsequent to the appointment of the arbitrator. The applicant had a duty to make full disclosure of all material facts. An applicant must always act in good faith and disclose all material and relevant information that will assist in the determination of the matter. In the event that a court, faced with such an application, decides to deal H

A with the matter on the papers, this results in prejudice to the respondent and ultimately the court is misled. The courts should frown at such conduct. The same approach was adopted in *Graspeak Investments (Pvt) Ltd v Delta Corporation (Pvt) Ltd & Anor* 2001 (2) ZLR 551 (H) at 554 where the court stated as follows:

> "If the court had chosen the *ex parte* route, which is competent, it would have been B misled by the applicant. In applications of this nature, utmost good faith must be shown by the applicant . . . It is the

duty of the applicant to lay all relevant facts before the court, so that it may have full knowledge of all the circumstances of the case before making its order."

I agree with these sentiments. It is the duty of the courts to discourage applications that are characterised by material non-disclosures especially C where it appears that the non-disclosures were deliberate. The certificate does not explain the reasons why the application was not made as soon as it was realised that an arbitrator had been appointed and further, why it was made after the commencement of the arbitration. I do not think that Mr Nyamayaro, who certified the matter as urgent, would have done so had he D had knowledge of the background and the correspondences that took place between the parties up to the time the application was made. He seems to have been a victim of the non-disclosures complained of. If he was aware, then he abused the urgent application procedure and this reflects on him as an officer of this court.

E As regards the issue of irreparable harm, averments were made to the effect that:

"the commercial urgency of the matter is overwhelming. The applicant will suffer extremely high losses if the illegality by the first and second respondents is not interdicted."

What high losses? It does not seem as though the person who certified the F proceedings as urgent applied his mind fully to the requirements of urgency. The applicant has not canvassed the nature of the harm that it is likely to suffer if the arbitration proceedings proceed and further if this harm is irreparable and why. The certificate of urgency does not disclose urgency. An urgent application stands or falls on the basis of averments made in the certificate of urgency. I am not satisfied that, if the arbitration proceeds, G irreparable harm will occur.

The applicant has not treated this matter with urgency. This matter has been going on since October 2010, a period of over two years. The applicant has always known that the first respondent intended to have the matter referred to arbitration and did nothing to stop the arbitration. There are a number of H correspondences between November 2012 and the filing of this application.

Dube J

These deal with the appointment of the arbitrator and the setting up of a A mutually convenient date for the proceedings. Events during this period, especially the appointment of the arbitrator on 18 February 2013, ought to have triggered this application. This did not happen. The applicant seeks to rely on the pendency of the case under case no. HC 8410/10 for the relief of an interdict, and yet it has not done anything to have the matter set down B for argument so that the dispute is resolved. That is most inappropriate. Where a party fails to assert its rights within the time it is expected to act, it cannot bank on an urgent application to get redress. This position was clearly enunciated in *Kuvarega v Registrar-General & Anor* 1998 (1) ZLR 188 (H) at 193E-H as follows:

"What constitutes urgency is not only the imminent arrival of the day of reckoning; C a matter is urgent if at the time the need to act arises, the matter cannot wait. Urgency which stems from a deliberate or careless abstention from action until the deadline draws near is not the type of urgency contemplated by the rules. It follows that the certificate of urgency or the supporting affidavit must always contain an explanation of the non-timeous action if there has been any delay."

The applicant did nothing, during the period it was expected to act, to assert D its right to be heard. The applicant waited for the day of reckoning. It sat on its laurels and waited until the appointment of the arbitrator. This urgency is self-created and is clearly an abuse of court process. Such conduct is inexcusable.

As regards the issue of the jurisdiction of the arbitrator and the availability E of an alternative remedy, art 16 of the Model Law provides as follows.

"Competence of arbitral tribunal to rule on its jurisdiction

(1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract . . ." F

The arbitrator has power and competence to determine any challenge raised in respect of his jurisdiction and any objections with respect to the existence or validity of the arbitration agreement. The Model Law provides for a remedy to resolve this dispute. The applicant contends that the arbitrator has no power to determine the validity of the agreement. The applicant may well G be correct. Whether the arbitrator has power to deal only with the narrow issue of the validity of the arbitration clause or the validity of the whole contract is the issue that should have been taken up

with him. The parties were required to raise their preliminary issues with the arbitrator for his determination. There are a number of authorities that have been referred to by both parties with regard to this issue. All the arbitrator is saying is, address H

2013 (1) ZLR p467

Dube J

A me on the preliminary issues and I will make my ruling. The applicant is misconstruing the invitation to make submissions on the issue of jurisdiction with the actual arbitration proceedings over the validity of the contract. The issue regarding whether the arbitrator has power to rule on whether there is an agreement has a bearing on the issue of his jurisdiction and should have been taken up with the arbitrator for his determination. The applicant B should have complied with the directive to file submissions on preliminary issues and let the arbitrator make a ruling on the matter. The appellant has not exhausted the domestic remedies provided for in the Model Law. There was an effective remedy available capable of providing effective redress for the applicant's concerns. The applicant should have exhausted this remedy C before approaching this court. See *Girjac Services (Pvt) Ltd v Mudzingwa* 1999 (1) ZLR 234 (S) at 249D and *Djordjevic v Chairman, Practice Control Committee, Medical & Dental Practitioners Council of Zimbabwe & Anor* 2009 (2) ZLR 221 (H) for this approach.

The arbitrator also has power to order interim measures in terms of art 17(1) and (2)(a) of the Model Law. He also has power to grant interdicts in terms of D art 17(2)(a). My observation is that the arbitrator can do exactly what the High Court is being asked to do by the applicant. The applicant has not exhausted the domestic remedies available to it. I am aware that arbitration proceedings have commenced with the arbitrator reportedly hearing preliminary issues and reserving judgment. In the event that the arbitrator decides to proceed E with the actual arbitration on the merits and comes out with an award not favourable to the applicant, the applicant is not without a remedy. The applicant can apply to have the award set aside by the High Court in terms of art 34(1) of the Model Law. There is no reasonable apprehension of harm as any harm likely to ensue is curable.

F I have considered all the arguments advanced by the applicant on the jurisdiction of the arbitrator. I am not going to deal with the merits of the arguments and have decided that, as the arbitrator has jurisdiction to determine and "rule on its own jurisdiction", he is the best person to determine this question and any other preliminary points arising. I do not wish to pre-empt the arbitrator. He is also best placed to determine whether or not the liquidator G was properly cited and served for the arbitration proceedings and if indeed the liquidator should be part of the proceedings before him. The arbitrator is capable of dealing with all the preliminary issues raised by the applicant.

The points I have dealt with on urgency dispose of the application. I am not satisfied that the matter is urgent .This application fails. It will not be H necessary to decide all the other issues raised.

2013 (1) ZLR p468

Dube J

In the result, the application is dismissed with costs on an attorney and A client scale.

Chambati & Mataka Attorneys, applicant's legal practitioners

Mtetwa & Nyamirai, first respondent's legal practitioners

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

1 See p 260 of this volume. – *Editor*.
1 See p 260 of this volume. – *Editor*.

© 2015 Juta and Company (Pty) Ltd.

Document 60 of 73

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2013/Volume 1/MAWARIRE v MUGABE NO & ORS 2013 (1) ZLR 469 (CC)

MAWARIRE v MUGABE NO & ORS 2013 (1) ZLR 469 (CC)

Citation	2013 (1) ZLR 469 (CC)
Case No	CC-01-13
Court	Constitutional Court, Harare
Judge	Chidyausiku CJ, Malaba DCJ, Ziyambi JA, Garwe JA, Gowora JA, Patel JA, Hlatshwayo JA, Chiweshe AJA, Guvava AJA
Heard	24 May 2013; *CAV*
Judgment	31 May 2013
Counsel	*J Mandizha*, for the applicant *T Hussein*, for the first respondent *L Uriri*, for the second respondent *T Mpofu*, for the fourth respondent No appearance for the third and fifth respondents
Case Type	Constitutional application
Annotations	No case annotations to date

Flynote

Constitutional law – *Constitution of Zimbabwe 1980 – Declaration of Rights – s 24(1) – application to Supreme Court alleging infringement of Constitutional rights – who may bring – every person entitled to bring* D *application to ensure public officer complies with duties under the law*

Constitutional law – *Constitution of Zimbabwe 1980 – elections – when must be held – Parliament being dissolved by effluxion of time – President's duty to fix election date before Parliament dissolved – undesirability of lengthy period without all three arms of State being in existence*

Headnote

E The applicant brought an application against the President and the other principals in the Global Political Agreement, alleging that his rights under ss 18(1) and 18(1a) of the Constitution had been contravened. He sought an order directing the President forthwith to proclaim an election date for a Presidential election, general election F and elections for members of the governing bodies of local authorities in terms of s 58(1) of the Constitution. At the time of the application, the dissolution of Parliament by effluxion of time was imminent, the date for such dissolution being 29 June 2013.

The issues for decision were: (a) whether the applicant had *locus standi* in terms of s 24(1) of the Constitution; (b) when harmonised general G elections fell due in terms of the laws of Zimbabwe and (c) whether the applicant had made out a case for the order sought. In respect of the first issue, he contended that his right to the protection of the law in terms of s 18(1) of the Constitution had been, was being and was likely to continue being violated, in view of the failure by the President to fix H the date for elections when, at law, according to him, the said elections

were looming and were now due. He further claimed protection of the A law as a person duly entitled to vote, with a vested right to vote in an election at a stipulated time. The second, third and fourth respondents argued that elections had to be held within four months of the dissolution of Parliament.

Held, that s 18(1a) of the Constitution (introduced in 2009), which provides B that "Every public officer has a duty towards every person in Zimbabwe to exercise his or her functions as a public officer in accordance with the law and to observe and uphold the rule of law", conferred a right on any and every Zimbabwean who is affected by a failure to uphold the law to approach the court in terms of s 24(1). The court did not expect to appear before it only those who are dripping with the blood of the actual C infringement of their rights or those who are shivering incoherently with the fear of the impending threat which has actually engulfed them. It would entertain even those who calmly perceive a looming infringement and issue a declaration or appropriate order to stave the threat, more so under the liberal post-2009 requirements. D

Held further, that s 58(1) of the Constitution, which provides for the holding of elections, was open to two interpretations: one, that elections must be held within the life of Parliament; the other, that elections may be held up to four months after the dissolution of Parliament. The second interpretation implied that the President must wait until the life of E Parliament would have expired in terms of s 63(4) and then issue a proclamation recognising that fact and fixing dates within four months of the event. The expiry of the life of Parliament would have passed silently without notice to all concerned but with a dramatic effect of creating a deformed State without Parliament for up to four months. This would lead to an absurdity and glaring anomalies. F

Held further, that there are two approaches open to a court faced with apparent absurdities in the construction of statutes – the narrow and the wider approach. Under the narrow approach, the court chooses, between the two possible interpretations, the one which does not lead to an absurdity. In this case, it would be the first interpretation. Under the "wider approach" G the court has a broad discretion in removing an absurdity being guided ultimately by the intention of the legislature or in constitutional terms by the intention of the framers of the supreme law. Once an ambiguity or absurdity has been established, the proper approach to adopt would be the wider one, where the court calls into aid historical, schematic, teleological and purposive approaches to interpretation. H

A *Held,* further, that if the framers of the Constitution wanted Zimbabwe to function without a Parliament for four months, they surely would have said so in clear and explicit terms and they would not have left this to speculation and interpretation. The only interpretation that could be given to this section is one that favours constitutionalism. The current Constitution was based on the fundamental principles of separation of B powers between the three arms of State – the executive, the judiciary and the legislature. This principle was entrenched in the Constitution. Nowhere in the Constitution was there an excuse to function without any one of these branches for an extended period of time. Whatever exceptions are dictated by transitional imperatives of the going out C and coming in of governments, these are always kept at the minimum possible. In fact, so important are the tripartite pillars of State that even in a time of emergency or war, these three institutions are preserved. To exist too long without a Parliament would be tantamount to shredding the Constitution and inviting a state of lawlessness and disorder.

D *Held* further, that the proper construction of s 58(1) is that election dates should be fixed and notified (whether pursuant to Presidential dissolution or automatic dissolution of Parliament) in such a way that elections are held within the life of Parliament or a day or days immediately following its dissolution. The setting of these dates has to take into account the requirements of the Constitution and the Electoral Act, which stipulate E a period of at least 44 days between proclamation and actual holding of elections.

Held further, that the President was already out of time in fixing and proclaiming dates for the elections to be held before the expiry of the life of the current Parliament. The applicant's rights had already been F infringed and continued to be violated with each passing day. He was entitled to the declaration of such infringement and an order correcting or rectifying as far as is possible such infringement. The President could not remedy the situation by issuing the proclamation for elections to be held by 29 June 2013, as doing so would inevitably contravene the time lines set out in s 38 of the Electoral Act, which gives prospective G Parliamentary candidates 14 days to organise their nominations and 30 days to campaign before the date of the elections. To fix the

date of the elections now in anticipation of the dissolution of Parliament on 29 June 2013 would have the effect of violating the fundamental right of aspiring Parliamentary candidates, entitling them to bring similar applications H to that of the applicant.

Held (per Malaba DCJ, dissenting) that s 58(1) was clear. It gives the A President the discretionary power to fix a day or days for the holding of the first elections to fall within a period of four months calculated from the date of occurrence of any of the events referred to in ss 63(4) and 63(7) of the former Constitution. The date or dates fixed for the holding of the first elections must follow the date of the happening of the event B concerned. There was nothing in s 58(1) which imposed on the President an obligation to fix a day or days of the election to coincide with the date of the end of the natural life of Parliament. If that were the case the date of the election would be known in advance as if it was fixed by legislation. If the framers of the Constitution had intended the date of the elections to fall on the last day of the maximum duration of the life C of Parliament, they would have said so. They would have imposed the duty on the President to simply issue the proclamation announcing that date. There would have been no need at all to vest the President with the power to "fix" "such day or days" of the holding of the elections. The principle that there can be a period following automatic dissolution of D Parliament when the affairs of a country are run by the executive and judiciary is widely recognized and accepted in several other countries.

Held (per Patel JA, dissenting), that a plain reading of s 58(1) makes it clear that elections must be held after the dissolution of Parliament on such day or days as the President may fix by proclamation. This applies to both scenarios for the dissolution of Parliament. Where it is dissolved E by the President under s 63(7), elections must take place within four months *after the issue of a proclamation dissolving Parliament*. Where Parliament stands dissolved by operation of law in terms of s 63(4), elections must be held within four months *after the dissolution of Parliament*. The wording used is unambiguous and does not admit of F any other interpretation, nor does it entail any absurdity. Consequently, there is no need to invoke any teleological or purposive approach in the construction of s 58(1).

Cases cited

Buchanan & Co v Babco Ltd [1977] QBD 208 (CA) G

Catholic Commission for Justice and Peace in Zimbabwe v A-G & Ors 1993 (1) ZLR 242 (S)

CFU v Min of Lands & Ors 2000 (2) ZLR 469 (S)

Hewlett v Minister of Finance & Anor 1981 ZLR 571 (S)

Law Soc of Zimbabwe & Anor v Min of Finance 1999 (2) ZLR 231 (S) H

A *Mike Campbell (Pvt) Ltd & Anor v Minister of National Security Responsible for Land, Land Reform & Resettlement & Anor* 2008 (1) ZLR 17 (S)

The Queen v Judge of the City of London Court [1892] 1 QB 273

The Sussex Peerage (1843-1845) 65 RR 11

Tsvangirai v Registrar-General & Ors (2) 2002 (1) ZLR 268 (S)

United Parties v Minister of Justice, Legal and Parliamentary Affairs & Ors 1997 (2) ZLR 254 (S)

B *Venter v Rex* 1907 TS 910

Legislation considered

Zimbabwean legislation:

Constitution of Zimbabwe 1980, ss 3, 18(1), 18(1)(a), 24(1), 29(1), C 31E(2), 52(1), 58(1) & 63(1), (2), (4) (5), (6) & (7)

Constitution of Zimbabwe 2013, ss 143, 157(3), 158(1)(a), 175(6)(b), 6th Schedule Part 1 s 1, Part 2 s 3(1)(e), & Part 3 ss 6(3) & 8

Foreign legislation

Canada: Election Act, s 56.1(2)

D Constitution of Andorra, Art 15(2)

Constitution of Bulgaria, Art 64.3

Constitution of Croatia, Art 73(1)

Constitution of Kenya 2010, 6th Schedule s 9

Constitution of Ireland, Art 16.3

E Constitution of Malaysia, s 55(3) & (4)

Case information

J Mandizha, for the applicant

T Hussein, for the first respondent

L Uriri, for the second respondent

T Mpofu, for the fourth respondent

F No appearance for the third and fifth respondents

Judgment

Chidyausiku CJ: This is an application brought under s 24(1) of the Constitution of Zimbabwe (hereinafter "the Constitution") on the basis that the applicant's rights enshrined in ss 18(1) and 18(1a) have been contravened.

G **The parties**

The applicant is a citizen of Zimbabwe domiciled in this country and has always regarded this country as his only and permanent home. He is a registered voter in Zaka East Parliamentary Constituency and also a member of the non-governmental organisation, the Centre for Election Democracy H in Southern Africa, based in Harare.

2013 (1) ZLR p474

Chidyausiku CJ

The first respondent is the President of Zimbabwe, Robert Gabriel Mugabe, A who is cited in his official capacity and as the office-bearer responsible for fixing the date for Parliamentary, Presidential and local authority elections (hereinafter called "the harmonised elections"). He is also cited in his capacity as a principal of the Interparty Political Agreement (commonly referred to as the Global Political Agreement ("GPA")) between his political party, the B Zimbabwe African National Union (Patriotic Front) ("ZANU-PF") and the two formations of the Movement for Democratic Change ("MDC"), referred to in Schedule 8 to the Constitution.

The second respondent is Morgan Richard Tsvangirai, who has been cited in his capacity as the Prime Minister of Zimbabwe, who also is a signatory to the GPA, representing his formation of the MDC. C

The third respondent is Arthur Guseni Oliver Mutambara, who has been cited as the Deputy Prime Minister of Zimbabwe and also due to the fact that he is a signatory to the GPA.

The fourth respondent is Welshman Ncube, a Minister in Government and cited herein in his capacity as the representative of the other formation of D the MDC, which organisation is a party to the GPA and is represented in the current coalition government.

The fifth respondent is the Attorney-General, who has been drawn into these proceedings in view of their constitutional nature and in his capacity as the principal legal adviser to the Government. E

Background

On 2 May 2013 the applicant issued an urgent court application against the above five respondents. Before any opposition was filed to the court application, the applicant was, on 6 May 2013, directed by the Registrar of the Supreme Court of Zimbabwe to file a separate urgent chamber application F seeking leave for the urgent hearing of his court application, if such was his wish. The applicant proceeded to do so in case no. SC 157/2013. This urgent chamber application was subsequently heard on 15 May 2013. On 17 May 2013 the order sought by the applicant in the urgent chamber application was granted.

The principal application was opposed by the first, second and fourth G respondents. The applicant subsequently filed a replying affidavit as well as a notice of an amendment of the draft order to his principal application. The amended order sought is as follows:

> " (1) The first respondent be and is hereby directed to forthwith proclaim an election date for a Presidential election, general election and elections for H

Chidyausiku CJ

> A members of the governing bodies of local authorities in terms of section 58(1) of the Constitution of Zimbabwe.
>
> (2) The elections referred to in paragraph 1 hereof shall be conducted no later than the 30th day of June 2013.
>
> ALTERNATIVELY
>
> The elections referred to above shall be conducted no later than (the) 25th B day of July 2013.
>
> (3) Any party (parties) who oppose(s) this application shall bear the costs of this suit jointly and severally, the one paying the other to be absolved."

Read together, the papers filed of record seem to pose the following as issues which fall for determination –

(a) whether C the applicant has *locus standi* to approach this court in terms of s 24(1) of the Constitution of Zimbabwe;

(b) when harmonised general elections fall due in terms of the laws of Zimbabwe;

(c) whether the applicant has made out a case for the order sought.

D Each issue will now be dealt with in turn.

Whether the applicant has *locus standi* to approach the Supreme Court in terms of s 24 (1) of the Constitution

The applicant avers in his founding affidavit that his application is premised on s 24(1) of the Constitution, which provides as follows:

> E "If any person alleges that the Declaration of Rights has been, is being or is likely to be contravened in relation to him . . . then without prejudice to any other action with respect to the same matter which is lawfully available, that person . . . may apply to the Supreme Court for redress."

Essentially, the applicant contends that his right to the protection of the law in terms of s 18(1) of the Constitution has been, is being and is likely to F continue being violated. He asserts that the failure by the first respondent to fix the date for the holding of Presidential, Parliamentary and local government elections when, at law, according to him, the said elections are looming and are now due, violates his right to the protection of the law. He further claims protection of the law as a person duly entitled to vote, with G a vested right to vote in an election at a stipulated time. He then proceeds to demonstrate his fears of the real or at least perceived violation of his constitutional rights, as follows:

> "The first respondent, for reasons that I am not clear about, has not carried out his functions in fixing a date for the elections, even as the expiry of Parliament looms dangerously close. His inaction will lead to a state where Zimbabwe may, H in fact, run unconstitutionally. The misleading signals that have been sent by

Chidyausiku CJ

> some of the respondents cited herein have been the cause for great concern and A may be an indication, coupled with (the) first respondent's inaction, that come June 29, 2013, a general election will not have

been called, and Zimbabwe will be hobbling along illegally, without a Parliament.

No interpretation whatsoever of the Constitution could ever validate the existence of a situation of the State without the legislative arm of Government. Such an unprecedented situation would be a crippling negation of a fundamental tenet B of our democracy which is a *sine qua non* of our constitutional order."

The applicant further bases his *locus standi* on s 18(1a) of the Constitution which, together with s 18(1), states as follows:

"18 Provisions to secure protection of law

(1) Subject to the provisions of this Constitution, every person is entitled to the protection of the law. C

(1a) Every public officer has a duty towards every person in Zimbabwe to exercise his or her functions as a public officer in accordance with the law and to observe and uphold the rule of law."

A "public officer" is defined as "a person holding or acting in any public office" and "public office" is defined as "a paid office in the service of the D State". Thus, s 18(1a) clearly confers a right on any and every Zimbabwean who is affected by a failure to uphold the law to approach this court in terms of s 24(1).

The objections by the second and fourth respondents to the applicant's right to approach this court for relief are based on a restrictive approach to E *locus standi* in the pre-2009 period and a failure to appreciate that the 2009 Amendment No.19 has thrown wide open the right to seek relief in terms of s 24(1) to any and every citizen who is affected by a failure by a public officer to uphold the law. Hence, the applicant states his apprehension of likely infringement of his rights under s 18(1a) as follows:

"I also persist that the absence of Parliament is not only unconstitutional, and thus F will lead to a rule by decree, but will also lead to a paralysis in governance. In addition, the fact of the fourth respondent's insistence that elections can be held as late as 30 October 2013, coupled with his insistence that the Parliamentary vacuum that will eventuate between 29 June 2013 and 30 October 2013 is legal, amounts to a violation, or likely violation, of my fundaments rights under the Bill of Rights."

The pre-2009 discourse pertaining to the need to establish a right infringed G or likely to be contravened under Chapter 3 before having recourse to s 24(1) is captured in the following opinion in *United Parties v Minister of Justice, Legal and Parliamentary Affairs & Ors* 1997 (2) ZLR 254 (S) at 259G:

"Much turns on the meaning of the phrase 'likely to be contravened'. Certainly, it does not embrace any fanciful or remote prospect of the Declaration of Rights H

Chidyausiku CJ

A being contravened. Nor does it refer to the Declaration of Rights being liable to contravention . . . Rather it means a reasonable probability of such a contravention occurring."

In *Tsvangirai v Registrar General & Ors* 2002 (1) ZLR 268 (S) at 270G -271A the following was said:

"The first observation to be made is that a bald, unsubstantiated allegation will not B satisfy the requirements of the section. The applicant must aver in his founding affidavit facts, which if proved would establish that a fundamental right enshrined in the Declaration of Rights has been contravened in respect of himself . . ."

And at 276E-F:

"Although in the founding affidavit the applicant did not specify which section of the Declaration of Rights was contravened . . . I do not think that the failure to do C so is fatal (especially as) the omission was remedied by the heads of argument filed by counsel for the applicant . . .".

See also *Catholic Commission for Justice and Peace in Zimbabwe v A-G & Ors* 1993 (1) ZLR 242 (S), and *Law Soc of Zimbabwe & Anor v Min of Finance* 1999 (2) ZLR 231 (S).

D Even under the pre-2009 requirements, it appears to me that the applicant is entitled to approach this court for relief. Certainly, this court does not expect to appear before it only those who are dripping with the blood of the actual infringement of their rights or those who are shivering incoherently with the fear of the impending threat which has actually engulfed them. This Court will entertain even those who calmly perceive a looming infringement and E issue a declaration or appropriate order to stave off the threat, more so under the liberal post-2009 requirements.

When do harmonised general elections become due?

It is common cause amongst all the parties that Parliament shall stand dissolved, by the effluxion of time, on 29 June 2013. Whilst the papers before this court F are voluminous and at times unnecessarily argumentative, the issue before this court is in fact a simple one, which can be reduced to one question: "When, after the accepted dissolution of Parliament by the effluxion of time in terms of the Constitution, should the harmonised elections be held?"

The response to this rather simple and straightforward question has elicited G contradictory responses from the second and fourth respondents on the one hand, and the applicant, on the other. The responses from the second and fourth respondents also show a serious divergence of opinion between them. According to the second respondent, who is the Prime Minister and an important part of the Executive:

> "What is plain from s 58 (1) of the Constitution of Zimbabwe, as read with other H relevant sections, is the fact that if the terms of Parliament, local government

---

Chidyausiku CJ

> authorities, and of the President expire on 29 June 2013 through the natural A passage of time (as opposed to induced dissolution or prorogation) elections must be conducted *within four (4) months* of the automatic dissolution of Parliament" (emphasis is added).

The fourth respondent, who himself is a Minister of Government and leader of a party to the Global Political Agreement, takes the following similar position when he states: B

> "Alternatively, if the President does not dissolve Parliament and allows it to automatically dissolve by operation of law on the last day of its five year term, in that event the President must cause an election to be held *within four months* of the date of the automatic dissolution of Parliament" (emphasis added).

He then goes on to say: C

> "The Constitution permits that an election be held anytime within four months after the dissolution of Parliament by operation of law at the expiration of its five year term and hence that Constitution, by so providing, contemplates and allows that *there may be no Parliament between its automatic dissolution and the holding of an election within four months of that dissolution*" (emphasis added). D

The first respondent disagrees with the interpretation by the second and fourth respondents, saying it is not supported by the Constitution or the canons that govern its interpretation. Instead, the first respondent agrees with the interpretation placed by the applicant on ss 58 and 63 of the Constitution.

Section 58 (1) simply states: E

> "(1) A general election and elections for members of governing bodies of local authorities shall be held on such day or days within a period not exceeding four months after the issue of a proclamation dissolving Parliament under section 63(7) or, as the case may be, the dissolution of Parliament under section 63(4) as the President may, by proclamation in the *Gazette*, fix."

Now, it is clear that s 58(1), read in its ordinary sense, deals with the timing F of elections or the fixing of dates for elections by proclamation. If one were to pose the question "when are harmonised general elections to be held?" and seek an answer from the above quoted provisions of s 58(1), two possible answers emerge, depending on punctuation and emphasis and are juxtaposed below as READING "A" and "B":

READING "A" G

> " PART 6
>
> *Elections and Sessions*
>
> **58 Elections**
>
> (1) A general election and elections for members of the governing bodies of local authorities shall be held on: H

Chidyausiku CJ

> i. such A day or days within a period not exceeding four months after the issue of a proclamation dissolving Parliament under section 63(7) or,
> ii. as the case may be, the dissolution of Parliament under section 63(4) as the President may, by proclamation in the *Gazette,* fix."

READING "B"

B "PART 6

Elections and Sessions

58 Elections

(1) A general election and elections for members of the governing bodies of local authorities shall be held on such day or days within a period not exceeding C four months after:

i. the issue of a proclamation dissolving Parliament under section 63(7) or,

ii. as the case may be, the dissolution of Parliament under section 63(4) as the President may, by proclamation in the *Gazette,* fix."

There could be any number of other variations the text of s 58(1) can be broken into, but the two scenarios above will suffice for the purpose of D this case. Both Reading "A" and Reading "B" answer the question when elections are to be held, but with one putting the emphasis on the preposition "on" and the other on "after". Both interpretations are compelling. Adopting one interpretation or the other results in starkly different outcomes. In one case elections must be held within the life of Parliament. In the other case, E elections may be held up to four months after the dissolution of Parliament.

A court faced with competing possible interpretations of a constitutional provision must call into aid principles or canons of construction. In this regard Fieldsend CJ had this to say in *Hewlett v Min of Finance & Anor* 1981 ZLR 571 (S) at 580G:

F ". . . in general the principles governing the interpretation of a Constitution are basically no different from those governing the interpretation of any other legislation. It is necessary to look to the words used and to deduce from them what any particular section, phrase or word means, having regard to the overall context in which it appears."

Accordingly, s 58(1) must be examined, not in isolation, but having regard G to the overall context in which it appears. In this regard it is important to immediately quote s 63 referred to in this provision, emphasising the key subss 63(7) and 63(4):

"63 Prorogation or dissolution

(1) The President may at any time prorogue Parliament.

H [Subsection substituted by section 6 of Act No. 23 of 1987 (Amendment No. 7)]

2013 (1) ZLR p480

Chidyausiku CJ

(2) Subject to the provisions of this Constitution, the President may at any time A dissolve Parliament.

[Subsection substituted by section 6 of Act No. 23 of 1987 (Amendment No. 7)]

(3) . . .

[Subsection repealed by section 6 of Act No. 23 of 1987 (Amendment No. 7)]

(4) *Parliament, unless sooner dissolved, shall last for five years, which period* B *shall be deemed to commence on the day the person elected as President enters office in terms of section 28(5) after an election referred to in section 28(3)(a), and shall then stand dissolved*:

Provided that, where the period referred to in this subsection is extended under subsection (5) or (6), Parliament, unless sooner dissolved, shall stand dissolved on the expiration of that extended period. C

[Subsection inserted by section 14 of Act No. 11 of 2007 (Amendment No. 18)]

(5) At any time when Zimbabwe is at war, Parliament may from time to time extend the period specified in subsection (4) by not more than one year at a time:

Provided that such period shall not be extended under this subsection for more than five years.

(6) At any time when there is in effect a declaration under section 31J(1), D Parliament may from time to time extend the period specified in subsection (4) by not more than six months at a time:

Provided that such period shall not be extended under this subsection for more than one year.

[Subsection amended by section 26 of Act No. 23 of 1987 (Amendment No. 7)] E

(7) *Subject to the provisions of subsection (4), any prorogation or dissolution of Parliament shall be by proclamation in the Gazette and, in the case of a dissolution, shall take effect from the day preceding the day or first day, as the case may be, fixed by proclamation in accordance with section 58(1) for the holding of a general election.*

(8) On the dissolution of Parliament all proceedings pending at the time shall be terminated and accordingly every Bill, motion, petition or other business F shall lapse" (emphasis added).

Although on the face of it ss 58 and 63 deal with distinct but related constitutional matters – the fixing of dates for elections on the one hand and the life of Parliament on the other – the interrelatedness of these matters creates a maze of back and forth cross-referencing between s 58(1) and G ss 63(4) and 63(7). These provisions are also subject to stipulations in the Constitution itself and the Electoral Act especially with regard to time limits. However, there are some conclusions that can be teased out of this maze to aid the interpretation of the provision in question:

(a) there must be a proclamation fixing the dates for elections which is issued by the President in the *Gazette* according to ss 58(1) and 63(7). H

(b) section A 63(7) is subjected to the provisions in s 63(4) in the sense that the President may not dissolve Parliament and fix dates which fall outside the life of Parliament. In other words, elections following a Presidential dissolution of Parliament must be held before the expiry of the life of that Parliament. There are other provisions in s 64(4) which might have necessitated the subjection of s 63(7) to it, *viz.* that dissolution of B Parliament following expiry of its extended period is automatic, whereas s 63(7) requires all other dissolutions to be by proclamation.

(c) the fixing of election dates must take into account the mandatory time limits set out in the Constitution and the Electoral Law.

From the above conclusions, one can now pose a number of useful questions C and try to answer them. What is this proclamation that is required for both the Presidential and the automatic dissolution of Parliament? What is its purpose? From a common sense position one could say a proclamation is issued in advance, giving a period of notice and time prior to the Presidential or automatic dissolution in order to afford the electoral authorities and the public time to prepare for the elections. That appears to also coincide with D the legal requirements teased above. However, to get a real life "feel" of this phenomenon called "proclamation" I dug up Statutory Instrument 7A of 2008, which, of course, the court is perfectly entitled to take judicial notice of. It was issued on 24 January 2008 dissolving Parliament "with effect from midnight, the 28th March, 2008", thus giving the electoral authorities E and the public slightly over two months to prepare for the elections. In that case, the night of dissolution was perfectly followed by the day or days of elections as stipulated in s 63(7). The proclamation goes on to fix the dates, places and times of the sitting of the nomination courts and the presiding officials thereof throughout the country for Presidential, Parliamentary and local government elections.

F This proclamation was issued by the President using his discretion to dissolve Parliament and call for elections in terms of s 63(7). It is important to note that the proclamation is prospective, not retrospective, pointing to a date in future when Parliament will stand dissolved and complying with all statutory time limits. Since the date for the automatic end of the life of Parliament is G known in advance, it would be perfectly feasible for a President to anticipate such a date and issue a similar proclamation announcing that Parliament shall stand dissolved by midnight of that day, followed by elections on the following day or days and complying with all statutory time limits. Not only would it be feasible, but, in my view, it would be the proper, constitutional and legal thing to do. In fact, the question may be asked: since the date of H automatic dissolution is known in advance, what is the purpose of granting

the President an additional four months within which to proclaim the dates A for elections after dissolution of Parliament? Is it to shield that decision from Parliamentary scrutiny or to reward the President for having allowed Parliament to run its full course, by granting the Executive four months to rule by decree? The mind boggles at this strange effect of adopting Reading "B" of s 58(1). B

The second scenario of interpreting s 58(1) also implies that the President must wait until the life of Parliament would have expired in terms of s 63(4) and then issue a proclamation recognising that fact and fixing dates within four months of the event. The expiry of the life of Parliament would have passed silently without notice to all concerned but with a dramatic effect of creating a deformed State without Parliament for up to four months. As C would be shown below, this would lead to an absurdity and glaring anomalies.

There are two approaches open to a Court faced with apparent absurdities in the construction of statutes: the narrow and the wider approach.

The narrow approach was articulated in *The Queen v Judge of the City of London Court* [1892] QBD 273 by Lord Esher as follows: D

> "If the words of an Act are clear, you must follow them, even though they lead to a manifest absurdity. The court has nothing to do with the question whether the legislature has committed an absurdity. In my opinion the rule has always been this – if the words of an Act admit of two interpretations, then they are not clear; and if one interpretation leads to an absurdity, and the other does not, the court will conclude the legislature did not intend to lead to an absurdity, and E will adopt the other interpretation"

Under the narrow approach, the court chooses between the two possible interpretations the one which does not lead to an absurdity. In this case, it would be the first interpretation or Reading "A" of s 58(1).

In *Venter v Rex* 1907 TS 910 at 914-915 Innes CJ expressed the wider F approach, thus:

> "That being so, it appears to me that the principle we should adopt may be expressed somewhat in this way – that when to give the plain words of the statute their ordinary meaning would lead to absurdity so glaring that it could never have been contemplated by the legislature, or where it would lead to a result contrary to the intention of the legislature, as shown by the context or G by such other considerations as the court is justified in taking into account, the court may depart from the ordinary effect of the words to the extent necessary to remove the absurdity and to give effect to the true intention of the legislature."

According to the "wider approach" the court has a broad discretion in removing an absurdity, being guided ultimately by the intention of the Legislature or in constitutional terms by the intention of the framers of the supreme law. H

2013 (1) ZLR p483

Chidyausiku CJ

A Once an ambiguity or absurdity has been established, it would appear that the proper approach to adopt would be the wider one, where the court calls into aid historical, schematic, teleological and purposive approaches to interpretation.

In *Buchanan & Co v Babco Ltd (CA*) [1977] QBD 208 at 213; [1977] All ER 518 B at 522j-523b Lord Denning followed precisely this method of interpretation long adopted by the European Court of Justice at Luxembourg, thus:

> "They adopt a method which they call in English by strange words – at any rate they were strange to me – the 'schematic and teleological' method of interpretation. It is not really so alarming as it sounds. All it means is that the judges do not go by the literal meaning of the words or by the grammatical structure of the sentence. They go by the design or purpose which lies behind it. When they come on a C situation which is to their minds within the spirit – but not the letter – of the legislation, they solve the problem by looking at the design and purpose of the legislature – at the effect which it was sought to achieve. They then interpret the legislation so as to achieve the desired effect. This means that they fill in gaps, quite unashamedly, without hesitation. They ask simply: what is the sensible way of dealing with this situation so as to give effect to the presumed purpose D of the legislation? . . .. To our eyes – shortsighted by tradition – it is legislation, pure and simple. But, to their eyes, it is fulfilling the true role of the courts. They are giving effect to what the legislature intended, or may be presumed to have intended. I see nothing wrong in this. Quite the contrary."

If the framers of the Constitution wanted Zimbabwe to function without a Parliament for four months as suggested by the second and fourth respondents, E they surely would have said so in clear and explicit terms and they would not have left this to speculation and interpretation. The Constitution itself states emphatically in s 52(1):

> "Provided that . . . no law shall be deemed to amend, add to or repeal any provision of this Constitution unless it does so in express terms."

F Therefore, the only interpretation that can be given to this section is one that favours constitutionalism. It is common cause that the current Constitution is based on the fundamental principles of separation of powers between the three arms of State - the Executive, the Judiciary and the Legislature. This principle is entrenched in the Constitution in the various sections which state in peremptory terms that there shall be a President, a Parliament and a G Judiciary. Nowhere in the Constitution is there an excuse to function without any one of these branches for an extended period of time. Whatever exceptions are dictated by transitional imperatives of the going out and coming in of governments, these are always kept at the minimum possible. In fact, so important

are the tripartite pillars of state that even in a time of emergency H or war, these three institutions are preserved. See subss 63 (5) and (6).

Chidyausiku CJ

The principle of constitutionalism which we referred to earlier is embodied A in s 3 of the Constitution which states:

> "This Constitution is the supreme law of Zimbabwe and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void."

If one applies both the doctrine of separation of powers and constitutionalism, B it is inconceivable that an interpretation that permits or allows for any extended period without one or other arms of State, in this case Parliament, can be sustainable. To exist too long without a Parliament would be tantamount to shredding the Constitution and inviting a state of lawlessness and disorder. It would, with respect, be tantamount to an "annihilation" of the Constitution, in the words of Malaba JA (as he then was) in *Mike Campbell (Pvt) Ltd &* C *Anor v Minister of National Security Responsible for Land, Land Reform & Resettlement & Anor* 2008 (1) ZLR 17 (S).

If s 58 is a repeal or amendment of the peremptory requirement that "there shall be a Parliament", it should have said so explicitly. It does not do this. It is also instructive to note that in terms of s 158 of the new in-coming D Constitution the timing of elections is such that they must be held before the expiry of the life of Parliament, thus:

> **"158 Timing of Elections**
>
> (1) A general election must be held so that polling takes place not more than –
>
> (a) thirty days *before* the expiry of the five-year period specified in section E 143" (emphasis added).

The submission that the mischief of rule by decree consequent upon no elections being held by 29 June 2013 is obviated by the continuation in office of both the President and Cabinet in terms of s 29(1) of the Constitution totally misses the point that what is at issue is rule by the Executive in the absence of the checks and balances of a Parliament. It matters not whether F the rule by decree is that of a single individual or that of a group, such as a Cabinet. The purpose of this section is to allow a smooth handover between the retiring and the incoming Executive in the shortest possible time. Its existence is also further proof of the need to ensure that the period between the dissolution of one Parliament and the inauguration of the next is as short G as possible.

Furthermore, the applicant is correct in submitting that the fourth respondent fails to appreciate that the overarching philosophy in s 31E(2) is in fact constitutionalism and not proof that governance without Parliament is acceptable. The section is an exhortation to anyone appointed as Vice-President, Minister or Deputy Minister (from outside Parliament) to become H

Chidyausiku CJ

A members of Parliament within three months. The only time when such officials are allowed to exceed those three months is during that period Parliament is dissolved (thus frustrating him or her from becoming a member). Only then can the period be extended to "until Parliament first meets after dissolution". In fact, this provision presupposes the prior existence of Parliament and not its wholesale absence and caters for a few desired members of the Executive B who may not have made it to Parliament.

It is also instructive to have recourse to the history of this provision. The original provision stated that the terms of office of Vice-Presidents, Ministers or Deputy Ministers terminated on their ceasing to be members of Parliament, thus emphasising the centrality of an extant Parliament in the composition C and functioning of the Executive in a democratic dispensation.

Section 31E reads:

> **"31E Tenure of office of Vice-Presidents, Ministers and Deputy Ministers**
>
> (1) The office of a Vice-President, Minister or Deputy Minister shall become vacant –
>
> (a) if D the President removes him from office; or
>
> (b) if he resigns his office by notice in writing addressed and delivered to the President; or
>
> (c) upon the assumption of office of a new President.

[Subsection amended by section 9 of Act No. 15 of 1990 (Amendment No. 10)]

(2) No E person shall hold office as Vice-President, Minister or Deputy Minister for longer than three months unless he is a member of Parliament:

Provided that if during that period Parliament is dissolved, he may continue to hold such office without being a member of Parliament until Parliament first meets after the dissolution.

[Subsection substituted by section 2 of Act No. 31 of 1989 (Amendment No. 9)]"

F In the context of the GPA-based Government of National Unity (GNU) – not to be confused with the animal gnu with an ox-like head and a tufted tail and ironically also an inhabitant of the savannas of Africa – whose existence is premised on political parties represented in Parliament, the question arises as to what the constitutional justification of its continued existence becomes G once Parliament is no more. It becomes a Government made up of political parties *previously* represented in Parliament! And what would that say to other political parties patiently waiting for their chances at the polls?

In conclusion therefore, the proper construction of s 58(1) is that election dates should be fixed and notified, whether pursuant to Presidential dissolution H or automatic dissolution of Parliament, in such a way that elections are held

---

within the life of Parliament or on a day or days immediately following its A dissolution. The setting of these dates has to take into account the requirements of the Constitution and the Electoral Act, which stipulate a period of at least forty-four days between proclamation and actual holding of elections. In terms of the provisions of the new Constitution, which came into force on publication day, s 157(3), the minimum period is forty-four days, thus: B

> "The Electoral Law must provide for the nomination of candidates in any election to take place at least fourteen days after the publication of the proclamation calling for that election. Polling must take place at least thirty days after the nomination of candidates."

(c) Whether the applicant has made out a case for the order sought C

The essence of the applicant's case is that the first respondent has failed to fix and proclaim a date for Presidential, Parliamentary and local government elections as required by s 58(1) of the Constitution and failure by the first respondent to do so is unconstitutional in general and in particular is in violation of the applicant's rights as a voter and his legitimate expectation of protection of the law as enshrined in subss 18(1) and (1a) of the Constitution. D

As can be deduced from what is concluded above, the first respondent is already out of time in fixing and proclaiming dates for the harmonised general elections to be held before the expiry of the life of the current Parliament. The applicant's rights as already stated above have already been infringed and continue to be violated with each passing day. The applicant is entitled E to the declaration of such infringement and an order correcting or rectifying as far as is possible such infringement. See *CFU v Min of Lands & Ors* 2000 (2) ZLR 469 (S) at 486-487.

When the first respondent failed to fix and proclaim a date for Presidential, Parliamentary and local government elections, as required by s 58(1) of the Constitution, to enable elections to be held on the dissolution of Parliament F on 29 June 2013, not only did he violate the applicant's fundamental right as protected by s 18 of the Constitution, he thereby derailed the electoral process. From then onwards, the rule of law as regards the electoral process was no longer extant. It is imperative that the rule of law be restored to the electoral process and the applicant be afforded some relief. G

The first respondent has placed himself in a serious legal quandary or predicament by his failure to issue the said proclamation timeously. The first respondent cannot remedy the situation by issuing the proclamation for elections to be held by 29 June 2013, as doing so will inevitably contravene the time lines set out in s 38 of the Electoral Act. Prospective Parliamentary candidates are entitled, in terms of s 38 of the Electoral Act, to fourteen H

A days to organise their nominations and thirty days to campaign before the date of the elections. Thus, affixing the date of the elections now in terms of s 58(1) of the Constitution in anticipation of the dissolution of Parliament on 29 June 2013 will have the effect of violating the fundamental right of aspiring Parliamentary candidates, entitling them to bring similar applications to that of the applicant.

B Apart from this, the coming into operation of the new Constitution of Zimbabwe has further complicated the situation. The new Constitution has introduced new time lines and necessitated amendments to the Electoral Law, making the immediate issuance of a proclamation fixing the date for harmonised elections on the dissolution of Parliament on 29 June 2013 C legally impossible.

The court, in my view, is compelled to take into account the exigencies of this situation in the order that it makes. Thus compliance with the court order must not of necessity compel the first respondent to contravene another electoral provision. The applicant must have appreciated the first respondent's D legal predicament. In his draft order, the applicant asked for the immediate issuance of a proclamation fixing the date of the harmonised elections upon the dissolution of Parliament on 29 June 2013. In the alternative, the applicant asked for the issuance of a proclamation forthwith setting the date of the harmonised elections by no later than 25 July 2013. I have no doubt that the applicant's alternative relief is out of the realisation and appreciation of the E first respondent's legal predicament.

I am inclined to grant the alternative relief sought by the applicant and add six days to 25 July 2013 to compensate for the period between the hearing of this appeal and the handing down of this judgment. The first respondent, while not explicitly consenting to the alternative relief, indicated that he F had no objection to such relief. The main litigants in this matter, namely the applicant and the first respondent, are accordingly in agreement over the alternative relief. This relief also accords with the court's desire to issue an order that will help restore legality to the electoral process as quickly as possible.

(d) Costs

G The applicant has won his case and costs should follow the result. As against the first respondent, the first respondent literally consented to the alternative relief sought by the applicant. Ordinarily a respondent who takes this attitude will not be ordered to pay the costs. However, in this case it is the conduct of the first respondent in failing to timeously fix a date for harmonised H elections that has compelled the applicant to approach the court. Apart from

---

this, the first respondent represents the State, and in my view it is only fair A and just that the State should pay the costs of a public spirited citizen like the applicant, who undertook the responsibility of doing something about an electoral process that had gone astray. The second and fourth respondents opposed the application on the basis of an interpretation of s 58(1) of the Constitution which this court has found to be permissible although erroneous. B In my view, it would be unjust to mulct the second and fourth respondents in costs. The second and fourth respondents should simply bear their own costs.

It is my hope that, although the order of the court is not against the second and fourth respondents, they will use their good offices to assist the first respondent to restore the rule of law to the electoral process. C

(e) Order

In the result, the court makes the following order -

1. It is declared that the harmonised general elections in terms of s 58(1) of the Constitution of Zimbabwe are due upon the dissolution of Parliament on 29 June 2013. However, due to the first respondent's failure to issue a proclamation fixing the date for the harmonised elections timeously D it is no longer legally possible to hold the harmonised elections on that date.
2. It is declared that the failure by the first respondent to fix and proclaim date(s) for harmonised general elections to take place by 29 June 2013 is a violation of the first respondent's constitutional duty towards the E applicant to exercise his functions as a public

officer in accordance with the law and to observe and uphold the rule of law in terms of s 18(1a) of the Constitution.

3. It is further declared that by failing to act as stated in para 2 above, the first respondent has violated the applicant's rights as a voter and his F legitimate expectation of protection of the law entrenched in s 18(1) of the Constitution.
4. Accordingly, the first respondent be and is hereby ordered and directed to proclaim as soon as possible a date(s) for the holding of a Presidential election, a general election and elections for members of governing bodies of local authorities in terms of s 58 (1) of the Constitution of G Zimbabwe, which elections should take place by no later than 31 July 2013.
5. The first respondent shall bear the costs of the applicant.

ZIYAMBI JA, GARWE JA, GOWORA JA, HLATSHWAYO JA, CHIWESHE AJA and GUVAVA AJA agreed with CHIDYAUSIKU CJ. H

2013 (1) ZLR p489

Chidyausiku CJ

A MALABA DCJ:I have read the judgment prepared by the learned Chief Justice. I do not, with respect, agree with it for reasons I proceed to set out.

The applicant approached the court seeking redress in terms of s 24(1) of the former Constitution. I say "the former Constitution" because Zimbabwe has a new Constitution. Some of the provisions of the new Constitution B came into effect on 22 May 2013 which is the publication day. Section 1 of Part 1 of the Sixth Schedule of the new Constitution provides that the "first elections" shall be held in terms of the new Constitution. The "first elections" is defined in s 1 of Part 1 of the Sixth Schedule to mean:

> "(a) the first election for the office of the President under this Constitution;
>
> (b) the first general election of members of Parliament under this Constitution;
>
> and C
>
> (c) the first elections of governing bodies of provincial and metropolitan councils and local authorities;
>
> held after the publication day."

The elections in relation to which the applicant sought redress in terms of D s 24(1) of the former Constitution have become the "first elections" as they will be held after the publication day. The effect of the provisions of the new Constitution which came into operation together with express provisions of the Sixth Schedule on matters relating to the "first elections" are of greatest importance in the determination of the question raised by the application.

E The question for determination is whether the applicant's interpretation of s 58(1) of the former Constitution on the timing of the "first elections" which he wants the court to apply in deciding whether the first respondent (the President) has violated his fundamental right to the protection of the law is correct. In my view, the clear and unambiguous provisions of s 58(1) of the former Constitution as read with the other relevant sections admit of F nothing other than their ordinary grammatical meaning. The applicant has turned the clear and unambiguous language of the provisions into a subject-matter of a question of interpretation which has unfortunately plunged the court into irreconcilable differences of opinion. I, however, refuse to have wool cast over the inner eye of my mind on this matter.

G The relevant provisions of the former Constitution are these:

> "Section 58(1) Elections
>
> (1) A general election and elections for members of the governing bodies of local authorities shall be held on such day or days within a period not exceeding four months after the issue of a proclamation dissolving Parliament under section 63(7) or, as the case may be, the dissolution of Parliament under section 63(4) H as the President may, by proclamation in the *Gazette*, fix."

2013 (1) ZLR p490

Chidyausiku CJ

> **"63 Prorogation or dissolution** A
>
> (1) The President may at any time prorogue Parliament.
>
> (2) Subject to the provisions of this Constitution, the President may at anytime dissolve Parliament.
>
> (3) . . .

(4) Parliament, unless sooner dissolved, shall last for five years, which period B shall be deemed to commence on the day the person elected as President enters office in terms of section 28(5) after an election referred to in section 28(3)(a), and shall then stand dissolved:

(5) . . ..

(6) . . .

(7) Subject to the provisions of subsection(4), any prorogation or dissolution C of Parliament shall be by proclamation in the *Gazette* and, in the case of a dissolution, shall take effect from the day preceding the day or first day, as the case may be, fixed by proclamation in accordance with section 58(1) for the holding of a general election."

According to the interpretation of s 58(1) which the applicant wants the D court to apply, the provision imposes on the President a duty to fix 29 June 2013 or a day after as the date of the first elections. He contends that s 58(1) requires the President to issue a proclamation fixing the date of the first elections within four months before the date of automatic dissolution of Parliament. It is common cause that, barring any dissolution by proclamation, the Parliamentary term of five years will come to an end at midnight on 29 E June 2013. It is common cause that up until the hearing of the application on 24 May, the President had not fixed the date of the first elections. The applicant alleges that he has a right to the performance by the President of his legal duty to fix 29 June 2013 as the date of the first elections. He says his corresponding right derives from the fact that he is a registered voter. F As a result of the alleged failure by the President to fix 29 June 2013 as the date of the first elections, the applicant alleges that his right to the protection of the law has been violated.

I have no difficulty in recognising in the applicant the right to approach the court in terms of s 24(1) of the former Constitution seeking the relief of an G order of *mandamus* against the President. The principle on *locus standi* is after all that it is better to let people have access to the fountain of justice where they fail for the reasons of their folly than have them blame the gate keepers. An order of *mandamus* is a means of relief which the court in the exercise of its wide discretionary powers under s 175(6)(b) of the new Constitution can, in appropriate cases, grant. H

2013 (1) ZLR p491

Chidyausiku CJ

A In determining the question raised by the application I bear in mind the fact that elections are crucial to democracy. This is particularly so at this stage of the history of our country. The first elections which are due to be held under the new Constitution are bound to test the readiness of Zimbabweans to embrace the change embodied in the new Constitution. The leadership that is going to emerge elected will have to embrace the new values prescribed by B the new Constitution. Choosing the precise date to hold the first elections is therefore a matter of utmost importance to be handled with the greatest care.

There is no doubt that s 58(1) of the former constitution grants power for the fixing of the date of the first elections. For ease of understanding of the import of the provisions, I have analysed them against a framework which C looks at the nature of the power, the repository, the contents, the conditions and restrictions on its exercise. The answers to these questions determine the democratic quality of the first elections as they depend on the guarantees that surround the different aspects of the choosing of the date of the elections.

Section 58(1) vests in the President a discretionary power to fix a day or days D of the first elections by a proclamation published in the official *Gazette*. The use of the word "may" is clearly indicative of the fact that the power conferred on the President is of a discretionary nature. It means that the President can act on his own discretion or judgment. It is not a power which is accompanied by a duty on the President to act in a specified manner at a specified time. In matters in which the President has discretion he may seek advice from E any quarter but he must discharge his duties to the best of his own judgment and ability. The power is vested in the President but he has the freedom to decide when to act provided he observes all the requisite conditions of the exercise of the power. So s 58(1) as the source of the discretionary power defines the circumstances when the power *may* be exercised, not when it F *must* be exercised.

There is, in my view of the nature of the power conferred on the President by s 58(1), no legal duty on him to fix 29 June 2013 or a day after as the date of the first elections as suggested by the applicant. This is not a case where the date of a general election following automatic dissolution of Parliament is precisely determined in the Constitution. The date is left to be chosen by G the

authority vested with the power to do so within a framework of time determined by the Constitution. Within that time frame the authority is left with a fairly large margin of appreciation in choosing the day or days in which the election will have to take place. In that regard the court has no power to dictate to the President when and how he should exercise the discretion H vested in him by the Constitution.

2013 (1) ZLR p492

Chidyausiku CJ

It is important that the repository of the discretionary power to fix the date of A the first elections is the President. He is a democratically elected authority. As he is vested with the power to fix the date of the "first elections" in his capacity as the President of the Republic, he is expected to take into account all relevant factors relating to the proper conduct of the elections in the national interest. He does not in that capacity act as a leader of a political party. B

The content of the discretionary power is very clear. It is the fixing of a day or days on which the first elections are to be held. The discretionary power is to be exercised in respect of a specific matter. Which day or days the President chooses to fix as the date or dates of the election is a matter strictly within his discretion. The court cannot get involved in determining for the President the manner in which he should exercise his discretion. It C cannot tell the President which day or days he should fix or that he was wrong in fixing a certain day. It is not the function of a court of law to substitute its own wisdom and discretion for that of the person to whose judgment a matter is entrusted by the law. Whilst a court can review a public officer's action for legality it cannot act as if it were the Executive. D

The real issue in this case arises because of the interpretation of the conditions and restrictions imposed by the law on the exercise of the discretionary power by the President. The first condition is of course not so controversial. It relates to the form the exercise of the discretion should take. The President is required to give notice to the public of the day or days he has fixed for the holding of the first elections in the *Gazette*. Upon public notification, E the date or dates fixed for the elections have legal effect. The fact that the manner by which the President is required to make known to the public the result of the exercise of his discretion is by a proclamation published in the *Gazette* means that it is an unconditional notification. It cannot be conditional upon the President reserving for himself the right to dissolve Parliament by proclamation. If the contention by the applicant that the proclamation fixing F the date of the first elections must be issued some four months before the date of automatic dissolution of Parliament is accepted, that would be the implication.

The next condition is one in respect to which the interpretation of s 58(1) by the applicant has given rise to the question for determination. In my view G s 58(1) is clear. It gives the President the discretionary power to fix a day or days for the holding of the first elections to fall within a period of four months calculated from the date of occurrence of any of the events referred to in ss 63(4) and 63(7) of the former Constitution. The date or dates fixed for the holding of the first elections must follow the date of the dissolution. If the dissolution of Parliament is by a proclamation issued by the President H

2013 (1) ZLR p493

Chidyausiku CJ

A in terms of s 63(2) of the former Constitution, the time within which the day or days for the holding of the elections must be fixed starts running from the date of the issuance of the proclamation. If the dissolution of Parliament is automatic as provided for in s 63(4), the time within which the day or days for the holding of the elections should be fixed starts to run from the date of the automatic dissolution.

B It is generally accepted that in the absence of express provisions to the contrary, dissolution of Parliament is usually followed and not preceded by a proclamation fixing the date of a general election. A general election is usually called and polling dates fixed by a proclamation after and not before dissolution. I have no doubt in my mind that the period of four months C referred to in s 58(1) relates to what should happen after the dissolution of Parliament by either proclamation or operation of law.

The contention by the applicant that the time limit of four months relates to what the President should do before the date of automatic dissolution cannot be correct. It ignores the word "after" in s

58(1). It also does not put any weight at all on the words "or, as the case may be" in the section. D According to the old legal maxim, "Parliament does not speak in vain". These words must surely have been used in s 58(1) for a purpose. The purpose is precisely to subject each type of dissolution to the same mode of fixing the day or days for the holding of the elections. The words "or, as the case may be" mean that whichever of the two events referred to in ss 63(4) and 63(7) occurs, two things shall happen. The first consequence of E the occurrence of the event is the need for the President to decide when to exercise his discretionary power and fix the date or dates of the election by issuing a proclamation. The second consequence of the occurrence of the event is the commencement of the running of the limitation period of four months referred to in s 58(1).

F Whilst the two elements are the direct consequences of the issuance of a proclamation dissolving Parliament or of the automatic dissolution of Parliament, there is an additional restriction on the exercise by the President of the discretionary power which applies to dissolution by proclamation only. The restriction is provided for in s 63(7). The words "subject to the G provisions of subsection (4)" in s 63(7) emphasise the additional restriction. They also emphasise the fact that there are elements which are common to both methods of dissolution in so far as the direct consequences are concerned. In other words, whilst the time limit is applicable to both forms of dissolution, the requirement that the dissolution shall take effect on the day preceding the first day of polling in the elections does not apply to the H automatic dissolution of Parliament in terms of s 63(4).

Chidyausiku CJ

It is important to understand the effect of s 63(7). The section must be read A together with ss 63(1) and (2). Whilst these sections provide for the power to prorogue and dissolve Parliament respectively, they do not state the manner in which the power is to be exercised. Section 63(7) then provides that the power to prorogue or dissolve Parliament shall be exercised by means of a proclamation published in the *Gazette*. Where the proclamation dissolves B Parliament as opposed to proroguing it, s 63(7) then goes on to prescribe the restriction therein contained.

Section 63(4) fixes the Parliamentary terms at five years. This is clearly an upper limit to ensure regular accountability to the electorate. That principle is not offended by a shorter term by dissolution of Parliament by proclamation. The purpose or objective of accounting to the electorate is the same. The fixing C of a day or days of the holding of the elections facilitates accountability to the electorate in each case. Put differently, s 63(7) does not affect a situation where s 63(4) applies.

The contention that the President is under a duty to issue a proclamation fixing the day or days of the election within a period of four months before D the date of automatic dissolution of Parliament is difficult to justify. It requires that the word "after" in s 58(1) be ignored or expunged and in its place read the word "before". On what event would the proclamation fixing the date or dates of the elections be based except on itsel?. The fact is that there is nothing in s 58(1) of the former Constitution which imposes on the President an obligation to fix a day or days of the election to coincide with the date of E the end of the natural life of Parliament. If that were the case, the date of the election would be known in advance as if it was fixed by legislation. If the framers of the former Constitution had intended the date of the elections to fall on the last day of the maximum duration of the life of Parliament they would have said so. They would have imposed the duty on the President to simply issue the proclamation announcing that date. There would have F been no need at all to vest the President with the power to "fix" "such day or days" of the holding of the elections. It is clear to me that the words "fix" and "day or days" indicate the conferment of a discretionary power. In other words the date of elections remains unknown to the public until the publication in the *Gazette* of the proclamation fixing it. G

Reference to s 158(1)(a) of the new Constitution is inappropriate. Section 158(1) provides that "a general election must be held so that polling takes place not more than thirty days before the expiry of the five-year period specified in s 143". Section 158(1) cannot be used to support the applicant's contention. It is correct to say s 143 of the new Constitution relates to an automatic dissolution of Parliament. Section 3(1)(e) of Part 2 of the Sixth H

Chidyausiku CJ

A Schedule to the new Constitution makes it clear that s 158 does not come into operation on the publication day.

Section 1 of Part 1 of the Sixth Schedule provides that the "first elections" shall be held in terms of the new Constitution. In fact, s 8 of Part 3 of the Sixth Schedule specifically provides that the "first elections" must be conducted "in B terms of an Electoral Law in conformity with this Constitution". In suspending the coming into operation of s 158 the framers of the new Constitution were aware of the provisions of s 58(1) of the former Constitution. They were aware of the clear conflict between the position provided for under s 58(1) and that enacted by s 158(1)(a) of the new Constitution. Section 158(1)(a) provides for the fixing of the date of elections within the specified period C before the date of an automatic dissolution of Parliament. Section 58(1) to the contrary provides for the fixing of the date of the election within the prescribed period after the date of automatic dissolution of Parliament.

For the purposes of the timing of the holding of the first elections the former Constitution operates simultaneously with the new Constitution. In any case D the applicant's case is not that a general election must take place within four months before the President leaves office or Parliament is dissolved by operation of law. His case is that s 58(1) requires the issuance by the President of a proclamation fixing the date of the first elections on 29 June 2013, four months before the date of the automatic dissolution of Parliament.

E It is important to refer to constitutions of other countries practising constitutional democracy. Section 55(3) of the Malaysian Constitution provides that:

> "Parliament unless sooner dissolved shall continue for five years from the date of its first meeting and shall then stand dissolved."

F Section 55(4) then provides that the general election "shall be held within sixty days from the date of the dissolution of Parliament". During the debate on the 13th general elections in Malaysia there was no question about the period of sixty days running after the date of the automatic dissolution of Parliament. The debate centred on when the Prime Minister would fix the date of the election.

G The Kenyan situation is even closer to ours. Kenya has had a new Constitution, as we have. The Constitution of Kenya 2010 has prescribed a precise general election date. Section 9 of the Sixth Schedule suspended the operation of some of the provisions of the new Constitution during the transitional period. The date of the first elections was fixed on the basis of the former Constitution. H Section 9 of the Sixth Schedule provided that the "first elections for the

---

President, the National Assembly and the Senate shall be held within sixty A days after dissolution of the National Assembly at the end of its term".

Cases that went to the courts in Kenya did not raise the question of when the period of sixty days started to run. The cases which were eventually decided by the High Court of Kenya raised the question whether the courts should involve themselves in fixing the date of the first elections. In fact, the High B Court fixed the date of the first elections by calculating sixty days after the date of the automatic dissolution of Parliament.

In this case there are provisions of the new Constitution relating to the conduct of the first elections which the President would have to take into account in fixing the date of the elections. As pointed out earlier, s 8 of Part 3 of the Sixth C Schedule requires that the first elections be conducted in terms of an Electoral Law in conformity with the new Constitution. Section 6(3) of Part 3 of the Sixth Schedule requires that there be conducted by the Registrar-General of voters under the supervision of the Zimbabwe Electoral Commission a special and intensive voter registration and voters' roll inspection exercise for at least thirty days after the publication day. Section 157(3) of the new D Constitution requires that the Electoral Law must provide for the nomination of candidates in any election to take place at least fourteen days after the publication of the proclamation calling for that election. It further requires that the polling in that election must take place at least thirty days after the nomination of candidates.

The presumption of constitutionality requires that the President in the exercise E of the discretionary powers vested in him should take into account all these factors in deciding to issue the proclamation fixing the day or days on which the "first elections" are to be held. All these factors are designed to

ensure not only accountability to the electorate but also that the electorate plays a meaningful role in the election and makes informed choices. F

In all matters relating to the "first elections", Chapter 7 of the new Constitution is the supreme and binding law. The President would have to take into account the amendments which have to be made by Parliament to the Electoral Law and other regulations relating to the conduct of the elections to make them in conformity with the new Constitution. Section 157(5) provides that G after a proclamation of the date of the first elections no amendment to the Electoral Law or to any law relating to the elections would have effect for the purposes of those elections. Any changes to such a law must be made before the proclamation is issued.

What all this means is that the President's exercise of discretion in calling the first elections and fixing the date when the poll should be held must in H

A itself be in conformity with the new Constitution. The applicant, like all other potential voters, must wait for the exercise by the President of his discretion in accordance with the law. The applicant seems to have been driven into making the application by his aversion for what he calls a situation in which the executive and judicial arms of government can function for four months without Parliament. The aversion is obviously based on the interpretation of B the principle of separation of powers which is a characteristic feature of a constitutional democracy. Whilst the situation criticised by the applicant may be undesirable it is certainly not unconstitutional. It is a situation provided for by the Constitution. The applicant exaggerates the case by saying that the second and fourth respondents want the affairs of the country to be run by C the executive and judiciary without Parliament for four months. An honest and objective assessment of what the two respondents have said shows that they acknowledge that the President has a discretionary power to fix the date of the first elections by a proclamation. They accept that it is in the exercise of his discretion for the President to decide when, within the period of four months after the date of the proclamation dissolving Parliament or the date D of automatic dissolution of Parliament, the first elections are to be held.

Zimbabwe is not the only constitutional democracy with a provision of a Constitution allowing for a period in which the affairs of the country can be run by the executive and judiciary without Parliament following its dissolution by operation of law at the end of its full term. Section 55 of the Malaysian E Constitution has already been referred to. Article 16.3 of the Constitution of Ireland provides that after dissolution of the Dail Eireann (Parliament) a general election for members of Parliament shall take place not later than thirty days after the dissolution. Article 15(2) of the Constitution of Andorra provides that the President has the power to choose a date of an election to fall between the thirtieth and fortieth day following the end of the term of F Parliament. Article 64.3 of the Constitution of Bulgaria provides that the date for an election shall fall within two months from the expiry of the life of Parliament. Article 73(1) of the Constitution of Croatia provides that elections for members of the Croatian Parliament shall be held not later than sixty days after the expiry of the mandate or dissolution of the Croatian Parliament. Even in countries such as Canada, where the date of a general G election is fixed by legislation, the situation the applicant criticises has not been avoided. In terms of s 56.1(2) of the Canada Elections Act a general election is required to take place on the third Monday of October in the fourth calendar year following the previous election. The dissolution of Parliament by proclamation prematurely terminated the life of Parliament. As a result H of a general election which took place on 2 May 2011 the life of Parliament

---

would end on 2 May 2015. The general election would have to be held five A months later, on 19 October 2015.

It is clear, therefore, that the principle that there can be a period following automatic dissolution of Parliament when the affairs of a country are run by the executive and judiciary is recognised. It is interesting to note that whilst the applicant is concerned about the fate of Parliament, he does not B seem to be interested in the need to comply with the requirements of the new Constitution designed to ensure that the electorate plays a meaningful role in the electoral process.

There is no doubt in my mind that the requirements of the new Constitution are designed to ensure that the first elections are truly a legitimate democratic C instrument for the people to choose and control the authorities that will act in their name. Taking into account the importance of the first elections the new Constitution tries to guarantee the democratic character of the decision making on the date of the election.

It appears to me that once it is accepted that the date of the first elections can D be fixed to take place after 29 June 2013 the whole basis of the applicant's argument collapses. He then clearly falls in the "within four months after automatic dissolution of Parliament" argument. It also defeats logic for the majority to find that the President has broken the supreme law of the land and at the same time authorise him to continue acting unlawfully. That is a very dangerous principle to apply as it has no basis in law. The principle of E the rule of law just does not permit of such an approach. A finding that the President has a discretionary power under s 58(1) which he has to exercise within the prescribed time limits would clearly avoid such a contradictory order by the majority.

For all these reasons I would dismiss the application with costs. F

PATEL JA: On the question of *locus standi*, I entirely concur that the applicant has established the requisite standing to institute this application. Pursuant to s 18(1) of the former Constitution, which guarantees the protection of the law and constitutional due process, he undoubtedly has the right to have general G elections held when they are due as prescribed by the law. By the same token, s 18(1a) of that Constitution bestows upon him a legitimate expectation that the President, the first respondent, will exercise his functions as a public officer in fixing election dates in accordance with the law. The fact that he has an alternative administrative law remedy by way of *mandamus* does not, in my view, preclude his entitlement to approach this court for constitutional H

Chidyausiku CJ

A relief. In this regard, I respectfully adopt the reasoning and conclusions of the learned Chief Justice.

Turning to the substantive merits of the matter, the principal issue for determination is the meaning of and interrelationship between ss 58(1), 63(4) and 63(7) of the former Constitution. On this aspect, I fully endorse the B principle of constitutionalism that informs the approach taken by the learned Chief Justice and the majority of the court. However, I am constrained, with the utmost respect, to disagree with the construction that they place on the provisions under review, in particular, on s 58(1).

The tripartite structure of the State is the keystone of every constitutional democracy and the need to safeguard the attendant separation of powers is C unquestionably paramount. However, as was recognised in *Mike Campbell (Pvt) Ltd & Anor v Minister of National Security Responsible for Land, Land Reform & Resettlement & Anor* 2008 (1) ZLR 17 (S) at 33-35, the clear words of a constitution must be construed to override any doctrine of constitutionalism predicated on essential features or core values. In general, the principles governing the interpretation of a constitution are basically the D same as those governing the interpretation of statutes. One must look to the words actually used and deduce what they mean within the context in which they appear. See *Hewlett v Minister of Finance* 1981 ZLR 571 (S) at 580. If the words used are precise and unambiguous, then no more is necessary than to expound them in their natural and ordinary sense. See *The Sussex Peerage* (1843-1845) 65 RR 11 at 55. In essence, it is necessary to have E regard to the words used and not to depart from their literal and grammatical meaning unless this leads to such an absurdity that the Legislature could not have contemplated it. See, in this regard, the case authorities cited by the learned Chief Justice.

Section 58(1) of the Constitution, as amended by Act No. 11 of 2007 to F accommodate harmonised elections, prescribes when general elections are to be held and the fixing of election dates, as follows:

> "A general election and elections for members of the governing bodies of local authorities shall be held on such day or days within a period not exceeding four months after the issue of a proclamation dissolving Parliament under section 63(7) or, as the case may be, the dissolution of Parliament under section 63(4) as the G President may, by proclamation in the *Gazette*, fix."

The prorogation and dissolution of Parliament are dealt with in s 63 of the Constitution. For present purposes, subss (4) and (7) are the pertinent provisions and they provide as follows:

"(4) Parliament, unless sooner dissolved, shall last for five years, which period H shall be deemed to commence on the day the person elected as President enters

---

2013 (1) ZLR p500

Chidyausiku CJ

office in terms of section 28(5) after an election referred to in section 28(3)(a), A and shall then stand dissolved:

Provided that, where the period referred to in this subsection is extended under subsection (5) or (6), Parliament, unless sooner dissolved, shall stand dissolved on the expiration of that extended period."

"(7) Subject to the provisions of subsection (4), any prorogation or dissolution B of Parliament shall be by proclamation in the *Gazette* and, in the case of a dissolution, shall take effect from the day preceding the day or first day, as the case may be, fixed by proclamation in accordance with section 58(1) for the holding of a general election."

The first point to note is that both s 58(1) and ss 63(4) and (7) have remained unaltered in substance since they were first enacted in 1980. The second more C critical point is that they deal with two distinct though related constitutional processes, *viz.* the fixing of elections on the one hand and the life of Parliament on the other. These two processes and their objectives have been unnecessarily conflated by the applicant *in casu.*

The approach adopted by the learned Chief Justice in relation to s 58(1) is to read it so that the two separate scenarios for the dissolution of Parliament D are taken to follow after the words "shall be held on" rather than the phrase "within a period not exceeding four months after". In my respectful view, dividing s 58(1) in this fashion detracts from its grammatical structure and leads to an inchoate rendition of the provision. In particular, in the situation where Parliament is dissolved by operation of law under s 63(4), the literal E result is that elections are to be held "on the dissolution of Parliament". Does this mean that elections are to be held simultaneously with the dissolution of Parliament, or immediately thereafter, or at some later stage? More importantly, this reading has the peculiar effect that no actual "election day or days" are fixed, contrary to the very purpose of s 58(1). Such a construction surely cannot reflect what the Legislature would have intended. F

A plain reading of s 58(1) makes it clear that elections must be held after the dissolution of Parliament on such day or days as the President may fix by proclamation. This applies to both scenarios for the dissolution of Parliament. Where it is dissolved by the President under s 63(7), elections must take place within four months *after the issue of a proclamation dissolving Parliament*. G Where Parliament stands dissolved by operation of law in terms of s 63(4), elections must be held within four months *after the dissolution of Parliament.* In my considered view, the wording used is unambiguous and does not admit of any other interpretation, nor does it entail any absurdity. Consequently, there is no need to invoke any teleological or purposive approach in the construction of s 58(1). H

2013 (1) ZLR p501

Chidyausiku CJ

A The apparent ambiguity that might emerge arises from the wording of s 63(7) and its juxtaposition of the dissolution of Parliament with the first election day fixed under s 58(1). Read in their context, however, there is no real ambiguity as between ss 58(1) and 63(7). What the latter provision means is this. Any prorogation or dissolution of Parliament by the President must be effected by proclamation in the *Gazette*. In the case of a dissolution, this must take B effect from the day preceding the day or days fixed by proclamation under s 58(1) for the holding of a general election. This would apply, in particular, where the President dissolves Parliament in terms of s 63(2) well before the expiration of its five year tenure. However, this is *subject to s 63(4)*, so that the automatic dissolution of Parliament by operation of law *may but need not* C *take effect* on the day preceding the day fixed for the holding of elections. In other words, the prescribed tenure of Parliament cannot be extended beyond five years in the event that the date fixed for elections falls outside that period. In that case, the dissolution of Parliament cannot immediately precede the election date fixed under s 58(1).

Reading all of the relevant provisions together, the relationship between the D holding of elections and the life of Parliament is resolved as follows. Where Parliament is dissolved by the President acting under s 63(2), elections must be held within four months after the issue of the proclamation dissolving it in terms of s 63(7). In this case, the two events must be synchronised so that the dissolution of Parliament takes effect on the day preceding the day or E days fixed for elections in

terms of s 58(1). Conversely, where Parliament is dissolved by operation of law after the effluxion of five years in terms of s 63(4), elections must be held within a period not exceeding four months after the dissolution of Parliament. In this case, elections need not be held immediately after such dissolution, so long as they are held on a day or days within the four month period after dissolution. In short, different time frames F apply to the two forms of dissolution.

Does this differentiation necessarily entail an absurdity? I am inclined to think not. Where the President takes a deliberate decision, for whatever reason of political or practical expediency, to dissolve Parliament before the expiry of its prescribed five year tenure, that decision involves the exercise of an extraordinary executive power. And in that extraordinary eventuality, G Parliament has deemed it fit to ensure that there should not be any delay between its dissolution and the holding of general elections. However, the need for such urgency or immediacy does not arise where Parliament continues in existence and operation throughout its ordinary term of five years.

Of course, it is a matter of concern that the plain reading of s 58(1) invites H the "spectre" of rule by executive decree for a maximum period of four

---

Chidyausiku CJ

months without the restraint of Parliamentary oversight. While the possibility A of this hiatus may be undesirable from a democratic perspective, it is not necessarily absurd or unconstitutional. That scenario, unpalatable as it may be, is explicitly contemplated in s 31E of the Constitution dealing with the tenure of office of members of the executive. More specifically, s 31E(2) provides that:

> "No person shall hold office as Vice-President, Minister or Deputy Minister for B longer than three months unless he is a member of Parliament:
>
> Provided that if during that period Parliament is dissolved, he may continue to hold such office without being a member of Parliament until Parliament first meets after the dissolution."

This provision was substituted by Parliament through Act No. 31 of 1989, in tandem with the advent of the executive presidency. It constitutes a clear C recognition and acceptance by Parliament itself of the possibility of its abeyance for the duration of at least three months. In effect, it unequivocally fortifies the plain and unqualified construction of s 58(1) *vis-à-vis* the provisions of ss 63(4) and (7).

For all of the aforestated reasons, I would dismiss the present application D on its merits.

Mandizha & Company, applicant's legal practitioners

Terrence Hussein, Ranchod & Company, first respondent's legal practitioners

Atherstone & Cook, second respondent's legal practitioners E

Web, Low & Barry, fourth respondent's legal practitioners

Civil Division of the Attorney General's Office, fifth respondent's legal practitioners F

© 2015 Juta and Company (Pty) Ltd.

Document 61 of 73

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2013/Volume 1/FREDA REBECCA GOLD MINE HOLDINGS LTD v NHLIZIYO & ORS 2013 (1) ZLR 503 (S)

FREDA REBECCA GOLD MINE HOLDINGS LTD v NHLIZIYO & ORS 2013 (1) ZLR 503 (S)

Citation	2013 (1) ZLR 503 (S)
Case No	Judgment No. S-16-13
Court	Supreme Court, Harare

Judge	Ziyambi JA, Gowora J A and Omerjee AJA
Heard	16 July 2012; *CAV*
Judgment	3 June 2013
Counsel	*T Magwaliba*, for the appellant *A Muchadehama*, for the respondent
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Employment – *contract – termination – retrenchment – approval by Minister of proposed retrenchment – such approval not constituting termination of employment – employment only terminated when employer decides* D *to proceed with retrenchment – retrenchment intended for the benefit of employer – rights of employer where the retrenchment worsens its financial situation – employer entitled to revoke intention to retrench – employees obliged to return to work*

Headnote

E Due to financial difficulties, the appellant company decided to retrench the respondents so as to reduce its operational costs and notified the respondents of its intention to do so. Negotiations then took place in terms of the procedures laid down by the Labour Act [*Chapter 28:01*], culminating in the approval, in terms of s 12C of the Act, of the retrenchment by the Minister of Labour. The retrenchment was F approved, subject to the payment of a specified retrenchment package. The company then notified the respondents that, due to the high costs of the retrenchment package, the retrenchment process would be deferred until further notice. The respondents were ordered to return to work. The appellant also notified the Ministry of Labour that it had decided to defer the retrenchment process. The respondents turned up at work for two G days, but declined to work thereafter, asserting that their contracts had been terminated by reason of their retrenchment. They did not heed a further reminder to return to work, so the appellant brought proceedings against them in terms of the code of conduct for wilful disobedience to a lawful order, and the respondents were summarily dismissed. They then H brought proceedings against the appellant for an order declaring their

dismissals to be invalid and for the payment of a retrenchment package. A The Labour Court found in their favour. On appeal:

Held, that in terms of s 12C(9)of the Labour Act [*Chapter 28:01*], the Minister is required to consider any recommendation concerning a proposed retrenchment submitted to him by the Retrenchment Board and, subject to any conditions he may impose, approve or refuse it. The B Minister, however, not being a party to an employment agreement, does not terminate it. The Minister's directive merely sets the conditions upon which the employer, if still so minded, can proceed to retrench. A contract of employment is concluded by an employer and an employee and can only be terminated by one or other of them. Where, as here, after the Minister has exercised his powers in terms of s 12C(9), the C employer decides not to proceed with the retrenchment, the employment contracts remains in force.

Held, further, that the retrenchment exercise, as prescribed in the Labour Act, is intended to be for the benefit of the employer: the saving of the company and of the jobs of the remaining employees. Clearly, therefore, D the ability of the company to pay the retrenchment package is the ultimate criterion. If the company cannot pay what it is ordered to pay, it must go into liquidation, which is what any retrenchment exercise is designed to avoid. Where the retrenchment packages as set by the Minister would have the effect of worsening the financial

situation of the employer, the very purpose of the retrenchment would be defeated. E In these circumstances, the employer is entitled to revoke the intention to retrench and invite the employees back to work. Failure by the latter to return to work would constitute an act of misconduct on their part justifying their dismissal.

Case cited F

Continental Fashions (Pvt) Ltd v Mupfuriri & Ors 1997 (2) ZLR 405 (S)

Legislation considered

Labour Act [*Chapter 28:01*], ss 12C(5), (9) and (11), and 12D G

Case information

T Magwaliba, for the appellant

A Muchadehama, for the respondent

Judgment

Ziyambi JA: This is an appeal against a judgment of the Labour Court. The point of law to be determined is whether the Minister's decision in terms of s 12C(9) of the Labour Act [*Chapter 28:01*] (hereinafter referred H

Ziyambi JA

A to as ("the Act")] constitutes a termination of the employment contracts of the affected employees.

The background

The respondents are all former employees of the appellant. In or about April 2007, upon consideration of its financial viability due to reduced production B levels, the appellant decided to retrench the respondents so as to reduce its operational costs and notified the respondents of its intention to do so. Negotiations then took place in terms of the procedures laid down by the Labour Act culminating in the approval, in terms of s 12C of the Act, of the retrenchment on 19 July 2007, by the then Minister of Public Service Labour and Social Welfare, ("the Minister"). The retrenchment was approved on the C following terms and conditions:

(a) service pay: 2 months' salary for each year worked;

(b) severance pay: 3 months' salary;

(c) relocation allowance: 3 months' salary.

D The net effect of the Minister's decision was that the appellant was to pay a total of ZW$28 billion to the respondents.

On 24 July 2007, the appellant's General Manager wrote to each of the respondents in the following terms:

> "Management advises that due to the high costs of the retrenchment as approved by the Ministry of Labour, the process is deferred until further notice.
>
> E As a consequence of these developments, you are now required to report back to work on Monday 30 July 2007.
>
> On resumption of duty, you will revert to the previous rotational duties i.e. if you were on short time work before proceeding on paid leave pending finalization of the retrenchment process you will be expected to resume work on a short time basis. Please note that paragraph two (2) of the internal memorandum notifying F you of the retrenchment exercise clearly stated that you remain an employee until the finalisation of the exercise."

On 30 July 2007, he also wrote to the Secretary for Social Welfare advising that the appellant had decided to defer the retrenchment to a later date. The relevant part of the appellant's letter reads as follows:

> G "We advise that the reason for the retrenchment is the dire situation in which the mine finds itself in as it embarks on the rehabilitation of the plant. The situation remains critical and the magnitude of the

problem can only become worse because of the size of the retrenchment package approved. The total bill is in excess of ZW$28 billion, and unaffordable by Freda Rebecca Mine.

In view of this situation, Freda Rebecca Mine management has decided to defer H the Retrenchment to a later date.

2013 (1) ZLR p506

Ziyambi JA

In the meantime, all the employees have been called to resume work while the A company maps the way forward on this matter."

All the respondents signed acknowledging receipt of letters requesting them to resume work. They reported for work for about two days and declined to work thereafter, asserting that their contracts had been terminated by reason of their retrenchment. An internal memorandum from the appellant's General B Manager dated 3 October 2007, again reminded the respondents to report for duty on 8 October 2007. On 16 October 2007, the respondents, who had not reported for duty, were summarily dismissed in terms of the Collective Bargaining Agreement for the Mining Industry Code of Conduct (SI 165 of 1992). They were charged with disobedience to a lawful order and failing to report for work for a period in excess of five days. The respondents received C and signed for their terminal benefits. Thereafter they filed an application in the Labour Court seeking an order in the following terms:

"IT IS ORDERED THAT:

1. Application be and is hereby granted with the following terms:
   (a) The Minister's decision of 19 July 2007 is still binding on both parties. D
   (b) The purported dismissal of the Applicants by the Respondent be and is hereby declared void.
   (c) The Respondent be and is hereby ordered to pay out the retrenchment packages of each respective Applicant in United States Dollars or its lawful equivalent in South African Rand (ZAR) through direct deposit into Applicant's Legal Practitioners Trust Account within 20 days of E this order.
2. The Respondent be and is hereby ordered and directed to pay to the Applicant a total amount of US$1 475 055.59 or its lawful equivalent in South African Rand (ZAR)
3. The respondent to pay costs of suit." F

The application found favour with the Labour Court. It ruled that the respondents remained employees of the appellant only up to the date of the Minister's approval of the retrenchment, that is, 19 July 2007. It found that since the respondents had ceased to be employees of the appellant on 19 July 2007, the appellant had no right to recall the respondents to work or to G institute disciplinary proceedings against them leading to their dismissal. It further ruled that the respondents could approach the Minister for the alteration of the quantification which was done in United States dollars. It issued the following order:

"1. The applicants remain retrenchees of the respondent and are entitled to their retrenchment package as per the Minister's decision of 19 July 2007. H

2013 (1) ZLR p507

Ziyambi JA

2. The A respondent is ordered to pay retrenchment packages as per the Minister's decision by 31 August 2010.
3. The applicants can approach the Minister for alteration in quantification.
4. There be no order as to costs."

The main ground of appeal advanced by Mr *Magwaliba* is that the court *a* B *quo* erred and misdirected itself in finding that the Ministerial approval of the retrenchment of the respondents was the effective retrenchment of the respondents and that it bound the appellant to such extent that the appellant could not require the respondents to return to work. It is my view that a determination of this ground in favour of the appellant would dispose of the appeal. I deal with it, hereunder, in two parts.

C **Whether the Minister's letter constituted the effective retrenchment and therefore a termination of the contracts to employment**

A contract of employment is concluded by an employer and employee and can only be terminated by one or other of them. The Minister, not being a party to the employment agreement, could not terminate it.

D Section 12C of the Act, in subs (9), gives to the Minister the following powers.

> "The Minister shall *consider* without delay any recommendation submitted to him by the Retrenchment Board and, having regard to the factors referred to in subs (11), shall –
>
> (a) approve the proposed retrenchment, subject to such terms and conditions E as he may consider necessary or desirable to impose; or
>
> (b) refuse to approve the proposed retrenchment,
>
> and shall cause the Retrenchment Board, the works council or employment council, as the case may be, to notify the employer and employees concerned in writing of the decision in the matter.

F The *proposed* retrenchment can either be refused by the Minister or approved subject to terms and conditions which the Minister deems fit to impose. Thereafter the Minister must cause his decision in the matter to be conveyed to the employer and the other parties mentioned in subs (9).

Thus, in approving a proposed retrenchment the Minister is in effect saying, "You may proceed with the retrenchment but only on these conditions." G The Minister's directive is not constitutive of the retrenchment nor does it terminate the contracts of employment of the proposed retrenchees. It merely sets the conditions upon which the employer, if still so minded, can proceed to retrench. The contract is terminated by the employer when it proceeds with the retrenchment. In this connection the provisions of s 12C(5) are H relevant. Subsection 5 provides:

Ziyambi JA

> "(5) No employer shall retrench any employee without affording the employee A the notice of termination to which the employee is entitled . . ."

Accordingly, I hold the view that where, as in this case, the employer decides not to retrench, the employment contracts remain in force.

Whether the employer could revoke its intention to retrench and recall the employees at work B

It was submitted by Mr *Magwaliba* that where the retrenchment package set by the Minister would have the effect of worsening the financially precarious situation of the employer, the very purpose of the retrenchment was defeated. Further, since the retrenchment exercise was for the benefit of the appellant, the appellant could revoke its intention to retrench and invite the respondents C back to work. I agree with these submissions. They are in keeping with the spirit of ss 12C and 12D of the Act. It should be noted that the Act places no obligation on an employer to retrench its employees. Indeed, the clear intention of Parliament which emerges from ss 12C and 12D of the Act is that every effort should be made to *avoid* retrenchment wherever possible. Thus s 12C(11) provides: D

> "(11) In deciding whether or not to approve the retrenchment of employees in terms of this section, due regard shall be paid –
>
> (*a*) to the following general considerations –
>
> (i) that the retrenchment of employees should be avoided so far as possible, where this can be done without prejudicing the efficient operation of E the undertaking in which the employees concerned are employed;
>
> (ii) that the consequences of retrenchment to employees should be mitigated so far as possible;
>
> (*b*) to the following considerations in particular cases –
>
> (i) the reasons put forward for the proposed retrenchment; and
>
> (ii) the effect of the proposed retrenchment upon the employees involved, F including their prospects of finding alternative employment and the terminal benefits to which they will become entitled."

As I understand it, the letter written by the appellant to the Minister was merely stating that the onerous conditions imposed by the Minister were more detrimental financially to the appellant than the retention of the employees. G After all, it was to avoid financial collapse that the appellant

sought to take the drastic measure of retrenchment in the hope that it would be able to carry on its business.

In *Continental Fashions (Pvt) Ltd v Mupfuriri* & *Ors* 1997 (2) ZLR 405 (S), the company (the employer) had, during the course of a retrenchment exercise, sought to withdraw the retrenchment notice. The withdrawal was H

Ziyambi JA

A not accepted by the principal labour relations officer. McNally JA at pp 412-413A had this to say:

> "The principal labour relations officer dealing with the matter decided to ignore the 'purported withdrawal'. I cannot understand how such an attitude can be adopted. It seems to me to promote form above substance, procedure above reality, red tape above common sense. The whole purpose of legislation about B retrenchment is to mitigate the effect of retrenchment upon those declared redundant. However good the retrenchment package, it must normally be second prize. The first prize must be a withdrawal of the redundancy notice. How an official can reject that first prize when it is offered is incomprehensible. Did he do so on behalf of the workers, and if so, on what authority."

And at p 407F:

> C "But where, as here, the purpose of retrenchment is to avoid the collapse and liquidation of the company, the wellbeing of the retrenchees cannot be the only consideration. The survival of the company is the motivating consideration. The purpose of the exercise is to save the company. In so doing, care must be taken to cushion the blow to the workers. But to say, as the Tribunal has done in this case, that it is almost irrelevant whether or not the company can afford the package, is a fundamental misdirection. The immediate objective of retrenchment remains D the saving of the company and of the jobs of the remaining employees. Clearly therefore, although it is not stated in the Regulations, the ability of the company to pay the retrenchment package is the ultimate criterion – the bottom line. If the company cannot pay what it is ordered to pay, it must go into liquidation, which is what the retrenchment exercise was designed was designed to avoid."

These remarks are equally applicable to the present case where the E retrenchment packages set by the Minister are unaffordable to the employer. Clearly in these circumstances an employer is not obliged to retrench on the conditions imposed, to its financial detriment.

In my view, until the appellant notified the respondents of the termination of their employment by virtue of the fact that the proposed retrenchment F was going to be effected by the appellant, the respondents remained in the employ of the appellant who was entitled to recall them back to work. Their failure to respond positively to the command by the appellant to return to work constituted misconduct on their part. They were accordingly properly charged with misconduct and dismissed by the appellant.

The appeal is therefore allowed with costs.

G GOWORA JA and OMERJEE AJA concurred.

Magwaliba & Kwirira, appellant's legal practitioners

H *Kajokoto* & *Company*, respondent's legal practitioners

© 2015 Juta and Company (Pty) Ltd.

Document 62 of 73

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2013/Volume 1/ZIMBABWE ELECTRICITY TRANSMISSION & DISTRIBUTION CO v RUVINGA 2013 (1) ZLR 510 (S)

ZIMBABWE ELECTRICITY TRANSMISSION & DISTRIBUTION CO v RUVINGA 2013 (1) ZLR 510 (S)

Citation 2013 (1) ZLR 510 (S)

Case No	Judgment No. S-20-13
Court	Supreme Court, Harare
Judge	Ziyambi JA, Garwe JA & Omerjee AJA
Heard	12 November 2012; *CAV*
Judgment	3 June 2013
Counsel	*T Mpofu*, for the appellant Respondent in person
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Practice and procedure – *pre-trial conference – purpose of – failure by party to attend – legal practitioner appearing only to ask for postponement – party not considered to be represented – courses open to court* D

Headnote

The purpose of a pre-trial conference is to attempt to reach a settlement between the parties and, where this is not possible, to identify issues for trial with a view to curtailing the proceedings. For this reason, the presence of both the parties and their legal practitioners are required E thereat. Where a legal practitioner attends a pre-trial conference set by a judge without his client he must have his client's instructions to take decisions on its behalf. The pre-trial conference is not a formality. It is an essential part of the proceedings and the judge will have put aside other work and studied the pleadings, in order to prepare for the F conference. It is therefore disrespectful in the extreme to wait until the time scheduled for the conference to advise the court that the parties are unable to attend. Where a legal practitioner who appears on behalf of a party has no knowledge of the party's case, is not prepared to argue it and is there only to seek a postponement, it cannot be said that the G party is represented at the pre-trial conference. In an appropriate case, the defaulting party's pleadings could be struck out.

Case information

T Mpofu, for the appellant

Respondent in person H

2013 (1) ZLR p511

Ziyambi JA

Judgment

A **Ziyambi JA:** In the court *a quo* the respondent was the plaintiff whilst the appellant was the defendant. The respondent issued summons against the appellant in the High Court for the following:

"Payment of:

(i) US$9 800, being the costs of replacing the motor;

(ii) US$208 849 B in respect of damages suffered as a result of the loss of the plaintiff's crop;

(iii) US$200 000 being damages in respect of mental anguish, anxiety and depression;

(iv) costs of suit."

The appellant filed its plea and the pleadings followed their natural course C to a pretrial conference which was set down for 23 September 2010. At this hearing the learned judge was of the view that the parties, assisted by their legal practitioners, should attempt to reach a settlement failing which she would refer the matter to trial. She accordingly directed that the parties and their legal practitioners should convene a round table conference on their D own for that purpose on 18 October 2010. For this reason the learned judge then, with the concurrence of the legal practitioners of the parties, postponed the matter to 21 October 2010 for a second pretrial conference. The appellant was then represented by Mr Vote Muza.

On 21 October 2010, neither the appellant nor its legal practitioner Mr Muza E attended at the pretrial conference and the appellant's defence was struck off with costs. The learned judge's note reads, in relevant part, as follows:

> "For PLAINTIFF: K Ncube with plaintiff
>
> For DEFENDANT: S A Tawona without client
>
> 1. RESULT: The defendant is not in attendance. Its legal practitioner was F unable to proffer a reasonable excuse for the failure by the defendant to send a representative to attend the PTC.
>
> 2. Mr *Ncube* submitted that this was the second occasion on which the defendant failed to attend the PTC without a reasonable explanation. The parties were supposed to have met yesterday to discuss settlement and plaintiff and his legal practitioner waited for them for 30 minutes. A call then came from *Muza* to say G that his client could not come because [of] a course in Kadoma.
>
> 3. The defendant has been dilatory in dealing with this PTC and having no explanation for its non-attendance on 2 occasions. I find that it is in default. The plaintiff has opposed the postponement sought and has applied for the defence to be struck off.
>
> IT IS ORDERED
>
> (1) That H the defence and plea by the defendant be and is hereby struck out.

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

The appellant filed an application in the High Court for the reinstatement of the plea. Bere J dismissed the application. This is an appeal against that dismissal.

The grounds of appeal raised five issues. They are: B

1. that the court *a quo* erred in failing to determine the issue before it which was that the plea had been struck out in error;
2. that the court *a quo* erred in concluding that the plea could properly be struck off notwithstanding that the appellant's legal practitioner was present and sought a postponement on account of the unavailability of C the appellant's representatives;
3. that the court erred in failing to conclude that the presence of the legal practitioner as well as the defence on the merits constituted good and sufficient cause entitling it to grant reinstatement;
4. that the court erred in concluding that the affidavit of Judith Tsamba D attached to the answering affidavit could not be taken into account without leave of the court
5. that the court misdirected itself in not subjecting the huge claim made by the respondent, which claim raises new issues of law, to a full trial in properly contested adversarial proceedings.

The application E

The founding affidavit was attested to by the appellant's legal practitioner Vote Muza. He averred that the matter was initially set down for a pretrial conference by Gowora J on 23 September 2010 but was postponed at the appellant's instance. The parties were to meet on 18 October 2010 for a round table conference after which they would attend the pre-trial conference F which was scheduled for 21 October 2010. However, on a date not given the engineer, one Steven Mbavavira, indicated that he was to sit for professional exams during the week beginning 25 October 2010 and would not be available for the meeting on 18 October 2010 as he had to study. He was anxious to have the meeting held, so he telephoned the appellant's secretary G and requested the attendance of another engineer. He then agreed with Mr Ncube, the respondent's legal practitioner, that the meeting would be held on 20 October at 3 p.m.

On the morning of 20 October he telephoned Mr Mbavavira intending to discuss certain issues in preparation for the meeting. During this telephone conversation, it became clear to him that it would not be possible for any other H

Ziyambi JA

A person to attend the meeting. He then took the decision that Mr Mbavavira's attendance was necessary if the meeting was to be meaningful and decided to ask Mr Ncube to defer the meeting to a date after Mbavavira's examinations.

He called Mr Ncube after 2 p.m. (the meeting was scheduled for 3 p.m.) but Ncube was out of office and he spoke to his male secretary (name not given). He explained to him that he sought to have both the meeting and the pretrial B conference postponed in view of the developments surrounding the matter. He also indicated to him that his firm would attend to the postponement of the pre-trial conference. The secretary seemed to appreciate his position. The meeting was accordingly not held and no complaints having been made by Mr *Ncube,* he felt that "everything was in place".

C It is to be noted that he did not enquire as to whether Mr Ncube had received his message and he did not attend the meeting scheduled for 3 p.m. One would have thought that he would have done so if only to see Mr Ncube and speak with him personally about the dilemma in which he found himself.

The next day he asked his assistant Mr Tawona (he did not go himself and D gives no reason for his non- attendance) to attend upon Gowora J and move a postponement. He explained to Tawona that the plaintiff would not be in attendance (of this he had no confirmation) as he had already called Mr Ncube's office and undertaken to postpone the matter in his absence.

I quote from para 15 of the founding affidavit:

> "Mr Tawona was however surprised, to find that Mr Ncube was in attendance. Mr E Ncube's position as communicated to the judge was that it was only the meeting which had been deferred but as far as he was aware the pretrial conference would not be postponed. The only reasonable inference that I can draw from what he told the judge is that my message had not been properly communicated to him. Indeed I would be loath to make riling accusations against a person of Mr Ncube's standing and experience. The fact of the matter however, is that what F he communicated to the court is not what I had communicated to his office and is a position that I do not share.
>
> The judge was persuaded by Mr Ncube's explanation and rejected that of Mr Tawona, who by the way did not expect to be arguing the issue. The judge then found that applicant was in default, although its legal practitioner was in attendance. I verily believe that in matters before the High Court, corporates appear represented by their legal practitioners. I assert that the court made its G determination not on the correct version of the facts. I will not rejoice in locating and apportioning wrong and blame. I would rather locate the error. *The error was that the message that I communicated to Mr Ncube's office is not the one transmitted to the judge and in all probability to Mr Ncube as well*. I however, state this as fact and state it on my oath of office. My communication was to the effect that the applicant wanted both the meeting and the conference postponed.
>
> H That was my communication and I stand by it.

Ziyambi JA

> It is therefore clear that the order made by the court was made in error. Vital A information was not placed before it. On the basis set out above, I would urge the court to find that reinstatement ought to be decreed as a matter of course" (emphasis added).

The application was opposed by the respondent. He questioned the *bona fides* of the application. The appellant, he alleged, had defaulted at two meetings and two pre-trial conferences that were set to resolve the matter. The appellant B had failed to show good and proper cause for the rescission of the order of Gowora J. In particular, no affidavit had been filed by Stephen Mbavarira to confirm the averments made by Vote Muza. There was no evidence that he was sitting for professional exams and even if he was so sitting there had to be someone from the institution who could have attended at the pretrial C conferences and meetings. The persistent defaults by the appellant and its legal practitioner are an indication that they were not interested in having the matter resolved expeditiously.

The grounds of appeal

Dealing with the first and second grounds, two submissions were made. The D first is that the legal representative of the appellant was present and it was open to the court to express its displeasure by different means other than striking out of the plea.

It may be noted here that the purpose of the pretrial conference is to attempt to reach settlement between the parties and, where this is not possible, to identify issues for trial with a view to curtailing the proceedings. This is the E reason why the presence of both the parties and their legal practitioners are required thereat. Where a legal practitioner attends a pre-trial conference set by a judge without his client he must have his client's instructions to take decisions on its behalf. The pretrial conference is not a formality. It is an essential part of the proceedings and the judge will have put aside other work and studied the pleadings, in order to prepare for the conference. It is F therefore disrespectful in the extreme to wait until the time scheduled for the conference to advise the court that the parties are unable to attend. *In casu* the legal practitioner who appeared on behalf of the appellant had no knowledge of the appellant's case, was not prepared to argue it and was there only to seek a postponement. In such circumstances, it cannot be said that G the appellant was represented at the pretrial conference.

The second contention under this head was that the court which struck out the plea acted on wrong information. It was submitted that the court's judgment rested on the "uninformed" views of Tawona who had not checked the position and that the details of Muza's conversation with Mr Ncube's secretary were not placed before the court. H

2013 (1) ZLR p515

Ziyambi JA

A The first thought that comes to mind is that if, as was submitted on behalf of the appellant, Tawona was its representative, why was he uninformed? Why did he not have proper instructions? And if Muza was the one possessed of the necessary information and seized with the conduct of the case, why did he not attend the pretrial conference and take decisions on behalf of his client if the latter was for good reason unable to attend? The founding affidavit is B silent on why Muza did not himself attend to the postponement.

In any event, can it be said that had the judge been informed of Muza's conversation with Ncube's secretary she would not have given the judgment that she did? I think not. Any legal practitioner worthy of his calling will know that he cannot rely on a conversation with a secretary, without more, to C excuse him from attendance at a pre-trial conference in defiance of a judge's directive. The fact that Muza made no effort to ascertain that Ncube had received his message and the additional fact that he refrained from attending the pre-trial conference would seem to suggest a considered decision by both the appellant and Muza to play for time by getting the pre-trial conference D postponed.

Rule 449 of the High Court Rules permits the High Court to rescind, vary or correct a decision erroneously given. While the learned judge made no specific reference to the issue of error on the part of the Gowora J, I am inclined to agree with the respondent that this application was not based solely on E an alleged error by the learned judge. The allegations made therein, while including the allegation of error, were also of a general nature explaining the appellant's absence at the pretrial conference and stating the prospects of success as well as the reasons why the matter should go to a full trial. This is not a case where there existed a valid cause for the absence of the appellant and Mr Muza which cause was unknown to the judge at the time the order F striking out the plea was made. Indeed, no valid reason was advanced before the court *a quo* which would persuade it that the judgment was erroneously given. Further, the explanation given to Gowora J conflicted with that given by Vote Muza in the founding affidavit.

In any event, for such an application to succeed the error would have to G be obvious on the papers. If for instance, both the appellant and its legal practitioner had been involved in a serious accident on their way to the pre-trial conference unknown to the judge and the respondent's legal practitioner, it would have been quite obvious to the court that its judgment was granted in error. It follows that I do not agree with the submission by Mr Mpofu that H the plea was "clearly" struck out in error.

2013 (1) ZLR p516

Ziyambi JA

What is apparent from the judgment of the court *a quo* is that the court A considered the totality of the circumstances in which the plea had been struck out and came to the conclusion that the appellant had shown no good cause for the rescission of the judgment and the reinstatement of the plea.

With regard to the third ground of appeal, the finding that the appellant was in effect unrepresented, leaves only one question to be considered and that is B whether the court ought to have granted reinstatement in view of the defence on the merits. The learned judge reasoned as follows:

> "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 C complaining about the burnt electric motors which had been caused by low voltage leading to 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 which was to the following:
>
> > 'We acknowledge receipt of your letter dated 6 January 2010 whose contents D 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 E made from 100 kVA to 315 kVA. The LT line will be uprated from 50mm2 HAD to 100mm2 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 F founding affidavit filed for and on behalf of the applicant. This conflicting approach in dealing with this matter neither edifies the applicant's defence nor portrays Vote Muza in good light. If anything it casts reasonable doubt on the *bone fides* of the application filed.
>
> In para 11 of his notice of opposition to the application the respondent had challenged the applicant why its entire institution had failed to nominate a G representative to represent it at the pre-trial conference of 21 October 2010. In response, and in his answering affidavit, Vote Muza then grudgingly referred to the affidavit of Judith Tsamba 'filed herewith.'"

Since the appellant's case must stand or fall on its founding affidavit, the affidavit of Judith Tsamba was correctly rejected, having been appended to the answering affidavit without leave of the court. H

2013 (1) ZLR p517

Ziyambi JA

A I agree with the observations of the court *a quo,* that through its conduct and via its chosen counsel, the appellant deprived itself of the opportunity to clearly ventilate the issues in fully contested adversarial proceedings. It has only itself to blame if the result is not to its satisfaction. The conclusion reached herein also disposes of the fourth ground of appeal.

With regard to ground 5, the issue of the magnitude of the claim is a matter B for determination by the court before which the matter is placed on the unopposed roll. It cannot on its own constitute good and sufficient cause for setting aside the judgment entered in default.

In the result no good grounds have been established for interference by this Court with the judgment of the court *a quo*.

C Accordingly the appeal is dismissed with costs.

GARWE JA and OMERJEE AJA concurred.

D *Muza & Nyapadi*, appellant's legal practitioners

© 2015 Juta and Company (Pty) Ltd.

Document 63 of 73

Source:

GRANARY INVESTMENTS (PVT) LTD v PIANIM 2013 (1) ZLR 518 (H)

Citation	2013 (1) ZLR 518 (H)
Case No	HH-180-13
Court	High Court, Harare
Judge	Chigumba J
Heard	28 March 2013; *CAV*
Judgment	5 June 2013
Counsel	*L Uriri,* for the applicant *I E G Musimbe,* for the respondent
Case Type	Civil application
Annotations	No case annotations to date

Flynote

Practice and procedure – *execution – sale – dwelling house – house owned by company but occupied by director and family – company entitled to apply under r 348A(5a) for sale to be postponed – not necessary that execution debtor be a natural person for relief under rule to be available* D

Headnote

The applicant company owned a house in which a director and her family lived. The house was advertised for sale following judgment obtained several years earlier against the company. The applicant sought a stay of execution of the judgment, pending determination of an application for rescission of the judgment. The director also averred that the notice E of attachment served by the deputy sheriff was defective, not being in the prescribed form. The respondent argued that that the property in question did not qualify to be a dwelling for purposes of r 348A(5a) of the High Court Rules because it was registered in the name of a company, which is incapable of "dwelling" anywhere. The director challenged the averment that a dwelling house must be owned by an individual as F opposed to a company.

Held, that it was not necessary that the execution debtor be an actual person with a family, as opposed to a company. The definition of "dwelling house" in r 348A did not stipulate that the building ought to be registered in the name of a natural person as opposed to a juristic person, a company. G The question was simply whether the building was a dwelling which is capable of housing a single family. There was no reason why the fact that the property in question was owned by a company should preclude or disqualify the company from consideration for relief in terms of r 348A(5a). The rule was designed to prevent undue hardship to a judgment debtor who was in occupation of the property in question, resulting H

A from a sale in execution. The loss of a property of considerable value, in the circumstances of this case, would constitute undue hardship to the applicant, and to its director and shareholder, who was in occupation.

In terms of r 348A(5a), the execution debtor may, within ten days of the service of a notice of execution, apply for the postponement of suspension of the sale. However, the notice must be a

valid one; an invalid notice B is no notice.

Cases cited

Chimbadzo & Anor v Nkosana & Anor HH-153-92

Divine Homes (Pvt) Ltd v Sheriff of Zimbabwe S-54-03

Legislation considered C

Companies Act [*Chapter 24:03*], s 9

High Court rules 1971 (RGN 1047 of 1971), r 348A(1), (5a), (5e)(a) & (b)(i), (ii) and (iii)

Case information

D *L Uriri,* for the applicant

I E G Musimbe, for the respondent

Judgment

Chigumba J: This matter came to life as an urgent chamber application in terms of Order 40 r 348A(5a) of the High Court Rules 1971 (stopping of E sale to facilitate settlement of claims) on 25 November 2011. The relief that was being sought by Granary Investments (Pvt) Ltd (hereinafter referred to as Granary Investments) was:

1. For the sale in execution of Lot 66A Borrowdale Estate to be suspended pending determination of an application for rescission of judgment and stay of execution in case number HC 9363/03
2. That F applicant files an application for rescission of judgment and stay of execution within ten days of the date of the order.
3. That the respondent pays costs of suit.

The urgent chamber application was subsequently referred to the opposed roll in July 2012. This court is now seized with an opposed application for G suspension of a sale in execution of a dwelling house. Minora Koshen, née Omar, deposed to the founding affidavit in which she states that she is a director and shareholder of the applicant company, Granary Investments, which is the registered owner of the residential property known as Lot 66A Borrowdale Estate, or number 9 Kingsmead Road, Borrowdale, Harare. H She averred that this property was purchased by Granary Investments as a

---

residential family home, and that she has been residing there for the past ten A years, with her husband and children.

She submitted that she was surprised and horrified to receive notification from the Deputy Sheriff, on 23 November 2011, that her home had been advertised for sale by auction. The sale was pursuant to a Notice of Attachment issued in case number HC 9363/03 on 18 February 2004. Judgment in that matter B had been obtained on 27 November 2003, wherein it was ordered that:

1. Livre Investments (Pvt) Ltd, and Granary Investments, pay to the respondent the sum of US$512 000, alternatively ZW$421 888 together with interest thereon at the rate of 30% per annum calculated from 13 July 2002 to the date of final payment. C
2. Livre Investments and Granary Investments pay the respondent's costs of suit.

Minora Koshen averred that at no time during the ten years that she has been in occupation of the property in question was she served with any court process. She submitted that the court orders were obtained in a clandestine D manner, deliberately without notice to Granary Investments or to her. She contended that she has no idea why the respondent deliberately waited seven years to sell the property in execution. Finally, she submitted that the notice of attachment served on her by the Deputy Sheriff is defective; it is not the prescribed form number 43 in terms of r 347(4) of the rules of this court. E The notice served on her was repealed by SI 80 of 2000.

The respondent raised various points *in limine* in his opposing affidavit. He averred that the property in question does not qualify to be a dwelling for purposes of r348A(5a) because it is

registered in the name of a company which is incapable of "dwelling". The respondent's view is that the provisions F of r 348A(5a) must be fulfilled conjunctively. In other words, the court must satisfy itself that:

(a) r 348A(5e)(a): the dwelling concerned is occupied by the execution debtor and his family and that, it is likely that if it is sold, they would suffer great hardship, or G

(b) r 348A(5e)(b)(i): the execution debtor has made a reasonable offer to settle the judgment debt, or

(c) r 348A(5e)(b)(ii): the occupant of the dwelling concerned requires a reasonable period within which to secure alternative accommodation, or H

2013 (1) ZLR p521

Chigumba J

(d) r 348A(5e)(b)(iii): there A is some other good ground for postponing or suspending the sale of the dwelling concerned or the eviction of its occupants.

The respondent contended that the applicant ought to fulfill all subrr (5e)(a) and (5e)(b)(i) to (5e)(b)(iii), in order to establish entitlement to the relief that B it seeks. The respondent contended further that an application for rescission of judgment does not fall within the provisions of subr (5e)(b)(iii) (some other good ground), to entitle the applicant to relief in terms of r 348A(5a).

The applicant submitted that an application for suspension of a sale in execution of a dwelling house pending determination of an application for rescission of judgment and stay of execution can correctly be made in terms C of Order 40 r 348A(5e)(b)(iii), which should be read disjunctively with (5e)(b)(i) and (5e)(b)(ii), because of the use of the word "or" between (5e)(b)(i), (5e)(b)(ii), and (5e)(b)(iii).

In its answering papers, the applicant vigorously challenged the averment that a dwelling house must be owned by an individual as opposed to a company, D for purposes of r 348A(5a). The Sheriff, in his report dated 17 April 2012 raised various issues of concern to him such as whether in terms of r 348A(5a) the fact that immovable property is owned by a company which is separate and distinct from its shareholder should affect the outcome of the matter. In other words, whether r 348A(5a) requires that the judgment debtor be a natural person who is capable of living in the property in question, and further, E whether the provisions of the rule apply to a judgment debtor who does not make a payment proposal or arrangements for alternative accommodation.

I am persuaded by the applicant's argument, however, that the provisions of r 348A(5e)(b)(i) to (b)(iii) ought to be read disjunctively because of the use of the word "or", between (b)(i) to (b)(iii). I find that the application for F rescission of judgment and stay of execution constitutes "some other good ground", for postponing or suspending the sale of the dwelling concerned. I disagree with the submission made by the respondent, that r 348A(5a) envisages an execution debtor who is in fact an actual person with a family, as opposed to a company. Part of the reason for this finding is based on the definition of a dwelling house which is set out by r 348A(1)as:

> G "a building or part of a building including a flat designed as a dwelling for a single family and includes the usual appurtenances and outbuildings associated with such a building".

My interpretation of this definition is that a dwelling for purposes of r 348A is a building capable of being occupied by a single family. There is nothing H in this definition that stipulates that the building ought to be registered in

---

2013 (1) ZLR p522

Chigumba J

the name of a natural person as opposed to a juristic person, a company. The A question in my view is simply whether the building is a dwelling which is capable of housing a single family.

I find more support for this view in the wording of r 348A(5a) wherein it is stated that:

> ". . .where the dwelling that has been attached is occupied by the execution debtor B or members of his family. . ."

In my view it is not stipulated that the execution debtor must be a natural person. Section 9 of the Companies Act [*Chapter 24:03*] states that:

> "A company shall have the capacity and powers of a natural person of full capacity in so far as a body corporate is capable of exercising such powers".

It is accepted that Minora Koshen (the deponent to the founding affidavit) C is a director of Granary Investments, which is a separate and distinct legal persona from its directors. It is trite that a company can only act through its directors and officers. I see no reason why the fact that the property in question is owned by a company should preclude or disqualify the company from consideration for relief in terms of r 348A subr (5a) of the rules of this D court. In my view, the rule was designed to prevent undue hardship to a judgment debtor who is in occupation of the property in question, resulting from a sale in execution. The loss of a property of considerable value, in the circumstances of this case, would constitute undue hardship to Granary Investments, and to its director and shareholder, who is in occupation. Minora E Koshen is wearing two hats, that of an occupier, and that of a director of the applicant. She is an occupier as an individual, and again in her capacity as a director and officer of the applicant, and she is imbued with capacity to act on the applicant's behalf. The point *in limine* that only a natural person is entitled to relief under r 348A(5a) is hereby dismissed.

Having already found that the provisions of r 348A (5e)(b)(i) to (b)(iii) ought F to be read disjunctively because of the use of the word "or" which means "alternatively", in that context, I hereby dismiss the respondent's point *in limine* that the applicant is not entitled to the relief that it seeks unless or until it makes a proposal to settle the debt and proposes a date by which to secure alternative accommodation. G

Another point *in limine* raised is that the chamber application ought to have been filed within ten days of 18 February 2004, the date when the property in question was placed under judicial attachment, and that, in the absence of an application for condonation of late filing of the chamber application on 25 November 2011, the current application is not properly before the court, and ought to be dismissed. H

2013 (1) ZLR p523

Chigumba J

A The respondent submitted that the application for condonation of late filing ought to be dismissed because the applicant's explanation for the delay in filing was not reasonable, and that the application for condonation ought to have been made separately from the chamber application. The respondent referred the court to *Divine Homes (Private) Limited v Sheriff of Zimbabwe* S-54-03 as authority for the proposition that condonation of the non-observance of B the rules is by no means a mere formality and that it is for the appellant to satisfy the court that there is sufficient cause to excuse him from compliance. The respondent also relied on *Chimbadzo & Anor v Nkosana & Anor* HH-153-92 at pp 5 and 6 where it was held that:

> ". . . If the application is out of time it is in reality two separate applications, one for condonation, and the second on the merits".

C I am inclined to agree with the respondent that the applicant erred by filing the chamber application out of time and that its explanation for the delay is not believable or reasonable. There is need to make a separate and formal application to this court, to justify the applicant's non-compliance with the rules, and seeking the court's permission to proceed. The respondent's point D *in limine* in regard to the question of whether the chamber application was filed out of time is hereby upheld.

Turning to the merits of the matter, the respondent averred that, one Joosbi Sams Omar, a sole shareholder of the applicant at the time that the parties entered into the agreement of sale of shares, mortgaged the property in E question to the respondent as security for the payment of the purchase price of shares belonging to the respondent. The respondent stated that he placed a caveat, number 66/2004, on the title deeds of the property, after judgment was obtained, and that correspondence was exchanged in 2010 with the applicant's legal practitioners, who sought his requirements for uplifting the caveat. This according to the respondent shows that the applicant, and/or F its duly authorized agents, have always been aware of the existence of the judgment. The respondent averred that Minora Koshen is not being candid with the court, when she states that she only became aware of the judgment sometime in 2011.

The applicant submitted that no prejudice would be suffered by the respondent were this application to be granted, especially in light of the evidence that the G execution creditor chose to wait seven years to execute the judgment debt, a sign that he is not in a hurry to recover his money. At the hearing of the matter, the court's attention was brought to an application for condonation of late filing of an application for rescission of judgment and an application for rescission of judgment

which had been filed under case number HC H 9363/03, between the same parties. The applicant admitted to also having

---

2013 (1) ZLR p524

Chigumba J

filed the chamber application in terms of Order 40 out of time, and made an A oral application for condonation of late filing of the chamber application.

Counsel for the applicant submitted that r 348A(5a) clearly provides that an application must be filed within ten days of the service of the notice of attachment. He submitted that the ten day notice period only begins to run when a valid notice has been issued in terms of the rules and validly served B on the occupier of the premises. SI 80 of 2000 brought into effect a new form number 43 which requires service on:

(a) the execution debtor; and

(b) the occupier of the premises.

It is not in dispute that Annexure 'C' to the founding affidavit is not the new C form number 43. Annexure 'C' was repealed and replaced with different requirements by SI 80 of 2000. It is common cause that the Sheriff served the old and invalid form number 43 on the occupier of the property in question. I find the applicant's argument persuasive, that in the absence of service of a valid form number 43 to the applicant and to the occupier of the property D in question the ten day stipulated period within which to respond, does not begin to run. It is my view that the purported service was invalid; it failed to comply with the provisions of r 348A of the rules of this court.

The Sheriff must comply with the rules of this court and serve proper notice of the sale in execution on the applicant (judgment debtor) and on the E occupier of the property in question Minora Koshen. After proper service of the notice, the ten day period will begin to run. As things stand, neither the applicant Granary Investments, nor the occupier of the property in question has been put on the clock. It is thus not necessary that the applicant apply for condonation of late filing of the chamber application. The applicant is not late. F

No prejudice will be suffered by the respondent if the Sheriff is ordered to serve a fresh notice of sale in execution which complies with the rules of this court. The respondent has placed a caveat over the property and is in possession of the title deeds. On the other hand, Granary Investments stands to lose significant sums of money. Its director and shareholder who is in occupation will suffer great hardship if she is unceremoniously uprooted G from her home of ten years. The equities of the matter and the balance of hardship persuade me to exercise my discretion in favor of the applicant.

The application is allowed. It is hereby ordered that;

1. The sale in execution reference number SS 194/11 of Lot 66A Borrowdale Estate, measuring 4070 square metres be and is hereby suspended, H

2013 (1) ZLR p525

Chigumba J

A pending determination of an application for rescission of judgment and stay of execution in case number HC 9363/03.

2. That the applicant shall file an application for set-down of the application for rescission of judgment and stay of execution within ten days of the date of this order.

3. Respondent B shall pay costs of suit.

Hussein Ranchhod & Company, applicant's legal practitioners

C *I E G Musimbe & Partners*, respondent's legal practitioners

---

© 2015 Juta and Company (Pty) Ltd.

Document 64 of 73

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2013/Volume 1/MUSEMBURI & ANOR v TSHUMA 2013 (1) ZLR 526 (S)

MUSEMBURI & ANOR v TSHUMA 2013 (1) ZLR 526 (S)

Citation	2013 (1) ZLR 526 (S)
Case No	Judgment No. S-39-13
Court	Supreme Court, Harare
Judge	Malaba DCJ (in chambers)
Heard	5 June 2013
Judgment	5 June 2013
Counsel	First and second applicant in person *K Maereresa*, for the respondent
Case Type	Application for condonation and for extension of time
Annotations	No case annotations to date

Flynote

Legal practitioner – *conduct and ethics – duties – failure to adhere to time limits laid down in rules of court – extent to which litigant can be absolved*

Headnote

Generally, there is reluctance by the courts to visit the sins of the legal practitioner on an applicant for condonation for failure to comply D with the requirements of the rules of court. However, there is a limit to the extent to which a litigant should escape the results of his legal practitioner'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. Consideration *ad misericordiam* should not be E allowed to become an invitation for laxity. The legal practitioner, after all, is the agent whom the litigant has chosen for himself, and there is little reason why, in regard to condonation for failure to comply with a rule of court, the litigant should be absolved from the normal consequences of such a relationship. F

Cases referred to

Crundall Brothers (Pvt) Ltd v Lazarus NO & Anor 1991 (2) ZLR 125 (S)

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

Mubango v Undenge HH-110-06

Supreme Svc Station (1969) (Pvt) Ltd v Fox and Goodridge (Pvt) Ltd G 1971 (1) RLR 1 (A); 1971 (4) SA 90 (RA)

Case information

First and second applicant in person

K Maereresa, for the respondent H

Malaba DCJ

Judgment

A **Malaba DCJ:** This is an application for condonation of late filing of an appeal. The application is also for an extension of time within which to note an appeal.

Briefly the facts are as follows. On 11 March 1984 the first applicant and the second applicant, his brother, entered into an agreement of sale of house No. B 18 Ridgeway South, Highlands, Harare, with one M T Ncube. The terms of the agreement of sale were that the first deposit was to be paid upon signing of the agreement on 11 March 1984, and the last payment was to be made no later than the close of business on 31 March 1985. It is not in dispute that the applicants failed to pay the deposit in terms of the agreement, it is also not in dispute that they did not pay the last instalment towards the C purchase price by 31 March 1985. The applicants were therefore in breach of the agreement. On 11 June 1985 Mr Ncube cancelled the agreement, just a day before the applicants had secured a loan from CABS for payment of the balance on the purchase price.

Then on 31 October 1985 in case no. M 19592/85 the applicants instituted D proceedings in the magistrates court seeking to enforce terms of agreement by an order directing Ncube to transfer property to them. This was despite the fact that they had not paid the full purchase price and were in breach of the agreement which had already been cancelled. However, on 17 July 1986, the claim was dismissed in default. A subsequent application by the applicant E for rescission of judgment was also dismissed in default. The applicants appealed to the High Court and the appeal was dismissed.

Meanwhile, on 5 September 1988 Ncube entered into an agreement of sale with the respondent. He indicated to the respondent that the house was occupied by tenants to whom he had earlier on sold the house but they had failed to F pay the purchase price. Mr Tshuma was shown the letter of cancellation of the agreement to the applicants. The respondent made mortgage bond arrangements with CABS and secured the property, and a deed of transfer was registered in his name on 5 April 1989.

When he sought to evict the applicants they opposed the eviction. The matter initially went before Mtambanengwe J on 10 June 1992 in case no. G HC 2958/90 in which he dealt with actions in both case no. HC 1182/86 and case no. HC 2026/86. In HC 1182/86 judgment had been rescinded and in case no. HC 2026/86 the respondent sought eviction. In his judgment the learned judge held that the law on the subject of applications of this sort was to apply the test of "what might a reasonable court do", as discussed in H *Supreme Service Station (1969) (Pvt) Ltd v Fox and Goodridge (Pvt) Ltd*

Malaba DCJ

1971 (1) RLR 1 (A); 1971 (4) SA 90 (RA). Furthermore, in applying this A test he bore in mind the *dicta* of Beadle CJ in *Supreme Service Station*.

Having analysed the evidence in both cases, the learned judge held, further, that he entertained no doubt as to what a reasonable court might do and would grant absolution from the instance without any fear that he might be doing the plaintiff an injustice. In addition, in respect of case no. HC 2026/86 B where the respondent was suing the applicants and Ncube for eviction, Mtambanengwe J held that, although Tshuma denied taking a deliberate risk, his own evidence showed that he was aware that legal wrangles between Ncube and the Musemburis were yet to be resolved when he accepted the offer of sale of the property from Ncube. Therefore on the evidence, the defendants were entitled to an order of absolution from the instance in this matter. C

The matter was again brought before Karwi J on 20 January 2010 in case NO. HC 755/94. The learned judge held that the respondent had properly acquired the property which was registered in his name as a holder of title. He held further that the respondent had a better right to the property than the appellant. In particular, he found that the respondent took transfer at a D time when the owner of the property Mr Ncube, had cancelled agreement between him and the applicants. In principle, the learned judge found that the respondent had no knowledge of the rights of the applicants in the property in terms of the agreement with Mr Ncube.

It was therefore the court's finding that there was no basis upon which the E respondent could be ordered to retransfer the property to the applicants because even as at the time of the decision, the

applicants had not paid the full purchase price. As a result an order for the eviction of the applicants from the house was granted.

The applicant sought to note an appeal to the Supreme Court against the judgment of Karwi J. On 5 July 2010 Sandura JA struck off the appeal F from the roll on the ground that the notice of appeal was fatally defective for non-compliance with r 29(1)(a) of the Supreme Court Rules 1964. Nothing happened thereafter until 31 December 2012, when an application for condonation for late noting of an appeal and extension of time in which to file an appeal was made. The delay in noting the appeal is 18 months. G

The explanation given by the applicants for this inordinate delay is negligence of their erstwhile legal practitioners. The first applicant stated that there was infighting within the firm of their erstwhile legal practitioners, which caused inaction on their part in regularising the defective notice of appeal. He says after the erstwhile legal practitioners renounced agency on 16 June 2011, he took their file and made this application. Mr *Maeresera* for the respondent H

Malaba DCJ

A argued that the reasons for the delay are unacceptable; it was his argument that the applicants cannot escape the consequences of the negligence of their erstwhile legal practitioners. The applicants were themselves to blame for sticking to the legal practitioners when it was clear to them that they were not acting according to their instructions.

On prospects of success on appeal, the first applicant contended that Karwi B J misdirected himself in holding that the respondent did not know there was a case of double sale. He said Mtambanengwe J correctly held that the respondent was not truthful. For the respondent, Mr *Maeresera* argued that the judgment by Karwi J was unassailable, particularly when regard is had to the fact that the applicant had not paid the full purchase price at the C time of judgment.

It is the court's view that the applicants have failed to substantiate their application. In an application for condonation a court is enjoined to consider the three factors, namely, length of the delay, the explanation for the delay and the prospects of success. I will consider each in turn:

D **Length of delay**

There has been an inordinate delay of 18 months in making the application. There was therefore need for an acceptable explanation for such a long delay

Explanation for the delay

The negligence of the applicants' erstwhile legal practitioners, which is E pleaded by the first applicant, cannot be accepted as a reasonable explanation.

The applicants share the blame for the delay in two respects. When they realised that the erstwhile legal practitioners were acting against their interests they took no action to protest against it. After the legal practitioners renounced agency on 16 June 2011 it took the applicants 18 months to make F this application.

In *Mubango v Undenge* HH-110-06 Chatukuta J had this to say about the responsibility of litigants in ensuring that their legal practitioners act diligently:

> "Generally, there is reluctance by the courts to visit the sins of the legal practitioner on the applicants. However, the courts have held that there is a limit of the extent to which a litigant should escape the results of his/her legal practitioner's sins. G In *Kodzwa v Secretary for Health and Anor* 1999 (1) ZLR 313 (S) at 317E, Sandura JA cited with approval Steyn CJ in *Saloojee & Anor v Minister of Community Development* 1965 (2) SA 135 (A) at 141 C-E that:
>
> > 'I should point out, however, that it has not at any time been held that condonation will not in any circumstances be withheld if the blame lies with the attorney. There is a limit beyond which a litigant cannot escape H the results of his attorney's lack of diligence or the insufficiency of the

---

Malaba DCJ

> explanation tendered. To hold otherwise might have a disastrous effect upon A the observance of the rules of this court. Consideration *ad misericordiam* should not be allowed to become an invitation for

> laxity. In fact, this court has been lately burdened with an undue and increasing number of applications for condonation in which the failure to comply with the rules of this court was due to negligence on the part of the attorney. The attorney, after all, is the agent whom the litigant has chosen for himself, and there B is little reason why, in regard to condonation for failure to comply with a rule of court, the litigant should be absolved from the normal consequences of such a relationship.'"

The first applicant's explanation for the delay is not reasonable because they knew of the decision of 5 July 2010 by Sandura JA during the period.

Prospects of success C

In a case where there is no reasonable explanation for an inordinate delay, then there should be good prospects of success. In *de Kuszaba–Dabrowski et uxor v Steel NO* 1966 RLR 60 (A) at 64 Beadle CJ remarked as follows:

> ". . . the more unsatisfactory the explanation for the delay, so much greater must be the prospects of success of the appeal be, before the delay will be condoned D and the converse must of course be equally true, the more satisfactory are the explanations for the delay, the more easily will the court be inclined to condone the delay provided it thinks there is some prospects of the appeal succeeding."

In this case the court agrees with Mr *Maeresera* that there are no prospects of success. An examination of the judgement of Karwi J shows that he carefully assessed the facts and correctly applied the law of double sales. E

The principles which apply where a person sells a property to two or more persons separately were set out by this court in *Crundall Brothers (Pvt) Ltd v Lazarus NO & Anor* 1991 (2) ZLR 125 (S) at 132G-133C. The court adopted the approach set out by the late Professor McKerron in his article, "Purchaser with Notice" (1935) 4 *SA Law Times* 178. The conclusions reached by Professor Mackerron were that: F

> "It is submitted that where A sells a piece of land to B and then to C. . ..the rights of the parties are as follows:
>
> (1) . . .
>
> (2) Where transfer has been passed to C, C acquires an indefeasible right if he had no knowledge, either at the time of the sale or at the time he took transfer, of G the prior sale to B, and B's only remedy is an action for damages against A. If, however, C had knowledge at either of those dates, B, *in the absence of special circumstances affecting the balance of equities*, can recover the land from him, and in that event, C's only remedy is an action for damages against A."

This case falls into the second category of facts set out by the learned professor. The respondent entered into the agreement of sale with Mr Ncube, at a time H

Malaba DCJ

A when the agreement of sale with the applicants had been cancelled. There was no evidence at all that the respondent had prior notice of the interests of the applicants, apart from the fact that they were tenants who had been offered an option to purchase, but had not performed in accordance with the agreement. It is trite that a registered owner has a better right. According to *Wille's Principles of South African Law* 8 ed p 259:

> B "The registration of title in one's name constitutes the registration of a real right in the name of that person. A real right is a right in a thing which entitles the holder to vindicate his right, i.e. to enforce his right in the thing for his own benefit as against the world; that is against all persons whatsoever."

If regard is had to the definition by *Wille* above, the findings by Karwi J cannot be faulted. The court *a quo* correctly found that in such a case, the C respondent, being the holder of a registered title to the property, had a better right than the applicants.

In the circumstances the application is dismissed with costs.

D *Venturas & Samukange*, respondent's legal practitioners

© 2015 Juta and Company (Pty) Ltd.

Document 65 of 73

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2013/Volume 1/ORDECO (PVT) LTD v GOVERE & ANOR 2013 (1) ZLR 532 (H)

ORDECO (PVT) LTD v GOVERE & ANOR 2013 (1) ZLR 532 (H)

Citation	2013 (1) ZLR 532 (H)
Case No	Judgment No. HH-179-13
Court	High Court, Harare
Judge	Chigumba J
Heard	20 March 2013; *CAV*
Judgment	5 June 2013
Counsel	*E T Moyo,* for the applicant *N Bvekwa,* for the first respondent
Case Type	Opposed application
Annotations	No case annotations to date

Flynote

Company – *director – liability for company's debts – director acting recklessly, grossly negligently or fraudulently – limited liability of director no longer available – director may be held personally liable for debts*

Headnote

The applicant made an application for an order declaring the first respondent D to be personally liable for the judgment debt of a company, Coldrac Products (Pvt) Ltd, which amounted to US$112 000 plus interest. The applicant alleged that the first respondent was a director of Coldrac but the first respondent denied the allegation. The applicant contended that Coldrac, despite being in dire financial straits, continued to carry on E business knowing full well that it would be unable to meets its rental and other obligations as a tenant and continued to incur debts, despite having ceased to operate in August 2011. The court's findings was that it was satisfied that the first respondent held himself out to be, and acted as, a director of Coldrac. The application was based on the averment that F the first respondent, personally or with the other directors of Coldrac, carried on the business of the company recklessly or with intent to defraud the creditors of Coldrac.

Held, that the limited liability of company directors is afforded to persons who conduct business through the medium of a company. It is not there to protect them against conduct which is reckless or that takes place with G fraudulent intent. Once a court has found the conduct of the director to be reckless, grossly negligent or motivated by fraudulent intent, then the principle of limited liability in the conduct of company business ought to be set aside. Proof of fraud is an essential requirement and, in order to establish this element, it must be proved that the director made a false representation with intent to deceive. The representation H

A to creditors that the company had sufficient funds to make payment to the creditors concerned would constitute such a misrepresentation. A director who was knowingly party to the carrying on

of business by the company recklessly and with intent to defraud its creditors should be held personally responsible, without limitation of liability, for the discharge of a judgment debt obtained against the company arising out B of that misrepresentation.

Cases cited

Alcock v Mayhew 1990 (2) ZLR 346 (H)

Barnsley v Harambe Hldgs & Anor 2012 (1) ZLR 265 (H)

C *Pitelli v Everton Gardens Projects CC* 2010 (5) SA 171; [2010] 4 All SA 357 (SCA)

Legislation considered

Companies Act [*Chapter 24:03*], ss 115,187 and 318

Case information

D *E T Moyo,* for the applicant

N Bvekwa, for the first respondent

Judgment

Chigumba J: This is an application in terms of s 318 of the Companies Act [*Chapter 24:03*] for an order declaring the first respondent to be personally liable for the judgment debt of Coldrac Products (Pvt) Ltd t/a Tacoola E Beverages, in case no. HC 3159/11.

The relief that the applicant seeks is that:

1. the first respondent be declared to be personally liable for the payment of the entire judgment debt against Coldrac Products (Pvt) Ltd t/a Tacoola Beverages (hereinafter referred to as "Coldrac"), in case no. HC3159/11;
2. the F first respondent pay the sum of US$112 000, together with interest thereon calculated at the rate of 5% per annum, with effect from 1 December 2011, to the date of payment in full, within seven days of the date of this order, failing which the applicant shall be entitled to execute this order against the first respondent's immovable property'
3. a G declaratory order declaring the first respondent's immovable properties, registered under Deeds of Transfer DT 8110/99 and DT 3472/07 executable to satisfy thejudgment debt;
4. the first respondent pays costs on a legal practitioner and client scale.

This application is based on the averment that the first respondent, personally H or together with the other directors of Coldrac, carried on the business of

---

Chigumba J

the company recklessly or with intent to defraud the creditors of Coldrac, A in particular the applicant. The background to this application is that: on 8 November 2011 an order by consent was entered into whereby the applicant (the plaintiff in that matter) agreed with Coldrac (the first defendant) and David Govere (the second defendant), that:

(a) the first defendant shall pay the plaintiff the sum of $87 000 being the B amount of outstanding rentals;

(b) the first defendant shall pay the plaintiff $21 400, being the amount of outstanding operating costs;

(c) the first defendant shall pay the plaintiff the sum of $ 3 500, being the plaintiff's wasted legal costs on a legal practitioner and client scale; C

(d) the second defendant shall be absolved from the instance;

(e) all payments shall be made to the plaintiff in thirteen equal monthly instalments payable by the last day of each month, commencing in December 2011, failing which the plaintiff shall be entitled to execute on the entire outstanding amount. D

The applicant contended that at all material times, from the time that it leased its premises to Coldrac (the lease from which the judgment debt arose) it knew the first respondent as the main director of Coldrac. It contended further that the first respondent admitted to being a director of

Coldrac in the opposing affidavit in a case between the same parties, and tendered proof of the first respondent's directorship in Coldrac by way of a letterhead which, on 10 E June 2011, listed him as one of the directors of Coldrac.

According to the applicant, the conduct of the directors of Coldrac which brings them squarely within the ambit of s 318 of the Companies Act is firstly, failing to ensure that the company returns pertaining to past and present directors, namely the form CR14, were updated to reflect the correct F directorship. Secondly that, despite being in dire financial straits from May 2010 as evidenced by the payment plan attached to this application, Coldrac continued to carry on business knowing full well that it would be unable to meet its rental and other obligations as a tenant of the applicant. Coldrac continued to incur debts, despite having ceased to operate in August 2011. The applicant averred that it has no other remedy available to it. It also G submitted that it has no knowledge of the current whereabouts of the other directors of Coldrac.

The first respondent denied being a director of Coldrac and pointed out that, according to the form CR14 at the Companies Registry Office, the directors of Coldrac are listed as Mark Kopecky; James Eaton; John Owen; and Denzil H

Chigumba J

A Essof. The first respondent admitted to being a director of Coldrac between 2004 and 2007, in what is described as an "unofficial capacity", because he acquired only 80 per cent of the shareholding in Coldrac, with the original shareholders retaining 20 per cent of the shareholding. He denied trading recklessly or with intention to defraud the creditors of Coldrac during the period that he was an unofficial director. He denied ever personally running B the affairs of Coldrac or ever personally dealing with the applicant, or that he was the brains behind Coldrac as alleged.

In reply, the applicant contended that it is immaterial whether the first respondent ran Coldrac personally for purposes of establishing liability in terms of s 318 of the Companies Act. It averred that, in fact, by virtue of C having entered into the order by consent in which Coldrac undertook to discharge its indebtedness to the applicant, knowing full well that Coldrac was unable to pay as agreed, it could be said that the first respondent brought himself squarely within the four corners of s 318.

The issues that fall for determination by this court are:

(a) whether, D at all material times, the first respondent was a director of Coldrac, the judgment debtor;

(b) whether the first respondent and or the other directors, knowingly conducted the business of Coldrac in a reckless manner, or with intent to defraud its creditors, including the applicant, or with gross negligence;

(c) whether E the first respondent's immovable properties should be declared executable to satisfy the applicant's judgment debt;

(d) whether the first respondent should be ordered to pay costs on a legal practitioner and client scale.

Directorship of Coldrac

F At the hearing of the matter the applicant submitted that it had adduced sufficient evidence to demonstrate that the first respondent was, at all material times, a director of Coldrac, by way of the company letterhead, and various documents alluded to in the application, and by the first respondent's own admission to that effect. It is this court's finding that it is satisfied that the first respondent held himself out to be a director of Coldrac. The first G respondent's "unofficial directorship" status was known only to him and the other directors. His name was on the letterhead of Coldrac as a director. He negotiated contracts for, and signed letters in his capacity as a director of, Coldrac. His actions gave rise to a general impression that he was a director of Coldrac. The creditors of Coldrac relied on their previous dealings with the H first respondent in which he held himself out to be a director of Coldrac. The

---

Chigumba J

onus was on the first respondent to ensure that the formCR14 was altered to A reflect the fact that he was now a majority shareholder and director of Coldrac.

Section 115 of the Companies Act provides as follows:

> **"115 Register and index of members**
>
> (1) Every company shall keep a register of its members and punctually enter therein the following particulars – B
>
> (a) the names and addresses of the members, a statement of the shares held by each member, distinguishing each share by its number so long as the share has a number, and of the amount paid or agreed to be considered as paid on the shares of each member;
>
> (b) the date at which each person was entered in the register as a member;
>
> (c) the date at which any person ceased to be a member C
>
> . . .
>
> (4) Every company having more than fifty members shall, unless the register of members is in such a form as to constitute in itself an index, keep an index of the names of the members of the company and shall, within fourteen days after the date on which any alteration is made in the register of members, make any D necessary alteration in the index."

The first respondent did not comply with any of the provisions of s 115. He is estopped from relying on his failure to comply with the statutory requirements of the Companies Act to evade liability emanating from prejudice that arose as a result of that misconduct.

The question that then arises is whether it is necessary, for the purposes of E s 318 of the Companies Act, that first respondent be found to have been a director of Coldrac at all material times, including the time when the judgment debt was incurred. The applicant directed the court's attention to s 187(7) of the Companies Act, which provides as follows:

> "(7) The resignation of a director or a secretary shall not relieve him of his duties F as director or secretary, as the case may be, under this Act or under the articles of the company unless the director or secretary, having notified the Registrar and the company of his resignation, had reasonable ground to believe that the company would comply with subs (4)."

In my view, s 187(7) places an onus on a director of a company who has resigned to notify the company and the Registrar of Companies of the fact G of his resignation. The first respondent has not averred that he complied with this provision. The effect of failure to comply with s 187(7) is that the first respondent it still bound by his duties as a director of Coldrac, as if he has not resigned as he alleges. So the question of whether he was a director at all material times is irrelevant. He was a director between 2003-2007 by his own admission. In the absence of proof that when he resigned he notified H

Chigumba J

A Coldrac and the Registrar of Companies, he is deemed to be a director of Coldrac to all intents and purposes, bound by the duties of a director.

In *Barnsley v Harambe Holdings* 2012 (1) ZLR 265 (H), which involved an application for piercing the corporate veil, it was held that:

> ". . .the courts have always readily lifted the corporate veil where the company B is used as a vehicle for fraud or to justify wrong".

Accordingly, the first respondent cannot rely on the fact that his name is not on the current form CR14 of Coldrac, when the onus was on him to ensure that Coldrac complied with all statutory requirements in terms of the Companies Act, and he failed or neglected to perform that duty. I find that the first respondent was bound by the duties of a director of Coldrac C between 2003-2007, and after 2007 remained bound, to date.

Requirements of s 318 of the Companies Act

Section 318 of the Companies Act provides as follows:

> "(1) If at any time it appears that any business of a company was being carried on –
>
> (a) recklessly; D or
>
> (b) with gross negligence; or

(c) with intent to defraud any person or for any fraudulent purpose;

the court may, on the application of the Master, liquidator or judicial manager or any creditor of or contributory to the company, if it thinks it proper to do so, E declare that any of the past or present directors of the company or any other persons who were knowingly parties to the carrying on of the business in the manner or circumstances aforesaid shall be personally responsible, without limitation of liability, for all or any of the debts or other liabilities of the company as the court may direct".

The applicant submitted that, having successfully established that first F respondent was, and is currently deemed to be, a director of Coldrac, it has also successfully demonstrated that he acted recklessly by entering into the order by consent, knowing full well that Coldrac did not have the means to settle the judgment debt, and by allowing Coldrac to continue to occupy the leased premises, knowing full well that it could not meet its rental and other G obligations as a tenant. It was submitted further, that this conduct on the first respondent's part is tantamount to intention to defraud the applicant. In other words, the applicant charges the first respondent with contravening s 318(1)(a) and 318(1) c). I find the applicant's arguments persuasive.

In *Pitelli v Everton Gardens Projects CC* 2010 (5) SA 171; H [2010] 4 All SA 357 (SCA), it was held that:

Chigumba J

"The limited liability is afforded to persons who conduct business through the A medium of a company. It is not there to protect them against conduct which is reckless or that takes place with fraudulent intent."

Once a court has found the conduct of the director to be reckless or grossly negligent or to be motivated by fraudulent intent, then the principle of limited liability in the conduct of company business ought to be set aside. In *Alcock* B *v Mayhew* 1990 (2) ZLR 346 (H) it was held that:

". . . the proof of fraud is an essential requirement and in order to establish this element it must be proved that respondent made a false representation with intent to deceive. The representation to creditors would be that the company had sufficient funds to make payment to the creditors concerned".

I am persuaded by the applicant's submission that this is exactly what the C first respondent did when he entered into the deed of settlement on Coldrac's behalf, knowing full well that Coldrac did not have the means to fulfil the settlement terms. Coldrac misrepresented its capacity to pay the agreed sums within the stipulated time periods. In my view, it is proper that the first respondent, in his capacity as a director of Coldrac, who was knowingly D party to the carrying on of business by Coldrac recklessly and with intention to defraud its creditors, be held personally responsible, without limitation of liability, for the discharge of the judgment debt.

Having made the above declaration, it follows that the application is granted, and the first respondent's immovable properties are declared specially E executable. I have considered the question of whether costs should be awarded against the first respondent on a higher scale and it is my view that the parties had already agreed to costs on a higher scale in their order by consent. I see no reason to alter that agreement.

It is hereby ordered that: F

1. The the first respondent is liable for the payment of the entire judgment debt against Coldrac Products (Pvt) Ltd t/a Tacoola Beverages.
2. The the first respondent shall pay to the applicant the sum of US$112 000 together with interest thereon calculated at the rate of 5% per annum, from 1 December 2011 to the date of full and final payment, within G seven days of the date of this order, failing which the applicant shall be entitled to execute this order against the first respondent's immovable properties being a piece of land situate in the District of Salisbury, being remainder of Lot 4 Athlone Township of Greengrove and stand no. 783 Bannockburn Township of Stand 1 Bannockburn Township, registered under Deeds of Transfer numbers 8110/99 and 3472/07 respectively. H

Chigumba J

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

Scanlen & Holderness, the applicant's legal practitioners

B *Bvekwa Legal Practitioners*, first respondent's legal practitioners

© 2015 Juta and Company (Pty) Ltd.

Document 66 of 73

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2013/Volume 1/MUBAIWA v MUBAIWA AND ANOR 2013 (1) ZLR 540 (H)

MUBAIWA v MUBAIWA AND ANOR 2013 (1) ZLR 540 (H)

Citation	2013 (1) ZLR 540 (H)
Case No	Judgment No. HH-170-13
Court	High Court, Harare
Judge	Chitakunye J
Heard	6 June 2013
Judgment	6 June 2013
Counsel	*T Magwaliba*, for the applicant *T Mpofu*, for the first respondent No appearance for the second respondent
Case Type	Civil application
Annotations	No case annotations to date

Flynote

Family law – *child – birth – registration – child born out of wedlock – person believing himself to be the father acknowledging paternity – subsequently discovering he was not the father – not permissible to have entry in birth register cancelled – Registrar-General entitled to correct entry – name under which birth registered – purported father not entitled to order preventing his surname being used by the child* D

Headnote

Basing his claim upon s 27(4) of the Births and Deaths Registration Act [*Chapter 5:02*], the applicant sought a court order that the second respondent (the Registrar-General) delete an entry in the births register relating to the first respondent and that the respondents be interdicted E from registering the latter with the surname "Mubaiwa' in the register. The applicant alleged that the details in the entry were false, in that he was recorded as the father of the first respondent notwithstanding the fact that he was not the father. Indeed, it was common cause that this was so. The applicant and the first respondent's mother had been intimate before the first respondent was born and that the applicant, at the time F of the first respondent's birth, believed he was the father. The birth was registered about five years later, a birth certificate being necessary to enrol the child at school. Because the child was born out of wedlock, it was necessary, if the father's name was to be shown in the register, for both parents to appear and for the father to acknowledge paternity. A G DNA test later showed that in fact he was not the father.

The first respondent, however, took the point that the applicant had adopted the wrong procedure in seeking the cancellation of a birth entry by invoking s 27(4). It was argued on his behalf that this

provision, which empowered a court to "delete, remove or correct" an entry in the register, could only be exercised at the conclusion of a criminal trial at which H

A the question of *mens rea* could be decided. He further argued that a birth entry could only be cancelled in terms of a court order. On the merits, it was argued that there was no basis for such a cancellation in the absence of a finding that false information was knowingly given to second respondent as to the identity of applicant's father. In terms of s 8(1) of the Act, a simple error of fact provided to him can be corrected B without the need of a court order. In resisting the applicant's claim for a interdict, the first respondent submitted that he could not be compelled to discard his surname without good cause and that applicant could not claim a registered trademark in the name which was, in any event, share by many people unrelated to him.

C *Held*, that, based as it was upon s 27(4) of the Act, the application was fatally defective and no cause of action had been established. That provision concerned only proceedings in the criminal courts and not with civil matters such as the application *in casu.*

Held, further, that in any event, on the facts, the entry in the register of the applicant as the father of the first respondent could not be said to have D been the result of false information deliberately given to the Registrar General. When he gave the information, the applicant believed that he was the father of the first respondent. This was not a deliberate effort to give false information. That being so, the cancellation of the entry could not be granted. What occurred was an error of fact, innocently E given, which could be remedied by the Registrar General, in terms of s 8(1) of the Act, without the need for a court order.

Held, further, that there was no basis for the grant of the interdict as the applicant had failed to establish a clear right. He had not stated or mentioned his right to the exclusive use of his surname nor did he satisfactorily explain how his right to the name "Mubaiwa" would be F violated if the interdict were not granted. There were many people. not related to the applicant, with that surname.

Cases cited

Ebrahim v Pittman NO 1995 (1) ZLR 176 (H)

Fisher v Bell [1961] 1 QB 394

G *Flame Lily Investment Company (Private) Limited v Zimbabwe Salvage (Private) Limited and Another* 1980 ZLR 378 (G)

Masuku v Min of Justice 1990 (1) SA 832 (A)

Mtshali v Mtambo & Anor 1962 (3) SA 469 (G)

Philips Electrical (Pvt) Ltd v Gwanzura 1988 (2) ZLR 117 (H)

Setlogelo v Setlogelo 1914 AD 221

H *Timbe v Registrar General* 2008 (2) ZLR 250 (S)

Chitakunye J

Whitely v Chappel (1868) LR 4 QB 147 A

Legislation considered

Births and Deaths Registration Act [*Chapter 5:02*], ss 8(1), 11(1), 12 and 27(4)

Case information

T Magwaliba, for the applicant B

T Mpofu, for the first respondent

No appearance for the second respondent

Judgment

Chitakunye J: The applicant seeks an order that:

(a) the second respondent be ordered to delete the entry in his register relating to the first respondent, register no. SMS/96/81 now HMS/96/81, and any other entry that was made on the basis of the entry aforementioned; and

(b) the respondents be interdicted from registering such birth registry with "Mubaiwa" as the first respondent's surname.

The background of this matter is conveniently set out in the parties' documents filed of record which can be summarised as follows;

The applicant in this matter Keni Mubaiwa seeks an order that second respondent delete in his register the birth entry of the first respondent under birth entry number SMS/96/81, now HMS /96/81. The basis upon which the applicant seeks the deletion of the "entry" is that his details were falsely entered in the first respondent's birth entry as the father to the first respondent, yet he is not his father. He alleges that false information was given to second respondent leading to the registration of applicant as father of the first respondent. In support of the fact that he is not the father of the first respondent, the applicant produced a DNA test result which clearly shows that he is not the father.

In response, the first respondent said he is not aware of who provided the information contained in his birth entry that the applicant is his father but he believed that the person who did that had a basis for believing that the applicant was his father. He now accepted that applicant is not his father.

The second respondent did not oppose the application save to state that he will abide by the court's decision.

It is upon these facts that applicant seeks the deletion of the first respondent's birth entry from the second respondent's register. The fact that the applicant is not the first respondent's father is now common cause. It is accepted that in he second respondent's registry, the applicant is cited as

---

the first respondent's father and as the informant of such information. The question is thus whether or not false information was given to The second respondent leading to the registration of applicant as father of the first respondent. Before that can be determined, counsel for the first respondent raised the issue of the appropriateness of the procedure adopted. I will thus deal with that issue first.

Whether the applicant adopted the wrong procedure for seeking cancellation of a birth entry by invoking s 27(4) of the Births and Deaths Registration Act [*Chapter 5:02*]?

The applicant is seeking a court order directing the second respondent to effect the cancellation of a birth entry made in relation to the first respondent and any other entries made on the basis of the aforementioned birth entry in terms of s 27(4) of the Births and Deaths Registration Act [*Chapter 5:02*] ("the Act").

Counsel for the first respondent raised a point *in limine* that, approaching a court that has not heard the matter in criminal proceedings, seeking such cancellation is misplaced as that does not disclose a cause of action. He argued that the powers set out under that provision, that is s 27(4) of the Act, are to be exercised by a court at the conclusion of a criminal trial where the question of *mens rea* would have been determined. The powers set out under that section are to be invoked at the conclusion of a criminal trial, which is not the case here. Where a party seeks the cancellation of a birth entry purely as a civil claim they can do so, basing their application on a proper cause of action.

The applicant's counsel did not respond well to this point of argument save to contend in his supplementary heads of arguments that, in that legislative provision, it is clear that the court either in civil proceedings or in criminal proceedings may order the deletion, removal or correction of false information or entries made at the time of registering the birth of the first respondent herein. The point raised was not whether court has power in either civil or criminal proceedings to delete, remove or correct any false information or entry but whether applicant had adopted the correct procedure or not in founding his application on s 27(4) of the Act.

G It is pertinent to note that s 27 is titled "Offences and Penalties". Subsections (1) to (3) outline criminal offences that may be committed and penalties applicable in respect thereof.

Section 27(4) of the Act then states that:

> "Without derogation from its powers in any civil proceedings, a court may, at H the conclusion of any criminal proceedings, order the Registrar-General to –

Chitakunye J

(a) register any birth, still- birth or death of a person; or A

(b) delete, remove or correct any false information or entry; or

(c) reproduce or replace any destroyed or damaged register or document."

The wording of the section specifically refers to steps a court may take at the conclusion of a criminal matter. It is a rule of statutory interpretation that court should apply the literal rule which is giving the words of a statute B their natural or ordinary meaning before seeking to make sense of the statute.

See *Fisher v Bell* [1961] 1 QB 394 and *Whitely v Chappel* (1868) LR 4 QB 147

The court can only depart from the ordinary or natural meaning of a statute if the meaning happens to be still dubious or ambiguous. Dr John Bell wrote in *Cross Statutory Interpretation* 2 ed at p 48: C

> "If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in that natural and ordinary sense . . . But if any doubt arises from the terms employed by the legislature, it has always been held a safe means of construction of that intention to call in aid the ground and cause of the making of the statute".

From the reading of s 27(4)(b), there is no ambiguity in the wording of that D section nor can it be said that it is not precise. The section specifically deals with a court that would have heard the same matter in criminal proceedings. Even reading the entire section, it is very clear that the section is referring to a criminal court and not civil. The use of the term "without derogation" merely means without taking away from its powers in civil proceedings that E are brought in terms of a properly laid out civil claim. It does not, in my view, mean one can merely cite the section as a basis for a civil claim. It was thus wrong for applicant to seek to base its application on this section.

As a consequence of the failure to appreciate the above, the applicant failed to disclose a clear cause of action for the nature and extent of the relief sought. F

A cause of action, according to *Black's Law Dictionary* 2 ed, is a ground on which an action maybe legally sustained. A cause of action signifies the matter of the complaint or claim on which a given action is in fact grounded, whether or not legally maintainable.

I thus conclude that this application, based as it is on s 27(4)(b) of the Act, is fatally defective. Despite the fact that this finding results in the dismissal G of the application I will proceed to deal with the other issues.

Whether the second respondent can cancel a birth entry without a court order

An issue that may be considered is whether the second respondent can cancel a birth entry made in his register without an order of the court. In *imbe v* H

Chitakunye J

A *Registrar-General* 2008 (2) ZLR 250 (S) at 254B-C Malaba JA made the following remarks:

> "Regrettably I am unable to agree with the learned Judge in holding that the respondent was exercising the powers vested in him under section 8 (1) of the Act when he cancelled the children's birth certificates. 'Entry' in relation to any register kept in terms of the Act is defined in section 2(1) to include any B information contained in a birth certificate which forms part of that register. Section 8(1) is the only Section which gives the respondent the power to correct an entry in a register without erasing the whole entry altogether. Cancellation of a birth certificate has the effect of erasing the entry in the register. There is no section in the Act which gives the respondent power to cancel an entry in a register without an order of a court."

C From what was said in the *Timbe* case *supra*, it is very clear that the second respondent cannot purport to cancel an entry without a court order. What he can only do without a court order is correction of an error in terms of s 8(1) of the Act. Since the applicant wanted the entire birth entry to be erased or cancelled, he was correct in seeking a court order.

D The applicant's task, as alluded to above, is to bring an application based on a proper cause of action and to satisfy the court that false information was deliberately given to the second respondent for the purposes of registering a birth if court is to grant such an order.

Whether false information was given to the second respondent E leading to the registration of applicant as father of first respondent?

The issue of whether false information was given to the second respondent leading to the registration of applicant as the first respondent's father and the probable provider of such information, can only be ascertained from the circumstances surrounding the case. In his founding affidavit, the applicant did not disclose the circumstances under which he came to be cited as the F first respondent's father. He gave the impression that he was not aware who did it and why. It was as if he had just stumbled upon an entry in the second respondent's registry where he is cited as the first respondent's father and as the informant of that information.

It was only upon perusal of case no. HC 2625/10, referred to in the applicant's G heads of argument, that some light was shed as to the probabilities.

In his founding affidavit in case no. HC 2625/10, the applicant admitted that there was an intimate relationship between him and the first respondent's mother in the late 1970s. He went on to admit that sexual intercourse took place between him and the first respondent's mother in January 1976. From H the evidence presented, it is clear that the first respondent was born in

---

Chitakunye J

December of the same year. In terms of paternity laws, there is a rebuttable A presumption that the applicant is the father of the first respondent.

In the same affidavit in case no. HC2625/10, the applicant admitted that he met the first respondent's mother, who claimed that he was the father of the first respondent. Although he initially said he met her in 1983 when the respondent was about to get into grade one, in reply to the first respondent's B contention that it was earlier as he got into grade one in 1982, the applicant conceded when he said that there is not much of a difference whether he came in 1981 or 1982 or 1983. If it was a time before the respondent got into grade one, it could only have been in 1981 before the first respondent enrolled into grade one and before schools opened in 1982. This is the very same time the first respondent's birth entry was registered with the applicant C cited as the father of the first respondent and as the informant. I am of the view that the probability is that the applicant was not being candid with the court when he pleaded total ignorance of how and who provided the information in question.

The applicant's counsel argued, in his supplementary heads of arguments, D that if he had participated in the registration of the first respondent's birth entry, as indicated in the entry, he could not have misrepresented himself as Kennedy Mubaiwa, as is the information in the first respondent's birth entry. I am of the view that not much should be read into that. That is clearly a question of how one spells the name or calls oneself at a given time. In E any case he acknowledged that all the other identity details related to him.

The first respondent's counsel, in his submissions, counter argued that, the act of registration of births is carried out by the parents of a child unless there are circumstances requiring the contrary. He went on to argue that the name of the father of a child born out of wedlock will not be entered in the register except at the joint request of both parents and after the father himself F acknowledges in writing in the presence of the registrar that he indeed is the father. In this regard he cited ss 11 and 12 of the Act.

After a careful analysis of the documents filed of record and hearing counsel. I am of the view that, since the applicant had a relationship of a sexual nature with the first respondent's mother and that the first respondent's mother G claimed that he was the father of the first respondent, the applicant may have believed at that time, that he was the father of the first respondent, thereby causing that

information to be entered in the The second respondent's birth register in 1981 when he met with the first respondent's mother. The sexual intercourse in January 1976, the birth of the first respondent in December 1976, the paternity claim in 1981, the meeting of the applicant and the H

2013 (1) ZLR p547

Chitakunye J

A first respondent's mother around 1981 and later the registration of the first respondent's birth entry in 1981: all these events cannot be coincidences.

In *Ebrahim v Pittman NO* 1995 (1) ZLR 176 (H) at 177C-D court held that:

> ". . .in a civil case, where the court seeks to draw inference from the facts, it may, by balancing probabilities, select a conclusion which seems to be the more natural or plausible (in the sense of credible) conclusion from among several B conceivable ones, even though that conclusion is not the only reasonable one."

In the circumstances of this case a conclusion that applicant was involved in the registration of the first respondent's birth is most appropriate.

I also agree with counsel for the first respondent that the act of registration of births is primarily carried out by the parents of a child, unless there are C circumstances requiring the contrary. To that effect s 11(1) of the Act states as follows:

> "Subject to section twelve, it shall be the duty of the father or the mother of a child and, in the case of the death or inability of the father and the mother, the duty of-
>
> (a) the occupier of the house in which the birth or still- birth occurred, where D he had knowledge of such birth or still-birth; or
>
> (b) the person in charge of any hospital or other institution in which the birth or still-birth occurred; or
>
> . . . or
>
> (f) such other person as may be prescribed;
>
> to give notice of the birth or still-birth in the prescribed form to the registrar of E the district in which the birth or still-birth, as the case may be occurred"

In this jurisdiction the name of the father of a child born out of wedlock will not be entered in the register except at the joint request of both parents and after the father himself acknowledges in writing in the presence of the F registrar that he indeed is the father. In this regard, s 12 of the Act states that:

> "(1) Notwithstanding section eleven, no person shall be required to give information acknowledging to be the father of a child born out of wedlock.
>
> (2) A registrar shall not enter in the register the name of any person as the father of a child born out of wedlock, except –
>
> (a) upon the joint request of the mother and the person acknowledging himself G to be the father of the child; or
>
> (b) if the mother of the child is dead or has abandoned or deserted the child, upon the request of the person acknowledging himself to be the father of the child; or
>
> (c) . . .
>
> (3) A request in terms of subsection (2) shall be made in the form and manner H prescribed."

2013 (1) ZLR p548

Chitakunye J

It is clear from the above that where a child is born out of wedlock the registrar A will not require the father of such a child to give information concerning the birth of the child. Further the name of the father of such a child will not be entered in the register except at the joint request of both parents, and after the father himself acknowledges in writing that he is the father. The effect of this provision is that as the applicant's name appears as the informant and B the father, the court must first of all be satisfied of the circumstances leading to that information appearing on the certificate before it can become aware of the extent of its powers.

In *Timbe v Registrar-General* supra at 255D-E Malaba JA reasoned that:

> "It is also important to note that a finding of the existence of an error in a register attracts correction of the error whilst a finding that false information was given C to a Registrar for the purposes of obtaining registration of a birth leads to the cancellation of the entry itself."

It is thus upon the applicant to satisfy the court that false information was given, before the court can order the cancellation of the entry itself. Unfortunately, the applicant did not assist the court as to how his name and D information was registered on the first respondent's birth entry save to argue that the information was falsely given. The applicant did not plead or place evidence before the court that the parties deliberately gave the registrar false information; that is, that at the time the information was given the informant knew that it was false or did not believe it to be true.

Omnia praesumuntur rite esse acta: it is presumed that when the certificate E was issued and in the absence of a marriage certificate both parents appeared before the Registrar and the father identified himself as such. They could have been mistaken as to the real position but the truth is that, despite applicant's desultory attempts, they appeared.

Such a situation calls for a correction of the error in terms of s 8 of the Act. F In *Timbe v Registrar-General supra* p 254D-F the learned judge of appeal stated that:

> "Section 8(1) vests the respondent with a discretionary power exercisable only when he has satisfied himself that what he is called upon to correct is an error in the register. An error of fact or substance implies the existence of a state of mind in regard to the fact or state of facts but one which does not accord with G the facts or state of facts in question. For purposes of exercising the powers of correction under s 8(1) of the Act, it would have had to be shown that Mr Timbe had genuinely believed that he was the father of the children and had caused that belief to be entered in the register when in fact another man was the father of the children. That would have been an error of fact found to have been entered in the register. It would not have been enough, as the learned judge thought, for the respondent to find that Mr. Timbe was not the father of the children without H

> A relating that fact to his state of mind for the existence of an error of fact to be established."

In casu, I have come to the conclusion that the entry of the applicant as the father of the first respondent cannot be said to be a result of false information being deliberately given to the second respondent. The applicant caused the information to be registered, as indicated by the first respondent's birth B entry, that the applicant was the informant. When he gave the information he believed that he was the father of the first respondent. Therefore, the giving of the information was not a deliberate attempt to give false information but was a clear error of fact or substance.

Conclusion on applicant's claim for cancellation

C I am of the view that the applicant lamentably failed to show that false information, as against an error in the information, was given to The second respondent.

The probability is that the giving of the information was a genuine error of fact based on what the parties believed at the time. The fact that that belief D has now been found to be wrong does not mean at the time of giving the information the informant deliberately told a falsehood knowing it to be false.

Accordingly, the application for cancellation of the birth entry cannot be granted as there was no false information given to the second respondent leading to the registration by applicant of the first respondent as his son. What occurred was an error of fact, which can be remedied by the second E respondent in terms of s 8(1) of the Act without the need for a court order.

Whether a case has been made for a final interdict prohibiting the second respondent from registering the first respondent under the surname "Mubaiwa"?

The applicant's second claim in this application is for an interdict to prohibit F the The second respondent from registering an entry pertaining to the first respondent with the name "Mubaiwa'' as his surname. The main relief sought by the applicant is couched in the form of a final interdict. In *Mtshali v Mtambo & Anor* 1962 (3) SA 469 (GW) at p 473H, the court alluded to the fact that:

> "The interdict procedure is an extra ordinary remedy for matters which do not G admit of delay – *periculum in mora* – and in which the power of the court should be summarily interposed to prevent and, if necessary, to discontinue, the perpetration of unlawful acts forthwith and for good or pending action."

In order to succeed in respect of the main relief, applicant must show firstly that he has a clear right secondly that such right has been infringed and thirdly he has no other suitable legal remedy

other than the interdict sought. See H *Masuku v Minister of Justice* 1990 (1) SA 832 (A) at p 840-841.

2013 (1) ZLR p550

Chitakunye J

Before delving into the issue, it is important to give a brief explanation of A the law relating to interdicts. An interdict is part of the adjective law, the law of procedure. See Prest *The Law and Practice of Interdicts* pp 12-33.

Historically, as Prest *supra* remarks at p 9, the foundations of the modern South African Law of Interdict are to be found principally in the Roman –Dutch law, although the contribution made by the English law cannot be B disregarded. The requirement for the interdicts or *mandament* under the Roman-Dutch law was in a long line of cases over more than 150 years refined and developed, which ultimately culminated in *Setlogelo v Setlogelo* 1914 AD 221,which is to this day the leading case. The courts in Zimbabwe have over the succeeding years further elaborated on the requirements for the grant of a final interdict and this resulted in the decision of the case of C *Flame Lily Investment Company (Private) Limited v Zimbabwe Salvage (Private) Limited and Another* 1980 ZLR 378(G). At p 382B-D Waddington J confirmed that:

> "It is now settled law that the three essential requirements for the issue of an absolute interdict are –
>
> 1. a clear right on the part of the applicant;
> 2. actual or apprehended injury; and D
> 3. no other ordinary remedy by which the applicant can be protected with the same result."

The onus is upon the applicant to satisfy the court on the admitted or undisputable facts on a balance of probabilities as is required in every civil suit if his case is to succeed. See *Philips Electrical (Pvt) Ltd v Gwanzura* 1988 (2) ZLR 117 (H) E at 122F-G.

Whether the applicant has a clear right deserving a final interdict

In his supplementary heads of argument, applicant contended that the surname "Mubaiwa'' originates from the wrong perception that the first respondent is a son of the applicant which perception has since been dispelled by the F paternity tests carried out. He further contended that, the first respondent cannot insist on continuing to use the surname, as doing so will be in violation of the right of the applicant. The applicant did not however state the right that he claims will be violated.

In response, the first respondent argued that the applicant sets out no G ownership to the name "Mubaiwa" as he has no registered trademark over it. That is the name he has built his goodwill on and so he cannot be ordered to discard it for no good cause. The fact of continued use of the name by him and his children does not in any way mean he is portraying himself as the applicant's child. In any case there are many people by that name who are not related to the applicant. H

2013 (1) ZLR p551

Chitakunye J

A **Findings**

After a careful analysis of the submissions made, I am of the view that applicant has failed to establish that he has a clear right against the first respondent over the use of the surname "Mubaiwa". What he has only proved to court is that the surname was registered on the wrong perception that he was the father of the first respondent. However he did not state or mention his right B to the exclusive use of that surname neither did he satisfactorily explain how his right to the name 'Mubaiwa' will be violated if an interdict is not granted? It is my view that the fact that the surname was registered under the perception that he was the first respondent's father does not entitle him to its control or exclusivity. What he can only seek successfully is an interdict C to stop or prohibit the The second respondent from registering applicant as father of the first respondent and not the use of a name.

In view of the above findings it is unnecessary to deal with the other requirements of a final interdict as the failure to establish a clear right is fatal to the application.

I have thus come to the conclusion that the applicant has failed for reasons D stated above to satisfy the court that he has a clear right over the use of the surname ''Mubaiwa'' and a right to prohibit the first respondent from using the said surname.

Accordingly the applicant's application is hereby dismissed with costs.

E *Bvekwa Legal Practice*, applicant's legal practitioners

Gwaunza and Mapota, the first respondent's legal practitioners

---

© 2015 Juta and Company (Pty) Ltd.

Document 67 of 73

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2013/Volume 1/CONSTITUTIONAL COURT OF ZIMBABWE PRACTICE DIRECTIVE NO. 2 OF 2013 2013 (1) ZLR 552 (CC)

DIRECTIVE NO. 2 OF 2013 2013 (1) ZLR 552 (CC)

Citation	2013 (1) ZLR 552 (CC)
Case No	Details not supplied
Court	Details not supplied
Judge	Details not supplied
Heard	19 June 2013
Judgment	19 June 2013
Counsel	Details not supplied
Case Type	Details not supplied
Annotations	No case annotations to date

Flynote

Appeal – *Constitutional Court – procedure to be adopted*
Court – *Constitutional Court – applications and appeals to – procedure to be adopted*

Headnote

The procedure for bringing applications (whether urgent or in the ordinary course) and appeals to the Constitutional Court is set out in the Practice C Directive issued by the Chief Justice.

THE CHIEF JUSTICE, THE HONOURABLE MR JUSTICE G G CHIDYAUSIKU, HAS ISSUED THE FOLLOWING PRACTICE DIRECTIVE: D

With effect from the date of issue, applications and appeals that are brought to the Constitutional Court shall be dealt with and must comply with the following directive:

(A) APPLICATIONS (In terms of section 85(1) of the Constitution)

(1) The application shall be brought on a notice of motion supported by an E affidavit as to the facts upon which the applicant relies for relief.

(2) The application shall be signed by the applicant or his legal representative and it shall state:

(a) the address of service of the applicant or his legal representative F and

(b) the exact, nature of the relief which is sought.

(3) The application shall be served on the Registrar and the respondent(s).

(4) Upon being served with the application the respondent is required to indicate within 10 days whether or not he intends to oppose the application. If no such notification is given by the respondent, the Registrar is required G to place the matter before the Chief Justice to be dealt with in terms of paragraph (8).

(5) Any person opposing the granting of an order sought in the notice of motion shall:

(i) within a period of ten (10) days notify the applicant and the H

A Registrar in writing of his intention to oppose the application and

(ii) lodge his opposing affidavit, together with any relevant documents which may include supporting affidavits.

(6) The applicant may lodge an answering affidavit within ten (10) days of the service upon him of the affidavit and documents referred to in B paragraph 5(ii).

(7) (i) Where no notice of opposition is given or where no opposing affidavit in terms of paragraph 5(ii) is lodged within the stipulated time, the Registrar shall within five days of the expiry thereof place the application before the Chief Justice.

(ii) Where C opposing affidavit is lodged, the Registrar shall place the application before the Chief Justice within five (5) days of the lodging of the replying affidavit.

(iii) If no replying affidavit is lodged within the stipulated time, the Registrar shall within five days of the expiry thereof place the application before the Chief Justice.

(8) When D an application is placed before the Chief Justice in terms of paragraph (4) or paragraph 7(i) ,(ii) or (iii) the Chief Justice shall give directions as to how the application shall be dealt with and in particular:

(i) as to whether it shall be set down for hearing or

(ii) whether it shall be dealt with on the basis of documents filed of E record or

(iii) whether heads of arguments should be filed or

(iv) Any other direction that the Chief Justice may issue.

(9) (i) Where heads of argument are required to be filed the Registrar shall F send a written notification calling upon the applicant through his legal representative to file heads of argument within fifteen (15) days after the date of such notification.

(ii) The respondent is required within ten (10) days of receiving the applicant's heads of argument to file with the Registrar his Heads of Argument.

(10) (i) Upon G receiving the respondent's heads of argument in terms of paragraph 9(ii), the Registrar shall set the matter down for hearing.

(ii) Where a party fails to file heads of argument within the times stated in paragraph (9), the Registrar shall within five (5) days place the record before the Chief Justice who shall proceed in terms of H paragraph (8).

(B) URGENT APPLICATIONS A

1. The Registrar upon receiving an urgent application, must place it before the Chief Justice.
2. The Chief Justice may give directions for the matter to be dealt with at such time and in such manner as he deems fit.

(C) APPEALS B

Appeals on constitutional decisions of the Supreme Court, High Court and magistrates court shall be dealt with in accordance with part IV of the Rules of the Supreme Court, 1964:

Provided that no appeal shall be dismissed for non-compliance with the rules without first seeking the directions from the Chief Justice. C

Issued on 19 June 2013

© 2015 Juta and Company (Pty) Ltd.

Document 68 of 73

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2013/Volume 1/HWANGE COLLIERY CO v SAVANHU 2013 (1) ZLR 555 (H)

HWANGE COLLIERY CO v SAVANHU 2013 (1) ZLR 555 (H)

Citation	2013 (1) ZLR 555 (H)
Case No	Judgment No. HH-395-13
Court	High Court, Harare
Judge	Dube J
Heard	20 June 2013
Judgment	20 June 2013
Counsel	*L Uriri,* for the plaintiff *S Hashiti and C Mavondo,* for the defendant
Case Type	Civil trial
Annotations	No case annotations to date

Flynote

C **Property and real rights** – *ownership – vindication – owner's right to vindicate property – what owner must show – defences open to defendant – contractual right to possess – no contractual right existing – defendant relying on alleged precedent – such not giving rise to contractual right or legitimate expectation*

Headnote

D The defendant had been the non-executive chairman of the plaintiff company for some years. While holding that office he had been allocated a motor vehicle belonging to the plaintiff. Upon his removal as chairman, he did not return the motor vehicle and refused to return it to the plaintiff in spite of demands. In an action claiming the return of the car, a witness for the E plaintiff said that there was no policy or resolution which entitled former board chairpersons and members to retain vehicles issued to them. The defendant's stance was that he was entitled to the vehicle because his predecessors had been allowed to purchase their vehicles after leaving the company. He was willing to pay for the vehicle.

Held, that the *actio rei vindicatio* is a common law remedy which is based on F the principle that an owner of property cannot be deprived of his property without his consent and is entitled to recover it from any person who possesses it without his consent. An owner has the right to exclusive possession of his property and no other person may withhold that right from the owner

unless he is vested with an enforceable right against the owner. A litigant seeking to rely on the claim of *rei vindicatio* must G prove the following: that he is the owner of the property in question; that at the time of commencement of the action the defendant was in possession of the property; and that the defendant's possession is without the plaintiff's consent or concurrence. Once ownership has been proved, the onus is on the defendant to prove a right of retention. The H defences open to the defendant would be: (a) that he had acquired the

property by prescription; (b) that a third party was the owner; (c) that A the property was alienated or destroyed; or (d) that the defendant had a superior contractual right to possess. The defendant's position was that he was entitled to possess and purchase the vehicle because other former chairpersons were allowed to purchase the vehicles issued to them and he expected that he would be offered the purchase of the vehicle issued B to him in accordance with that practice. However, the benefits of non-executive directors were determined by a resolution of the board, not by a contract, and there was no resolution in the defendant's favour, nor had any offer been made to him. The fact that other directors were allowed to purchase their vehicles did not confer any rights on him to purchase the vehicle he had been allocated. The hope and expectation of an offer C did not justify possession of the vehicle. His expectation that the vehicle would be sold to him was not legitimate. He accordingly had no claim of right in respect of the car and it should be returned to the plaintiff.

Editor's note: this judgment was upheld on appeal: see *Savanhu v Hwange Colliery* D *Co* S-8-15, a judgment of Ziyambi JA (Gowora JA and Mavangira JA concurring), delivered on 30 May 2014.

Cases cited

Chenga v Chikadaya & Ors S-7-13

Chetty v Naidoo 1974 (3) SA 13 (A)

Dhege v Bell Medical Centre 2004 (1) ZLR 352 (H) E

Jolly v Shannon & Anor 1998 (1) ZLR 78 (H)

Masudi v Jera HH-67-07

Oakland Nominees (Pty) Ltd v Gelria Mining & Investment Co (Pty) Ltd 1976 (1) SA 441 (A)

Stanbic Finance Zim Ltd v Chivhungwa 1999 (1) ZLR 262 (H) F

Case information

L Uriri, for the plaintiff

S Hashiti and *C Mavondo*, for the defendant

Judgment

Dube J: This is an action for the vindication of the plaintiff's vehicle. The salient features of this action may be summarised as follows. The plaintiff is G the registered owner of a Toyota Land Cruiser. The defendant was appointed a non-executive chairman of the plaintiff's board of directors since 2006. He was allocated the above-mentioned vehicle for his use in July 2011, a month before he was removed from the plaintiff's board. Upon his removal as chairperson the defendant did not return the motor vehicle and has refused to return the vehicle to the plaintiff. H

Dube J

A The plaintiff called its company secretary, Mr Ncube, as its only witness. His evidence is summarised as follows. The plaintiff is the owner of the Toyota Land Cruiser in issue. The defendant has possession of the vehicle which was allocated to him as non-executive chairperson of the plaintiff's board of directors. He was allocated the vehicle to use for both business and private purposes during his tenure of office. The defendant has been removed as the B chairperson and he is not entitled to possess the vehicle. He is not aware of any policy or resolution which entitles former board chairpersons and members to retain vehicles issued to them. The chairperson is issued with a vehicle he uses in terms of a board resolution. The motor vehicle policy available covers executives,

middle managers and employees other than directors, C who are entitled to motor vehicles in terms of their employment contract.

The defendant had previously been issued with two Mercedes Benz vehicles and a Toyota Prado, which were returned to the pool when he was allocated a new car. The defendant returned the vehicles because he had a replacement vehicle. The defendant was not entitled to retain the vehicle when he ceased to be a board member or non-executive chairperson. A board meeting of 11 D December 2012 resolved that the incumbent chairperson could purchase his vehicle and it was specific to that incumbent chairperson. When the defendant was in office, there was no such policy and the company would retain the vehicle. The witness said that he was not aware of any non-executive director before the defendant who retained his official vehicle.

E The defendant testified as follows. He was the non-executive chairperson of the plaintiff for the past six years. He started using the vehicle in issue in 2011. The vehicle belongs to the plaintiff and he possesses it. He is entitled to the vehicle because his predecessors were allowed to purchase their vehicles after leaving the company. His predecessor, Mr Kudenga, was allowed to purchase the vehicle he was using after leaving the company. F Mr Kudenga was offered the vehicle but he turned down the offer because he was not happy with its state. The practice is to allow chairpersons to exercise the right to purchase their vehicles. He expected that he would be permitted to purchase the vehicle. He was treated unfairly, as he was not offered the vehicle. He served the company well. He is prepared to pay for the vehicle. The current position, as from December 2012, is that a G non-executive chairperson can purchase his vehicle at 20 per cent of book value. The company has decided to come up with a resolution to cover or protect a certain individual so that he can benefit by purchasing his vehicle when he leaves the company. The witness contended that, although there was no resolution allowing chairpersons to purchase their official vehicles, H there was an understanding and a practice in place that allowed purchase

---

of vehicles by non-executive chairpersons. The witness conceded that his A letter of appointment does not mention the right of retention of the vehicle on termination of his appointment. He expected that the company would offer him the vehicle as shown by precedent. He is holding onto the vehicle for justice to prevail, and wants the parties to negotiate and, if he is given a fair price, he will pay. Without prejudice negotiations have failed. B

The evidence of Mr Chasi to the effect that previous non- executive chairpersons were made an offer to purchase the vehicle they were using and that some may have accepted the offer was admitted by consent of both parties.

The issue that will dispose of this dispute is whether the defendant is entitled to purchase the plaintiff's car by reason of the fact that it ought to have been offered to him for purchase because former non-executive directors were C offered the vehicles they were using.

The *rei vindicatio* is a common law remedy which is based on the principle that an owner of property cannot be deprived of his property without his consent, and is entitled to recover it from any person who possesses it without his consent. In *Chetty v Naid*oo 1974 (3) SA 13 (A) the court recognised D that an owner has the exclusive possession of his property and that no other person may withhold that right from the owner unless he is vested with an enforceable right against the owner. Similar sentiments were expressed by Malaba J, as he then was, in the case of *Stanbic Finance Zimbabwe v Chivhunga* 1999 (1) ZLR 262 (H), where he made the following remarks:

> "the owner may claim his property wherever found, from whomsoever is holding E it. It is inherent in the nature of ownership that possession of the *res* should normally be with the owner and it follows that no other person may withhold it from the owner unless he is vested with some right enforceable against the owner (e.g. a right of retention or a contractual right). The owner, in instituting a *rei vindicatio*, need, therefore, do no more than allege and prove that he is the owner and that the defendant is holding the res, the onus being on the defendant F to allege and establish any right to continue to hold against the owner".

See also *Oakland Nominees (Pty) Ltd v Gelria Mining & Investment Co (Pty) Ltd* 1976 (1) SA 441(A).

A litigant seeking to rely on the plea of *rei vindicatio* must prove the following, that he is the owner of the property in question: *Jolly v Shannon* G *& Anor* 1998 (1) ZLR 78 (H). Once ownership is proved, its continuation is presumed: see *Stanbic Finance Zimbabwe supra*. He must also prove that at the time of commencement of the action, the defendant was in possession of the property: see

Masudi v Jera HH-67-07. He is enjoined to prove that defendant's possession was without the plaintiff's consent or concurrence. The law does not permit that a property owner be deprived of his property H

2013 (1) ZLR p559

Dube J

A against his will. He is entitled to recover it from any person who possesses it against his will: see *Stanbic Finance Zimbabwe supra*. Once ownership has been proved, the onus is on the defendant to prove a right of retention: *Chetty v Naidoo supra* and *Chenga v Chikadaya & Ors* S-7-13. In C G van der Merwe and J E du Plessis *Introduction To Law,* the defences available in a vindicatory action are summarised as follows.

(a) the B defendant had acquired the property by prescription

(b) the third party is the owner

(c) the property was alienated or destroyed or

(d) the defendant has a superior contractual right to possess.

C In *Oakland Nominees supra* Holmes JA said the following on the requirement placed on the defendant to have an enforceable right against the owner:

> "Our law jealously protects the right of ownership and the correlative right of the owner in regard to his property, unless, of course, the possessor has some enforceable right against the owner".

It is common cause that the plaintiff is the owner of the vehicle in issue and D the defendant has possession of it. The plaintiff avers that the defendant possesses the vehicle without its consent. The defendant conceded that he is in possession of the vehicle without the plaintiff's consent or concurrence. The defendant did not pursue his stance that he is entitled to the vehicle as a terminal benefit. The thrust of his defence was that he is entitled to E possess and purchase the vehicle because former chairpersons were allowed to purchase the vehicles issued to them and he expected that he would be made an offer to purchase his vehicle in accordance with that practice. He alluded to a resolution passed in December 2012 which enables the incumbent chairperson to purchase the vehicle he is using. The plaintiff conceded that former chairpersons may have been offered their issues.

F The plaintiff's motor car policy covers employees, other than directors. It does not cover non-executive directors whose benefits are covered by resolutions of the board. There is no vehicle policy or board resolution entitling the defendant to purchase the vehicle at the end of his term. There is no contractual right to possess the vehicle. There is also no proof of an offer to purchase the vehicle, either express or implied. I am not in agreement G with the defendant's contention in his closing submissions that he was offered directorship on the understanding that the plaintiff would offer him his last car provided that he had to pay for it. There is simply no evidence to support that assertion. In the absence of a car policy board resolution entitling him to purchase the vehicle or an offer to purchase the vehicle, the H defendant does not have a claim of right over the vehicle. The defendant is

---

2013 (1) ZLR p560

Dube J

trying to arm-twist the plaintiff into selling the vehicle to him on the premise A that other directors have previously been offered to buy their own issued vehicles. This state of affairs does not entitle him to purchase the vehicle. The fact that the plaintiff offered previous directors their vehicles after the termination of their contracts does not bind the plaintiff to sell this vehicle to the defendant. The plaintiff has no obligation to sell the vehicle to him. B The defendant is holding the vehicle against the wishes of the plaintiff. It is entirely in the discretion of the plaintiff whether to offer the vehicle to him. The court would err were it to compel the plaintiff to sell the vehicle to the defendant in the absence of an offer to sell the car or proof of some other entitlement. Similar sentiments were expressed by Ndou J in *Dhege v* C *Dell Medical Centre* 2004 (1) ZLR 352 (H) where he remarked as follows,

> "In the circumstances it cannot be argued that the respondent . . . was obliged to sell the . . . company car to applicant. The court cannot compel a party to exercise its discretion in a particular fashion. The court can compel a party to do what is mandatory in terms of an existing agreement. The right to purchase the company car could only be exercised after an offer had been made to the D employee and not before. The option to offer for sale cars used by employees was a privilege and not a right"

The defendant's right to use the vehicle ceased when he left the company. The fact that other directors were allowed to purchase their issues does not confer a right on him to purchase the vehicle. I agree with Mr *Uriri's* contention E that the hope and expectation of an offer does not justify possession of the vehicle.The defendant's expectation that the vehicle would be sold to him is not legitimate. His holding onto the vehicle is unlawful. The defendant has failed to show that he has contractual or enforceable rights against the plaintiff. He has no legal justification to continue holding onto the plaintiff's vehicle. F

The applicant is entitled to the order sought.

In the result it is ordered as follows.

1. The defendant is ordered to return the Toyota Land Cruiser within 7 days of the service of this order on him.
2. Should the defendant fail to comply with this order, the Deputy Sheriff G be authorised to seize from the defendant the Toyota Land Cruiser .
3. Costs of suit be paid by the defendant

Mawere & Sibanda, plaintiff's legal practitioners

Mhishi Legal Practice, defendant legal practitioners H

© 2015 Juta and Company (Pty) Ltd.

Document 69 of 73

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2013/Volume 1/MANWERE v MATAHWA NO & ORS 2013 (1) ZLR 561 (H)

MANWERE v MATAHWA NO & ORS 2013 (1) ZLR 561 (H)

Citation	2013 (1) ZLR 561 (H)
Case No	HH-206-13
Court	High Court, Harare
Judge	Mawadze J
Heard	14 June 2013; *CAV*
Judgment	20 June 2013
Counsel	*L Uriri,* for the applicant *T Mpofu,* for the first respondent No appearance for the second and third respondents
Case Type	Civil application
Annotations	No case annotations to date

Flynote

Practice and procedure – *affidavit – further affidavit in response to answering affidavit – when may be filed – court's discretion – no need for such application to be made in writing – may be made orally at hearing*

Headnote

D The applicant, in applying for rescission of judgment, averred in her founding affidavit that the cause of her not complying with the rules of court was the laxity of her erstwhile legal practitioners in failing to file heads of argument timeously. A replying affidavit was filed and the matter set down for hearing. At the hearing, an application was made for a further E affidavit to be filed on behalf of the applicant, her current counsel being of the view that an affidavit from the former legal practitioners was necessary. The application was opposed by the respondent, on the grounds that the application should be have been made in writing.

Held, that where an allegation is made which amounts to charging a legal practitioner of dereliction of duty and a violation of the rules, the applicant F should afford the legal practitioner involved an opportunity to condemn himself, if that be the case, from his own mouth. He should be asked to swear an affidavit as to the facts for which he is blamed. Failure to do so on the part of the applicant, particularly after his attention has been drawn to the need to do so, must inevitably lead the court to draw the inference that the applicant is not being truthful. In this case, the G respondent did not put the matter in issue. While it was prudent to place the legal practitioner's affidavit on record timeously, the door should not be completely shut and deny the applicant such an opportunity, albeit at the time of hearing.

Held, further, that r 235 provides for such leave to file further affidavits being H granted by either the court or the judge. This means that where such

leave is granted by a judge, it is granted by a judge sitting otherwise than A in open court. That fact that such leave may be granted by "the court" means that in proper circumstances an application for such leave can be made in court orally and not necessarily in writing. Rule 235 does not indicate that a party seeking such leave from the court or a judge should do so only in writing, nor does r 226, relied on by the respondent, B preclude oral applications being made during the hearing.

Held, further, that the applicant had given an explanation which was not disputed and which excluded *mala fides*. Her counsel had given a satisfactory explanation why the supporting affidavit was not filed earlier. No prejudice would be occasioned to the first respondent if leave were granted to allow the filing of the affidavit. C

Cases cited

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

Silver's Trucks (Pvt) Ltd & Anor v Director of Customs & Excise 1999 (1) ZLR 490 (H) D

Legislation considered

High Court Rules 1971 (RGN 1047 of 1971), rr 3, 235 and 226(1)

Case information

L Uriri, for the applicant E

T Mpofu, for the first respondent

No appearance for the second and third respondents

Judgment

Mawadze J: On 14 June 2013, I granted the applicant leave to file an additional supporting affidavit in the matter which was before me – an F application for rescission of judgment and upliftment of bar. Mr *Mpofu* for the first respondent immediately expressed displeasure with my ruling and sought leave to appeal to the Supreme Court against the interlocutory order I had granted. I granted the applicant leave to appeal and indicated that I will give my reasons for allowing the filing of an additional supporting affidavit by the applicant. I now proceed to do so. G

The reasons I shall proceed to discuss in this judgment relate to an interlocutory application made by the applicant in terms of r 235 of the High Court Rules 1971 which relates to filing of a further

affidavit after an answering affidavit has been filed. Before I discuss the reasons for the order I granted I believe I should outline the background facts of the matter. H

2013 (1) ZLR p563

Mawadze J

A On 5 April 2012 the first respondent filed a court application in case no. HC 3847/2012 (as the applicant) in her capacity as the guardian and agent of the two children, Rumbidzai Benhilda Mombo and Tatenda Desmond Mombo, in which she sought an order setting aside the appointment of the applicant (then second respondent in HC 3847/12) as the Executrix dative of the estate of the late James Desmond Mombo. The applicant filed a notice of opposition B on 23 April 2012 and the first respondent filed an answering affidavit on 7 June 2012. The first respondent proceeded to file heads of argument on 10 August 2012. The applicant did not file any heads of arguments as is required in terms of r 238(2b) of the High Court rules and was barred. The matter (HC 3847/12) was dealt with by brother Chitakunye J who granted C the following order:

"IT IS ORDERED THAT:

1. The first respondent's decision made on 27 February 2012 to confirm his earlier decision made on 24 October 2011 to appoint the second respondent as Executrix Dative of the estate of the late James Desmond Mombo be and is hereby set aside.
2. Anything D done by the second respondent on the basis of her appointment on 24 October 2011 as Executrix Dative of Estate late James Desmond Mombo be and is hereby set aside.
3. The first respondent be and is hereby ordered and directed to appoint a neutral executor, with competence and experience, as authorised by the parties, within seven (7) days of the date of this order being granted.
4. The E third respondent be and is hereby directed to register a caveat on a certain piece of land situated in the District of Salisbury, called stand 889 Bluffhill, Harare, registered in the name of the late James Desmond Mombo under Deed of Transfer No. 10214/2000, and such caveat to remain in force until final determination of this matter either in the court of first instance or on appeal.
5. Subject F to paragraph 6, the applicant's costs be borne by the second respondent in her personal capacity on attorney/client scale.
6. No order of costs be and is hereby granted against the first respondent and third respondent unless one or other or both of them opposes the relief sought by the applicant, in which event the applicant's costs on attorney/client scale, be and is hereby granted against one or other or all the first, second and third respondent, the second respondent in her personal capacity, G jointly and severally, the one paying the other to be absolved."

The Master of the High Court and the Registrar of Deeds were the first and third respondents in HC 3847/12.

I now turn to the facts leading to the interlocutory application. On 22 November 2012 the applicant in this case filed an application for the rescission of the H judgment granted by Chitakunye J in case no. HC 3847/12 in terms of r 63

2013 (1) ZLR p564

Mawadze J

of the High Court Rules and the removal of bar in terms of r 84 of the same A rules. The applicant seeks the following order:

"IT IS ORDERED THAT;-

(i) Default judgment granted under case No. HC 3847/12 be and is hereby rescinded.

(ii) The bar in operation for want of filing heads of argument be and is hereby B uplifted and the applicant is hereby ordered to file heads of argument within 5 days of this order.

(iii) There be no order as to costs."

In support of the application for rescission of judgment and upliftment of the bar, the applicant in her founding affidavit explained that her erstwhile legal practitioners, Mupindu and Mugiya Law chambers, specifically Mr Mupindu, C failed to file heads of argument although she had been made to believe that Mr Mupindu would timeously file such heads of argument. The applicant states that she was surprised on the date of hearing that Mr Mupindu had not filed the heads of argument. To compound her woes she also learnt that she had been barred and as a consequence a default judgment against her D was granted. The applicant makes it clear in the founding affidavit that her erstwhile legal practitioners are to blame for their laxity in their failure to observe this court's rules.

The applicant passionately begs and pleads with the court not to visit the sins of her erstwhile legal practitioners upon her.

In respect of the prospects of success, the applicant believes she has prospects of success in the main matter as the Master properly appointed her as the E executrix dative of the estate on account of her being the surviving spouse. It is the applicant's contention that thereafter she proceed to properly administer the estate in terms of the law and has since transferred the sole asset of the estate, an immovable property into her name.

Attached to the applicant's affidavit are a number of annexures which include F a copy of her marriage certificate to the late James Desmond Mombo, a letter from the Registrar of Marriages confirming the authenticity of the said marriage certificate, letters of administration appointing the applicant as the executrix dative of the estate of the late James Desmond Mombo and the first and final liquidation and distribution account of the estate. G

The first respondent on 4 December 2012 filed a notice of opposition. The first respondent in the opposing affidavit stated that the applicant was in wilful default and that there are no prospects of success in the main matter. A legal practitioner, Mr Canaan Dube, filed a supporting affidavit to the first respondent's opposing affidavit. On 12 February 2013 the applicant filed an answering affidavit and heads of argument were filed on 22 February 2013. H

Mawadze J

A The first respondent in turn filed heads of argument on 26 April 2013 and the matter was set down for hearing on 14 June 2013.

I now turn to the basis of this interlocutory application. On 12 June 2013, two days before the hearing of the application, the applicant caused to be issued by the Registrar a notice of intention to apply for leave to file a further affidavit at the hearing on 14 June 2013. Attached to this notice is B a supporting affidavit by the applicant's erstwhile legal practitioner in case no. HC 3847/12, Mr Simon Mupindu, dated 11 June 2013 in which he seeks to place on record the fact that he is to blame for the failure to file heads of argument in the main matter case no. HC 3847/12, culminating in a default judgment being granted against the applicant.

C At the commencement of the hearing on 14 June 2013 Mr *Uriri* made an oral application in terms of r 235, which provides as follows:

> **"235 Further affidavits**
>
> After an answering affidavit has been filed, no further affidavits may be filed without the leave of the court or a judge."

D Mr *Uriri* submitted that the basis of this application was that after he had been briefed by counsel for the applicant (C Mutsahuni Chikore & Partners) to argue the matter, he realised the need to have on record a supporting affidavit from the applicant's erstwhile legal practitioners, Mupindu and Mugiya Law Chambers, explaining their failure to file heads of argument in case no. HC 3847/12.

E Mr *Uriri* further submitted that he inquired why the supporting affidavit had not been filed either with the founding affidavit or answering affidavit and the explanation he received from the instructing counsel was that the instructing counsel was of the misplaced view that such a supporting affidavit was not necessary, a view Mr *Uriri* does not share.

F Mr *Mpofu* for the first respondent vigorously opposed the application to accept the filing of the supporting affidavit by Mr Simon Mupindu. Mr *Mpofu* took the point that the purported supporting affidavit was issued by the Registrar just two days before the hearing. In argument Mr *Mpofu* made the point that the circumstances for not initially filing the supporting affidavit cannot be explained from the bar by Mr *Uriri*. Mr *Mpofu* argued that such an G application cannot be made orally but must be in writing. In fact Mr *Mpofu* submitted that r 235 should be read together with r 226 which deals with the nature of applications, either in the form of court applications or chamber applications. Mr *Mpofu* urged the court to take note of the applicant's dilatory nature in dealing with this case, which conduct can also be discerned in case H no. HC 3847/12. Mr *Mpofu* submitted that no proper application in terms of

---

Mawadze J

r 235 has been placed before the court, as Mr *Uriri* has not made a proper A application in writing.

It was after hearing the submissions from Messrs *Uriri* and *Mpofu* that I granted leave in terms of r 235 for the applicant to file the affidavit by Mr Simon Mupindu. Mr *Mpofu* is of the view that I erred in this respect and would want to take the matter up with a higher court. I found no need to B deny him leave to appeal against this interlocutory order.

I now deal with the reasons which informed my decision. It is clear that the application made by Mr *Uriri* for leave to file the supporting affidavit is informed by the wise words of Mutambanengwe J in *Cobra & The Wild Cat (Pvt) Ltd v Tundu Distributors (Pvt) Ltd* 1990 (1) ZLR 133 (H) at 135G-136A C wherein the learned judge had this to say:

> "Where, as is implied in the applicant's affidavits in this case, the allegation is made which amounts to charging a legal practitioner of gross dereliction of duty, and a fragrant violation of this court's rules, it is my view that it is incumbent upon the applicant to afford the legal practitioner involved an opportunity to condemn himself, if that be the case, from his own mouth; he should be asked to swear an affidavit as to the facts for which he is being blamed. Failure to do D so on the part of the applicant, particularly after his attention has been drawn to need to do so, as in this case, must inevitably lead the court to draw the necessary inference that the applicant is not being truthful."

It is not in dispute that a default judgment was granted in case no. HC 3847/12 as a result of failure by the applicant's erstwhile legal practitioner, Mr Simon E Mupindu, to file heads of argument. The applicant makes this point clear both in the founding and answering affidavits. The first respondent does not put this fact into issue at all. What therefore is in issue in my view is whether the sins of Mr Simon Mupindu should be visited upon the applicant.

It is common cause that the applicant did not include Mr Simon Mupindu's supporting affidavit as part of either the founding or answering affidavit. One F has to appreciate the applicant's predicament. The same legal practitioner according to her had not acted in her best interests, resulting in her being barred and a default judgment granted. While it was prudent to place on record Mr Simon Mupindu's affidavit timeously, I do not share the view that the door should be completely shut and deny the applicant such an opportunity, G albeit at the time of hearing.

My view is that r 235 provides for such leave to file further affidavits being granted by either the court or the judge. Simple interpretation means that where such leave is granted by a judge it implies that such leave is granted by a judge of this court sitting otherwise, not in open court: see r 3. By implication, this means that such leave may be granted by the court, which H

Mawadze J

A in my view means that in proper circumstances an application for such leave can be made in court orally and not necessarily in writing. In fact r 235 does not indicate that a party seeking such leave from the court or a judge should do so only in writing. I am not persuaded by the point taken in argument by Mr *Mpofu* that r 235 should be read with r 226. Even if one was to adopt that approach, the conclusion cannot be that oral applications cannot be made in B terms of r 235. Rule 226(1) provides as follows:

> **"226 Nature of applications**
>
> (1) Subject to this rule, all applications made for whatever purpose in terms of these rules or any other law, *other than applications made orally during the course of hearing*, shall be made;-
>
> (a) as C a court application, that is to say, in writing to the court on notice to all interested parties; or
>
> (b) as a chamber application, that is to say in writing to a judge" (emphasis is mine).

It is therefore clear that r 226(1) makes provisions for oral applications made during the course of a hearing.

D I am satisfied that this is a proper case in which I can properly exercise my wide discretion and allow a further affidavit to be admitted in terms of r 235 on the basis of an oral application. The applicant has given an explanation which is not disputed and excludes *mala fides*. I am of the view that Mr *Uriri* has given a satisfactory explanation why the supporting affidavit was not filed earlier. These are matters upon which blame should not be placed on the E applicant. Above all, I am not satisfied that there is any prejudice occasioned to the first respondent if such leave was granted to allow the filing of Mr Simon Mupindu's supporting affidavit. I am fortified in this finding by the views expressed by Smith J in *Silver's Trucks (Pvt) Ltd & Anor v Director of Customs & Excise* 1999 (1) ZLR 490 (H) at 493H-494A in which he quoted F with approval Hoffman AJ in

Kasiyamhuru v Minister of Home Affairs & others 1999 (1) SA 643 (W) where the learned acting judge said:

> "In my view the authorities do not restrict the discretion of the court in the manner suggested. I think if there is an explanation which negatives *mala fides* or culpable remissness as the cause of facts or information not being put before the court at an earlier stage, the court should incline towards allowing affidavits G to be filed . . . 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 of costs."

In conclusion, therefore, I am of the view that an oral application can be made in terms of r 235 of the High Court Rules in proper circumstances. I H am satisfied that a proper explanation has been given why the affidavit by

---

2013 (1) ZLR p568

Mawadze J

Mr Simon Mupindu was not filed timeously. The error of judgment by the A applicant's current legal practitioners cannot be the basis to deprive the applicant of the opportunity to place before this court all relevant facts and information of the case to enable the court to make an informed decision. There is no prejudice caused to the first respondent if the supporting affidavit is filed at this stage. B

It is for these reasons that I granted the order sought. For the avoidance of doubt I granted the following order:

IT IS ORDERED THAT:

(1) The application for leave to file a further supporting affidavit by Mr Simon Mupindu in terms of R 235 of the High Court r 1971 C be and is hereby granted.

(2) The application by the first respondent for leave to appeal against this interlocutory order be and is hereby granted.

(3) Costs be costs in the cause.

C Mutsahuni Chikore & Partners, applicant's legal practitioners D

Dube, Manikai & Hwacha, first respondent's legal practitioners.

© 2015 Juta and Company (Pty) Ltd.

Document 70 of 73

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2013/Volume 1/NGAZIMBI v MUROWA DIAMONDS (PVT) LTD 2013 (1) ZLR 569 (S)

NGAZIMBI v MUROWA DIAMONDS (PVT) LTD 2013 (1) ZLR 569 (S)

2013 (1) ZLR p569

Citation	2013 (1) ZLR 569 (S)
Case No	Judgment No. S-27-13
Court	Supreme Court, Harare
Judge	Malaba DCJ, Ziyambi JA and Omerjee AJA
Heard	14 February 2012; *CAV*
Judgment	24 June 2013
Counsel	*H Zhou*, for the appellant *T Mpofu*, for the respondent

Case Type Civil appeal

Annotations No case annotations to date

Flynote

Appeal – *leave required – leave not granted until after expiry of time for filing of notice of appeal – notice of appeal filed before leave granted – not a valid notice – leave to appeal must be granted first – procedure appellant should follow*

D **Employment** – *Labour Court – appeal from to Supreme Court – need for leave to be granted – leave not granted until after expiry of time for filing of notice of appeal – notice of appeal filed before leave granted – not a valid notice – leave to appeal must be granted first – procedure appellant should follow*

Headnote

E On 21 February 2011 the Labour Court gave a judgment, against which the appellant sought to institute an appeal on 9 March 2011. Rule 5 of the Supreme Court (Miscellaneous Appeals and References) Rules 1975 (RGN 449 of 1975) provides that an appeal against a decision of the Labour Court shall be instituted within 15 days of the decision being F given. The notice of appeal must be delivered to all interested parties and filed with the registrar of the Supreme Court within 15 days of the decision appealed against being given. However, leave to appeal to the Supreme Court was granted by the Labour Court, in terms of s 92F(2) of the Labour Act [*Chapter 28:01*], only on 2 June 2011.

G *Held*, that the fact that in terms of r 36 of the Labour Court Rules 2006 (SI 59 of 2006) leave to appeal may be granted after the expiry of the time within which to note an appeal against the judgment of the Labour Court, as required by s 5 of the Supreme Court (Miscellaneous Appeals and References) Rules, does not mean that a notice of appeal which precedes the granting of leave to appeal has been validly delivered and filed. H The purpose of requiring leave before noting an appeal to be given by

the President of the Labour Court (or, upon refusal, by a judge of the A Supreme Court), in terms of s 92F(2) of the Labour Act, is to prevent appeals, not based on questions of law, getting to the Supreme Court. The right of appeal given by s 92F(1) of the Act is a limited right. It is made conditional upon leave being granted. By making an application for leave to appeal, the party is seeking the right to lodge the appeal. B The law interposes the President of the Labour Court between the wish to appeal and the action to lodge the appeal. The authority, when granted, is prospective rather than retrospective. Until the special leave is granted, the party does not know whether an appeal is open to him; and until leave is granted, there cannot be said to be an appeal pending before the Supreme Court, even though a purported notice of appeal has C been filed. As no valid notice of appeal was filed and delivered after the grant of leave to appeal by the Labour Court on 2 June 2011, there was therefore no appeal before the Supreme Court.

Held, further, that the appropriate remedy for having a proper notice of appeal placed before the Supreme Court involves an application being made to a judge of the Supreme Court for an extension of time within D which to note the appeal and condonation for the late noting thereof.

Cases cited

Holt v Brook 1959 (3) SA 803 (N)

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

Matanhire v BP and Shell Mktg Svcs (Pvt) Ltd 2004 (2) ZLR 147 (S)

Legislation considered

Labour Act [*Chapter 28:01*], ss 92F(1) and (2)

Labour Court Rules 2006 (SI 59 of 2006), rr 4, 5 and 36

Supreme Court (Miscellaneous Appeals and References) Rules 1975 (RGN 449 of 1975), F r 5

Case information

H Zhou, for the appellant

T Mpofu, for the respondent G

Judgment

Malaba DCJ: This is an appeal against the judgment of the Labour Court upholding the decision of the appeals officer to dismiss the appellant from employment with the respondent. At the beginning of the hearing, Mr *Mpofu* who appears for the respondent raised two points *in limine*. Firstly, he argued that the notice of appeal against the judgment delivered on 21 February 2011 does not comply with the provisions of s 92F of the Labour Act [*Chapter.* H

Malaba DCJ

A *28:11*] ("the Act") and is therefore a nullity. The notice of appeal was filed by the appellant on 9 March 2011. Leave to appeal to the Supreme Court was granted by the Labour Court on 2 June 2011. The second point taken was that the grounds of appeal do not raise questions of law as required by s 92F of the Act. The preliminary points were contested by Mr *Zhou* on behalf of the appellant.

B Section 92F of the Labour Act [*Chapter 28:01*] provides that:

> "(1) An appeal on a question of law only shall lie to the Supreme Court from any decision of the Labour Court.
>
> (2) Any party wishing to appeal from any decision of the Labour Court on a question of law in terms of subsection (1) shall seek from the President who C made the decision leave to appeal that decision.
>
> (3) If the President refused leave to appeal in terms of subsection (2), the party may seek leave from the judge of the Supreme Court to appeal."

On 21 February 2011 the Labour Court gave a judgment against which the appellant sought to institute an appeal on 9 Marcy 2011. Rule 5 of the Supreme Court (Miscellaneous Appeals and References) Rules 1975 ("the D Rules) provides that an appeal against a decision of the Labour Court shall be instituted within fifteen days of the decision being given. The notice of appeal must be delivered to all interested parties and filed with the registrar of the Supreme Court within fifteen days of the decision appealed against being given.

E The notice of appeal delivered and filed by the appellant was filed before leave to appeal was granted. Leave to appeal was granted by the Labour Court on 2 June 2011. The respondent's heads of argument drew the attention of the appellant's legal practitioner to the fact that the purported notice of appeal did not comply with s 92F (2) of the Act and therefore a nullity.

Mr *Zhou* argued that r 5 is not made subject to the provisions of any other F enactment. Accordingly, it is not subject to the provisions of the Labour Act. Rule 5 of the Rules provides:

> "Subject to the provisions of r 6 a notice shall be delivered and filed in accordance with the provisions of r 4 within fifteen days of the decision appealed against being given."

G Mr *Zhou* further argued that in terms of the Labour Court Rules, SI 59 of 2006, the application for leave to appeal to the Supreme Court may be made within thirty days after the date on which the judgment appealed against was given. An application for leave to appeal can validly be made after the *dies induciae* of 15 days has expired. Mr *Zhou* said an absurdity is created which results in all appeals from the Labour Court of necessity being out H of time. The interpretation by Mr *Zhou* of r 36 of the Labour Court Rules

---

Malaba DCJ

and s 92F(2) as read with r 4 and 5 of the Rules would mean that all the A provisions must be complied with before an application for leave to appeal is granted. The fact that in terms of r 36 of the Labour Court Rules, leave to appeal may be granted after the expiry of the time within which to

note an appeal against the judgment, as required by r 5 of the Rules, does not mean that a notice of appeal which precedes the granting of leave to appeal, has B been validly delivered and filed.

The purpose of requiring leave before noting an appeal to be given by the President of the Labour Court or upon refusal, by the judge of the Supreme Court in terms of s 92F(2) of the Act is to prevent appeals not based on questions of law getting to the Supreme Court. The right to appeal given by s 92F(1) is a limited right. The exercise of it is made conditional upon C leave being granted.

A wish to exercise the right to appeal remains in the mind of the person intending to appeal. As long as it is not communicated to the President of the Labour Court who made the decision or a judge of the Supreme Court upon refusal of leave by the latter, it cannot be granted or refused. When D communicated by way of application for leave to appeal, the party is seeking the right to lodge the appeal. The law interposes the President of the Labour Court between the wish to appeal and the action to lodge the appeal. The authority, when granted, is prospective rather than retrospective. In other words, it could not be known whether an appeal is open to him until the special leave is given by the President of the Labour Court or upon refusal E by him or her, by a judge of the Supreme Court.

Mr *Zhou* submitted that in *Holt v Brook* 1959 (3) SA 803 (N), the court held that where leave to appeal is necessary, the notice required by para (a) of s 61 of Act 39 of 1896 (N) could properly be filed and served before leave to appeal was granted. That position, with respect, would be inconsistent F with our law. The court does not accept it as applicable in the present case. According to our law, authority must be sought from the President of the Labour court for leave to exercise the right to appeal. Until that authority is granted, there cannot be said to be an appeal pending before the Supreme Court, even though a purported notice of appeal has been filed. It is important G to relate the requirement for an application for leave to appeal to the purposes thereof. These are for the decision to be made on the questions whether the grounds of appeal relate to questions of law and the existence of prospects of success on appeal. A notice of appeal required by r 5 of the Rules contains matters expressive of more than an intention to appeal. A validly filed and delivered notice of appeal has the effect of entrenching the appeal. H

2013 (1) ZLR p573

Malaba DCJ

A In *Jensen v Acavalos* 1993 (1) ZLR 216 (S), the appropriate remedy for having a proper notice of appeal placed before the court was stated. The procedure involves an application for an extension of time within which to note an appeal and condonation for late noting of appeal made to a judge of the Supreme Court. See *Matanhire v BP & Shell Marketing Services (Pvt) Ltd* 2004 (2) ZLR 147 (S). As no valid notice of appeal was filed and B delivered after the grant of leave to appeal by the Labour Court on 2 June 2011, there is therefore no appeal before the Supreme Court.

In *Church of the Province of Central Africa v Kunonga & Anor* 2008 (1) ZLR 413 (S) at 418, the court dealt with the effect of a notice of appeal not complying with the statutory requirements as follows:

> C "In my view, a distinction has to be made between those matters where the notice of appeal is invalid by reason of failure to comply with the provisions of the statutes, such as s 43 of the High Court Act, and a situation where a notice of appeal is invalid by reason of failure to comply with the rules of the Supreme Court. Where a notice of appeal does not comply with the provisions of the Act of Parliament, the court has no discretion in the matter and the defect is incurable. In a situation like that, it is open to the court, and indeed a judge of the Supreme D Court, to order that the appeal is a nullity and is incurably defective."

Without an application for an extension of time within which to institute the appeal and for condonation of non-compliance with r 5, no appeal has been noted. The matter must be struck off the roll. It was not difficult for the appellant to regularise the situation by invoking the remedy provided E for the benefit of litigants in his position.

Having come to the conclusion that there is no appeal before the court, it became unnecessary to decide whether the grounds of appeal in the notice of appeal filed before leave to appeal was granted raise questions of law as required by s 92F of the Act.

F In the circumstances, the following order is made:

1. The point *in limine* be and is hereby upheld.
2. The matter is struck off the roll with costs.

G ZIYAMBI JA and OMERJEE AJA concurred.

Mhiribidi, Ngarava & Moyo, applicant's legal practitioners

Kantor & Immerman, respondent's legal practitioners

© 2015 Juta and Company (Pty) Ltd.

Document 71 of 73

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2013/Volume 1/S v MATARUSE 2013 (1) ZLR 574 (H)

S v MATARUSE 2013 (1) ZLR 574 (H)

Citation	2013 (1) ZLR 574 (H)
Case No	Judgment No. HH-202-13
Court	High Court, Harare
Judge	Musakwa J
Heard	14 June 2013; 18 June 2013; 19 June 2013; *CAV*
Judgment	25 June 2013
Counsel	*A Makon*i, for the applicant *J Uladi*, for the respondent
Case Type	Bail application
Annotations	No case annotations to date

Flynote

Appeal – *criminal matter – appeal from magistrates court – against sentence – sentence including community service – need for appellant to apply for suspension of operation of community service order – remedies when such application dismissed – do not include application for bail*

Criminal procedure – *bail – pending appeal – application – person out of* D *custody – sentence including community service – community service order not suspended pending appeal – appropriate procedure – not competent to apply for bail to avoid undergoing community service*

Headnote

The applicant was sentenced, following her conviction for theft, to a term E of imprisonment, portion which was suspended on condition that she undertake community service, part on condition that restitution was made and the rest on conditions relating to future good behaviour. An appeal was noted against conviction and sentence and an application made for the suspension of the community service order pending the F determination of the appeal. The magistrate dismissed that application, but ordered that the order for restitution be stayed. The applicant then applied to the High Court for bail.

Held, it was incongruous to seek bail for a person who was not in custody. Bail pending appeal can only be sought by a person who is in custody. A community service order may be a direct community service order G (s 350A of the Criminal Procedure and Evidence Act [*Chapter 9:07*]) or community service as an alternative to a fine (s 347) or as a condition for suspending a sentence

of imprisonment (s 358). Such an order may be suspended pending appeal in terms of s 63(b)(iii) of the Magistrates Court Act [*Chapter 7:10*]. In the event that the court turns down an application for suspension of the order, the aggrieved party may appeal H

A against such a decision or seek a review. The correct procedure had been followed in the magistrates court.

Cases referred to

S v Chinzenze & Ors 1998 (1) ZLR 470 (H)

B *S v Mhlanga & Anor* 2000 (2) ZLR 73 (H)

Case information

A Makoni, for the applicant

J Uladi, for the respondent

Judgment

Musakwa J: The applicant purports to make an application for bail pending C appeal. I use the term "purports" on account of the procedural incongruity of seeking bail for someone who is not in custody.

The applicant was convicted of four counts of theft. She was sentenced as follows:

> "36 months' imprisonment of which 10 months' imprisonment is suspended for 5 years on condition accused does not during that period commit any offence D involving dishonesty for which she is sentenced to imprisonment without the option of a fine.
>
> Of the remaining 26 months' imprisonment 14 months' imprisonment is suspended on condition accused makes restitution to complainant in the sum of $398 960.48 through the clerk of court Harare on or before 30 August 2013.
>
> The remaining 12 months' imprisonment is suspended on condition accused E completes 420 hours of community service at Admiral Tait School on the following conditions:
>
> (a) community service starts on 16 August 2013 and must be completed within 13 weeks of that date.
>
> (b) community service shall be performed between the hours of 9 a.m. and 1 p.m. and 2 p.m. and 4 p.m. on Mondays to Fridays which are not public F holidays and to the satisfaction of the person in charge of that institution whom the court has granted authority to grant the accused leave of absence on a particular day or during certain hours for good cause shown.
>
> (c) any such leave shall not count as part of community service performed."

The applicant noted appeal against both conviction and sentence. Having thus noted the appeal, the applicant also applied for suspension of the community G service order pending determination of the appeal. The application was dismissed by the trial court. Nonetheless the trial court ordered the stay of restitution in respect of four of the counts on which it had acquitted the applicant.

Mr *Makoni* submitted that he erroneously sought suspension of the community H service order before the trial court. He further submitted that in essence

Musakwa J

the applicant was sentenced to imprisonment which was suspended on the A various conditions.

Mr *Makoni* also submitted that the term "imprisonment" does not entail that the accused person be detained in custody. In this respect, he submitted that the applicant's liberty has been fettered by the order that she performs community service. Thus the manner in which the community service is B performed constitutes a form of imprisonment. Finally, Mr *Makoni* submitted that, since there is no other way the community service order may be stayed, the only appropriate procedure is to seek bail.

On the other hand, Mr *Uladi* submitted that a community service order can be suspended in terms of s 63(b)(iii) of the Magistrates Court Act [*Chapter* C *7:10*]. In the event that the court turns down such

an application, the aggrieved party may appeal against such a decision or seek a review. He also submitted that bail pending appeal can only be sought by a person who is in custody.

It is trite that at common law the noting of appeal suspends the decision that is being appealed against. However, it is also known that a statute may D provide that the noting of appeal does not suspend the sentence appealed against. That applies to s 63 of the Magistrates Court Act which provides that:

> "The execution of any sentence of imprisonment, fine or community service shall not be suspended by –
>
> (a) the transmission of or the obligation to transmit the record of the proceedings in the case for review in terms of section *fifty-seven* or for scrutiny by a E regional magistrate in terms of section *fifty-eight*; or
>
> (b) the noting of an appeal referred to in section *sixty*; unless –
>
> (i) in the case of imprisonment or fine, bail is granted by a judge or magistrate in terms of s 123 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]; or F
>
> (ii) in the case of community service, an application is granted by the magistrate to suspend the operation of the sentence pending determination of the appeal."

There is no doubt that the applicant was sentenced to imprisonment. However, the sentence was suspended on various conditions, such that the overall effect was that the applicant will not serve an effective prison term unless G she breaches the conditions. The various forms of punishment a court may impose are provided in s 336 of the Criminal Procedure and Evidence Act. For purposes of this application we are concerned with imprisonment for a determinate period or community service.

The rendering of service is what is commonly termed community service. H

2013 (1) ZLR p577

Musakwa J

A Can one term a community service order imposed as an alternative to imprisonment a prison term? Or put differently, is the term "community service" restricted to a direct community service order as opposed to community service as an alternative to a fine or imprisonment?

However, in terms of s 358 a court has discretion to suspend a sentence on conditions of good conduct, compensation for loss or damage or the rendering B of service to the community or a section thereof. The purpose of community service was put succinctly by Chinhengo J in *S v Mhlanga & Another* 2000 (2) ZLR 73 (H) at 74 as follows:

> "The basic idea behind an order of community service is that a person who has been convicted of a minor offence is not imprisoned but rather given an opportunity C to atone for his offence by doing work beneficial to the community whilst he is not in prison. Imprisonment has several adverse effects on an offender. He may become a hardened criminal by association with other prisoners. He becomes stigmatised and such stigmatisation may affect him psychologically with the result that he may degenerate into criminality. See J Reid Rowland *Criminal Procedure in Zimbabwe* p 25-28 and *S v Antonio & Ors* 1998 (2) ZLR 64 (H) at 67."

D Therefore, as much as Mr *Makoni* submitted that s 63 of the Magistrates Court Act requires no interpretation, my understanding of community service as provided in para (ii) is that it may be a direct community service order or community service as an alternative to a fine or as an alternative to imprisonment. I am fortified in my view by the remarks of Garwe J (as E he then was) in *S v Chinzenze & Ors* 1998 (1) ZLR 470 (H) at 475 where he had this to say:

> "The Criminal Procedure and Evidence Act [*Chapter 9:07*] now provides for community service in three situations. These may be summarised as follows:
>
> (a) by the suspension of a sentence, whether a fine or imprisonment, on condition that the accused person renders service for the benefit of the community or F a section thereof: s 358;
>
> (b) as an alternative to a fine: s 347; and
>
> (c) as a substantive penalty in its own right i.e. a community service order: s 350A."

It means Mr *Makoni* had adopted the correct procedure when he sought suspension of the community service order before the trial court. As to the G remedy where a court refuses to suspend the community service order, that is not the issue before me.

In the result, the application is hereby dismissed.

Makoni Legal Practice, applicant's legal practitioners

H *Attorney-General's Office*, respondent's legal practitioners

© 2015 Juta and Company (Pty) Ltd.

Document 72 of 73

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2013/Volume 1/MAWERE v REGISTRAR-GENERAL & ORS 2013 (1) ZLR 578 (C)

MAWERE v REGISTRAR-GENERAL & ORS 2013 (1) ZLR 578 (C)

2013 (1) ZLR p578

Citation	2013 (1) ZLR 578 (C)
Case No	Judgment No. CC-4-15[1]
Court	Constitutional Court, Harare
Judge	Chidyausiku CJ, Malaba DCJ, Ziyambi JA, Gwaunza JA, Garwe JA, Gowora JA, Hlatshwayo JA, Patel JA & Chiweshe JA
Heard	26 June 2013
Judgment	26 June 2013
Counsel	*F Mahere*, for the applicant *T Todhlana*, for the first respondent *T M Kanengoni*, with him *C Nyika,* for the second respondent No appearance for the third & fourth respondents
Case Type	Constitutional application
Annotations	Link to case annotations

Flynote

Constitutional law – *Constitution of Zimbabwe 2013 – citizenship – citizen by birth – who is – rights of such citizen – such citizenship may not be revoked – citizen of birth not prohibited from holding dual citizenship*

Headnote

The applicant was born in Zimbabwe in 1960. Both of his parents were also D born in Zimbabwe. In 2002 he acquired citizenship of South Africa by registration. In order to register as a voter in national elections that were scheduled to take place in 2013,he approached the offices of the first respondent in order to procure a duplicate national identity document, having lost the original. He was advised that for as long as he remained E a South African citizen, he would not be eligible for a Zimbabwean national identity document. He accordingly sought a declaratur that, being a citizen by birth, he was entitled to dual citizenship and that the law did not require of him to renounce his foreign citizenship before he could be issued with a Zimbabwean national identity document.

Before the enactment of the 2013 Constitution, the law prohibited dual F citizenship. In terms of the law then in operation, the applicant would have been required to renounce his South African citizenship before he could be eligible for Zimbabwean citizenship. Only then would he have been eligible for a Zimbabwean national identity card.

In terms of s 36 of the 2013 Constitution, persons are Zimbabwean citizens G by birth if they were born in Zimbabwe and, when they were born, either of their parents was a Zimbabwean citizen. The applicant submitted that citizenship by birth may only be revoked in two situations. The first is H

A where citizenship is acquired by fraud, false representation or concealment of a material fact by any person. See s 39(2)(a). The second is where the nationality or parentage of a child found in Zimbabwe, who is or appears to be less than 15 years of age and whose nationality and parents are unknown and is presumed to be a Zimbabwean citizen by birth, becomes known. Although s 42 of the Constitution empowers Parliament to pass B an enactment prohibiting dual citizenship, such prohibition may be in respect of citizens by descent or registration, but not in respect of citizens by birth. It was also submitted that there was no residency requirement in terms of the law for citizens by birth.

The first respondent submitted that the applicant was not a Zimbabwean C citizen when the new Constitution came into effect and could not have reverted to being one by virtue of s 36. Some formal act would be required to have citizenship restored to him.

Held, that the Constitution is the supreme law of the land and that any law, practice, custom or conduct inconsistent with it, is invalid to the extent of the inconsistency. The obligations imposed by the Constitution are D binding on every person, including the State and all its organs at every level. In interpreting the Constitution, all relevant provisions are to be considered as a whole and where rights and freedoms are conferred on persons, derogations therefrom, as far as the language permits, should be narrowly and strictly construed. The meaning of a right or freedom E guaranteed by a constitution must be ascertained by an analysis of the purpose of such guarantee and that such purpose must be sought, *inter alia*, in the character, larger objects, historical origins of the concepts enshrined in the Constitution and in the language in which the concepts are expressed.

Held, further, that the provisions of Chapter 3 of the Constitution (which F deals with citizenship) must be read together. Section 36 is not made subject to any other section in the Constitution. The ordinary grammatical meaning of the section is clear and allows of no ambiguity. A person born in Zimbabwe to a parent who, at the time of the person's birth, was a Zimbabwean citizen, is a Zimbabwean citizen and is not obliged to do anything further to qualify for Zimbabwean citizenship. Citizenship G by registration may be revoked under s 38. Under 39, citizenship by birth may be revoked only if such citizenship was acquired by false representation or where it is established that a child below fifteen years of age, who is presumed in terms of s 36(3) of the Constitution to be a citizen by birth, is a citizen of another country. The section does not H provide for the revocation of the citizenship of a person who born in

Zimbabwe to a Zimbabwean parent and the necessary corollary is that A citizenship acquired in terms of s 36(1) cannot be revoked by the State under any circumstances.

Held, further, that s 43(1), which restates that any person who, before 22 May 2013, was a Zimbabwean citizen, continues to be a Zimbabwean citizen after that date, applies to all classes of citizens, not only to B citizens by birth.

Held, further, that s 42, which itemises the matters relating to citizenship in respect of which Parliament may pass a law, requires that such legislation must be consistent with Chapter 3 of the Constitution. In other words, such legislation may not allow for the derogation of any rights conferred in terms of Chapter 3. The section makes it clear that such legislation C may deal with the prohibition of dual citizenship in respect of citizenship by descent or registration only. It does not provide for the prohibition of dual citizenship in respect of persons who are citizens by birth.

Cases referred to

Minister of Home Affairs v Bickle & Others 1983 (2) ZLR 400 (S); 1984 (2) SA 439 (ZS) D

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

Hewlett v Minister of Finance & Anor 1981 ZLR 571 (S)

James v Commonwealth of Australia [1936] AC 578

Park-Ross & Anor v Director, Office for Serious Economic Offences 1995 (2) SA 148 (C) E

Rattigan & Ors v Chief Immigration Officer & Others 1994 (2) ZLR 54 (S)

S v Zuma & Ors 1995 (2) SA 642 (CC)

Legislation considered F

Constitution of Zimbabwe 2013, ss 2, 36, 38, 39, 42 and 43

Case information

F Mahere, for the applicant

T Todhlana, for the first respondent

T M Kanengoni, with him *C Nyika,* for the second respondent G

No appearance for the third & fourth respondents

Judgment

Garwe JA:

[1] This is an application, filed on the basis of urgency, in which the applicant seeks a *declaratur* that, being a citizen by birth, he is entitled to dual citizenship and that the law does not require of him to renounce his H

Garwe JA

A foreign citizenship before he can be issued with a Zimbabwean national identity document.

[2] After hearing submissions from counsel, the court issued the following order:

"It is ordered that:

1. The applicant, Mutumwa Dziva Mawere, born 11 January 1960, is a B citizen of Zimbabwe by birth in terms of s 36 (1) of the Constitution of Zimbabwe Amendment (No. 20) Act 2013.
2. The first respondent is interdicted from demanding of the applicant to first renounce his foreign-acquired citizenship before he can be issued with a national identity document.
3. The first respondent is directed to issue the applicant with a national C registration document forthwith and in any event before the voter registration process being conducted by the second respondent in terms of s 6(3) of the Sixth Schedule to the Constitution is concluded.
4. The first respondent pay the costs of this application."

The court further indicated that the full reasons for the order would be made available in due course.

D What follows are the reasons.

Background

[3] The applicant was born in Bindura, Zimbabwe, on 11 January 1960. Both of his parents were also born in Zimbabwe. On 10 July 2002 the applicant acquired the citizenship of South Africa by registration.

[4] In E order to register as a voter in national elections that were scheduled to take place in 2013, the applicant approached the offices of the first respondent in order to procure a duplicate national identity document, having lost the original. He was advised that for as long as he remained a South African citizen, he would not be eligible for a Zimbabwean F national identity document.

[5] It is not in dispute that prior to the enactment of the new constitution, the law prohibited dual citizenship. In terms of the law then in operation, the applicant was required to renounce his South African citizenship before he could be eligible for Zimbabwean citizenship. Only then would he have been eligible for a Zimbabwean national identity card.

[6] On G 22 May 2013, the Constitution of Zimbabwe Amendment (No. 20) Act, 2013, ("the Constitution") was gazetted and became operational. Section 36 of the Constitution provides, in relevant part:

"36 CITIZENSHIP BY BIRTH

(1) Persons are Zimbabwean citizens by birth if they were born in Zimbabwe H and, when they were born –

Garwe JA

(a) either their mother or their father was a Zimbabwean citizen; or A

(b) . . . (not relevant) . . .”

[7] The dispute in the present matter revolves around the interpretation to be accorded to the above provision and whether in terms of the Constitution it is now permissible for a person in the position of the applicant to enjoy both Zimbabwean and South African citizenship. Put differently, B the question is whether the applicant is required to do anything more in order to qualify as a citizen.

The applicant’s submissions

[8] It is the applicant’s submission that citizenship by birth may only be revoked in two situations. The first is where citizenship is acquired by C fraud, false representation or concealment of a material fact by any person. See s 39(2)(a). The second is where the nationality or parentage of a child found in Zimbabwe, who is or appears to be less than fifteen years of age and whose nationality and parents are unknown and is presumed to be a Zimbabwean citizen by birth, becomes known.

[9] The applicant further submits that, although s 42 of the Constitution D empowers Parliament to pass an enactment prohibiting dual citizenship, such prohibition is in respect of citizens by descent or registration. Such enactment must in any event be consistent with the provisions of Chapter 3 of the Constitution. Therefore the prohibition of dual citizenship for citizens by birth, whose parents were born in Zimbabwe, as provided E for in s 9 of the Citizenship of Zimbabwe Act [*Chapter 4:01*] would be inconsistent with Chapter 3 and consequently null and void. Had the intention been to prohibit dual citizenship in respect of citizens by birth, the Constitution would have expressly made provision for the potentiality of such prohibition in s 42(e).

[10] The applicant further submits that contrary to submissions by the first F respondent, there is no residency requirement in terms of the law for citizens by birth whose parents were born in Zimbabwe. Section 43(2) of the Constitution in particular applies to a person born in Zimbabwe, was ordinarily resident in Zimbabwe on the publication day and at least one of his or her parents was a citizen of a SADC member State. G

The first respondent’s submissions

[11] The first respondent, the Registrar-General, does not agree. His argument is as follows:

(1) In terms of s 43(1) of the Constitution, the applicant was not a Zimbabwean citizen before 22 May 2013 when the new Constitution H

Garwe JA

A came into operation. He was a South African citizen. He could not therefore have metamorphosed into a citizen by birth immediately after that date solely because of the provisions of s 36(1).

(2) Having previously lost his citizenship, he needs to perform a formal act to have the citizenship restored to him. Such restoration can only be in terms of an Act of Parliament still to be passed in terms B of s 42, which Act would prescribe the procedure to be followed by persons wishing to have their citizenship restored in terms of s 42(d) of the Constitution.

The relevant Constitutional provisions

[12] Sections C 35 to 43 of the Constitution deal with the question of citizenship. Amongst other things, citizens are entitled to passports and travel documents as well as birth certificates and other identity documents issued by the State. Section 35 makes it clear that citizenship is by birth, descent or registration.

[13] As already noted, s 36 states that a person is a citizen by birth, *inter* D *alia*, if such person was born in Zimbabwe to either a mother or father who was a Zimbabwean citizen.

[14] Section 38 provides for citizenship by registration to three classes of persons. These are (a) persons who have been married to Zimbabwean citizens and satisfy other conditions prescribed by an Act of Parliament; (b) persons who have been continuously and lawfully resident in E Zimbabwe for a period of at least ten years; and (c) a child who is not a Zimbabwean citizen but is adopted by a Zimbabwean citizen.

[15] Section 39 provides for the revocation of citizenship, but only in respect of two types of citizenship. The first is citizenship by registration. Such citizenship may be revoked if the acquisition of citizenship was through F fraud, false representation or concealment of a material fact or, during war situations, the person concerned unlawfully trades, communicates or associates with any business that is carried out to assist an enemy. The second is citizenship by birth. Such citizenship may be revoked if it is acquired by fraud, false representation or concealment of a material fact or, in the case of a child found in Zimbabwe who appears to be G less than fifteen years of age and is presumed to be a citizen by birth in terms of s 36(3), the person's nationality or parentage becomes known and it is established that such person was a citizen of another country.

[16] Section 42 provides for the enactment of a law, consistent with Chapter 3, providing for (a) the procedures to be followed in acquiring citizenship H by registration; (b) the voluntary renunciation of Zimbabwean citizenship;

Garwe JA

(c) the procedures for the revocation of Zimbabwean citizenship by A registration; (d) the restoration of Zimbabwean citizenship; (e) the prohibition of dual citizenship in respect of citizenship by registration or descent; and (f) any other issues to give effect to Chapter 3.

[17] Section 43, on the other hand, provides that every person who before 22 May 2013 was a citizen continues to be one after that date. B

It also provides that any person who was born in Zimbabwe before 22 May 2013 is a citizen by birth if one or both of his parents was a citizen of a SADC member State and he or she was ordinarily resident in Zimbabwe as at that date.

Interpretation of the Constitution C

[18] Section 2 of the Constitution provides that the Constitution is the supreme law of the land and that any law, practice, custom or conduct inconsistent with it, is invalid to the extent of the inconsistency. It also provides that the obligations imposed by the Constitution are binding on every person, including the State and all its organs at every level. D

[19] This section is important as it stipulates beyond doubt that anything done contrary to the provisions of the Constitution is invalid.

[20] Various decisions of this Court and elsewhere have made pronouncements on the correct approach to the interpretation of a constitution.

In *Rattigan & Ors v Chief Immigration Officer & Others* 1994 (2) ZLR 54 (S) E at 57, Gubbay CJ remarked:

> "What is to be avoided is the imparting of a narrow, artificial, rigid and pedantic interpretation; to be preferred is one which serves the interest of the Constitution and best carries out its objects and promotes its purpose. All relevant provisions are to be considered as a whole and where rights and freedoms are conferred on persons, derogations therefrom, as far as F the language permits, should be narrowly and strictly construed."

In Park-Ross and Anor *v* Director, Office for Serious Economic Offences 1995 (2) SA 148 (C) at 160I-161A-J, Tebbutt J stated:

> "It must be recognized that a constitution is *sui generis*, that the spirit and tenor of the Constitution must 'permeate the process of judicial interpretation', that the meaning of a right or freedom guaranteed by a Constitution must G be ascertained by an analysis of the purpose of such guarantee and that such purpose must be sought, *inter alia*, in the character, larger objects, historical origins of the concepts enshrined in the Constitution and in the language in which the concepts are expressed."

In *Government of the Republic of Namibia and Anor v Cultura* 2000 *and Anor* 1994 (1) SA 407 (NmS) at 418F-H Mahomed CJ remarked: H

Garwe JA

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

In *S v Zuma & Ors* 1995 (2) SA 642 (CC) Kentridge JA stated thus:

B ". . . But it cannot be too strongly stressed that the Constitution does not mean whatever we might wish it to mean. We must heed Lord Wilberforce's reminder that even a constitution is a legal instrument, the language of which must be respected. . . . I would say that a constitution embodying fundamental principles should as far as its language permits be given a broad construction."

C Attention may also drawn to the remarks by Fieldsend CJ in *Hewlett v Minister of Finance* 1981 ZLR 571 (S) that the principles governing interpretation of a constitution are basically no different from those governing the interpretation of any other legislation; and the remarks by Lord Wright in *James v Commonwealth of Australia* [1936] AC 578 at 613, cited by Georges CJ in D *Minister of Home Affairs v Bickle & Others* 1983 (2) ZLR 400 (S) at 440; 1984 (2) SA 439 (ZS) at 447 that:

"The question, then, is one of construction, and in the ultimate resort must be determined upon the actual words used, read not in *vacuo* but as occurring in a single complex instrument, in which one part may throw light on another . . . The true test must as always, be the actual language used."

E **Whether applicant needs to renounce his foreign citizenship first**

[21] The first respondent's argument is that since the applicant had already lost his citizenship prior to the enactment of the Constitution, he needs to go through other procedures to be provided for in an Act of Parliament still to be passed in order to have his citizenship restored and that only then F would he be entitled to citizenship in terms of the current Constitution, together with the benefits that citizens enjoy.

[22] Bearing in mind that the provisions in Chapter 3 of the Constitution must be read together, one must, I think, start by looking at the language used in s 36 of the Constitution. As already noted, the section provides, G in simple and clear language that a person

"is a Zimbabwean citizen by birth if he or she was born in Zimbabwe and when born either his or her mother or father was a Zimbabwean citizen."

[23] Section 36 is not made subject to any other section in the Constitution. It stands alone. The ordinary grammatical meaning of the section is clear and allows of no ambiguity. A person born in Zimbabwe to a parent who, H at the time of birth, was a Zimbabwean citizen, is a Zimbabwean citizen.

Garwe JA

That section does not oblige a person in this category to do anything A further to qualify for Zimbabwean citizenship.

[24] Section 36(1), however, needs to be considered in the context of the other provisions of Chapter 3 of the Constitution.

[25] Section 38 provides for citizenship by registration to persons married to a Zimbabwean citizen or who have been continuously and lawfully B resident in Zimbabwe for at least ten years and in both cases satisfy other conditions prescribed by an Act of Parliament. Also included in this category are children, who are not ordinarily citizens, but are adopted by a Zimbabwean citizen.

This class of citizenship becomes relevant in cases where citizenship is C sought to be revoked by the State.

[26] Section 39 deals with the circumstances in which citizenship may be revoked. Such revocation is limited to citizenship by registration and citizenship by birth in cases where such citizenship was acquired by false representation or where it is established that, a child below fifteen years of age, who is presumed in terms of s 36(3) of the Constitution to D be a citizen by birth, is a citizen of another country.

[27] What is significant about s 39 is that it does not provide for the revocation of the citizenship of a person who is born in Zimbabwe to a Zimbabwean parent as provided in s 36(1) of the Constitution.

Read against s 39, the necessary corollary is that citizenship acquired in E terms of s 36(1) cannot be revoked by the State under any circumstances.

[28] One must however go further and consider the provisions of s 42 and 43 of the Constitution. It is, I think, convenient to consider s 43 (1) first.

[29] Section 43(1) is a neutral provision which simply restates that any person who, before 22 May 2013, was a Zimbabwean citizen, continues to be F a Zimbabwean citizen after that date.

[30] Of significance is the fact that the citizenship referred to in that section is not confined to citizenship by birth only. Citizenship by descent and registration is also included. This is a savings provision, intended to put beyond dispute that any person who enjoyed any type of citizenship before 22 May 2013 would continue to be a citizen after that date and G would consequently enjoy all the benefits of citizenship bestowed on a citizen in terms of s 35 of the Constitution.

[31] Section 42 provides for the passing of an Act of Parliament to deal with the following:

(a) the procedures to be followed in acquiring citizenship by registration; H

Garwe JA

(b) the A voluntary renunciation of Zimbabwean citizenship;

(c) the procedures to be followed in the revocation of citizenship by registration;

(d) the restoration of Zimbabwean citizenship;

(e) the prohibition of dual citizenship in respect of citizens by descent B or registration; and

(f) generally giving effect to the provisions of Chapter 3 of the Constitution.

[32] A number of observations must be made from the above provisions.

First, s 42 makes it possible for Parliament to enact legislation to deal C with the various aspects of citizenship itemised in that section.

Second, such legislation must be consistent with Chapter 3 of the Constitution. In other words, such legislation may not allow for the derogation of any rights conferred in terms of Chapter 3.

Third, the section makes it clear that such legislation may deal with the D prohibition of dual citizenship in respect of citizenship by descent or registration only. It does not provide for the prohibition of dual citizenship in respect of persons who are citizens by birth.

Fourth, the section provides for the enactment of legislation dealing with the restoration of Zimbabwean citizenship. It is implicit that the Constitution envisages a situation where citizenship is lost but an E application is then made for the restoration of such citizenship.

Fifth, it is clear that citizenship can be lost in a number of situations. It may be revoked in terms of s 39 of the Constitution. It may also be the result of voluntary renunciation as provided for in 42(b) or the prohibition of dual citizenship in terms of s 43(e) of the Construction.

[33] In F all these situations, any affected person may apply for the restoration of Zimbabwean citizenship. An Act of Parliament will provide details on how such citizenship can be restored.

[34] Section 42 does not and cannot have an overriding effect on the other provisions of Chapter 3. If anything, it complements these other provisions G and is not inconsistent with them.

[35] Consequently, on a proper reading of all the provisions of Chapter 3, the inference is irresistible that dual citizenship in respect of citizens by birth is not proscribed. Such citizenship exists by operation of law.

[36] It was for the above reasons that, after hearing counsel, we made the H order reflected in paragraph 2 of this judgment.

Garwe JA

CHIDYAUSIKU CJ, MALABA DCJ, ZIYAMBI JA, GWAUNZA JA, A GOWORA JA, PATEL JA, HLATSHWAYO JA and CHIWESHE AJA concurred.

Nyakutombwa/Mugabe, Legal Counsel, applicant's legal practitioners B

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

Nyika Kanengoni & Partners, second respondent's legal practitioners C

1 *Editor's note*: although the Court's decision was handed down on 26 June 2013, the judgment was not made available until March 2015, hence the 2015 judgment number.

© 2015 Juta and Company (Pty) Ltd.

Document 73 of 73

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2013/Volume 1/S v NKOMO & ORS 2013 (1) ZLR 589 (H)

S v NKOMO & ORS 2013 (1) ZLR 589 (H)

Citation	2013 (1) ZLR 589 (H)
Case No	Judgment No. HB-99-13
Court	High Court, Bulawayo
Judge	Kamocha J
Heard	27 June 2013
Judgment	27 June 2013
Counsel	Details not supplied
Case Type	Criminal review
Annotations	No case annotations to date

Flynote

C **Criminal procedure** – *sentence – fine – may not be imposed as a condition of suspension of a term of imprisonment – term of imprisonment should be stipulated as being in default of payment of fine*

Headnote

It is not competent to suspend a sentence of imprisonment (or a portion D thereof) on condition that the convicted person pays a fine. The correct way to formulate the sentence is to impose a fine and, in default of payment, the relevant period of imprisonment.

Legislation considered

E Criminal Procedure and Evidence Act [*Chapter 9:07*], ss 347 and 358

Judgment

Kamocha J: This judgment relates to four cases from different magisterial stations. The cases have a similar problem, which seems to suggest that the problem is common among magistrates.

In the case of *S v Nkomo* the accused was convicted by a Provincial magistrate F of malicious damage to property as defined in s 140(a)(b) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. He was sentenced to 18 months' imprisonment, of which six months' imprisonment was suspended on the usual condition of future good behaviour. A further six months' imprisonment was suspended on condition the accused pays a fine of $200 on or before 18 December 2012, through the clerk of court. The remaining G six months' imprisonment was suspended on condition the accused restitutes the complainant in the sum of $100 on or before 18 December 2012, through the clerk of court.

The same provincial magistrate dealt with the case of *S v Simela.* The accused was convicted of stock theft, as defined in s 114 of the Criminal H Law (Codification and Reform) Act. The provincial magistrate held the

---

Kamocha J

view that there were special circumstances in the matter entitling him to A impose a sentence other than the minimum mandatory sentence of nine years. The accused was sentenced to six years' imprisonment, of which two years' imprisonment was suspended on the usual condition of future good behaviour. A further two years' imprisonment was suspended on condition the accused pays a fine of $400, through the clerk of court, on or before 31 B December 2012. The remaining two years' imprisonment was suspended on condition the accused compensates the complainant, through the clerk of court, the sum of $1 300 on or before 31 December 2012.

I queried the propriety in respect of each case of suspending a prison term on condition that the accused pays a fine. The provincial magistrate in charge of Matabeleland South combined the two cases and responded to the queries, C advising that the provincial magistrate who had presided over the two cases had left service in December 2012 and was now based in South Africa.

In *S v Nzvingu* the accused appeared at Nkayi magistrates court facing a charge of contravening s 3(a) of the Domestic Violence Act [*Chapter 5:16*]. He was convicted and sentenced to six months' imprisonment, of which three D months' imprisonment was suspended for five years on the usual conditions of future good behaviour. The remaining three months' imprisonment was suspended on condition that the accused paid a fine of $50 through the clerk of court, Nkayi.

The scrutinizing regional magistrate raised a query with the trial magistrate about the wording of the above sentence and suggested that if the trial court E had wanted to sentence the accused to a total of six months' imprisonment and also to pay a fine of $50, the proper wording would be as follows:

> "a fine of $50 or, in default of payment, 3 months' imprisonment. In addition, 3 months' imprisonment wholly suspended for 5 years on condition the accused does not, during that period, commit an offence F of which assault is an element for which, on conviction, the accused is sentenced to imprisonment without the option of a fine."

The trial magistrate responded to the scrutinizing regional magistrate and said, *inter alia,* "That could have been the proper wording for the sentence and I stand guided". The regional magistrate then referred the record for review, G seeking guidance on the proper wording of the sentence in such matters.

In *S v Chiwota* the accused pleaded guilty to a charge of assault with intent to cause bodily harm and was sentenced as follows:

> "6 months' imprisonment, of which 3 months' imprisonment is suspended for 5 years on condition the accused does not, within that period, commit any offence involving violence on another person. If convicted the H

Kamocha J

A accused will be sentenced to imprisonment without the option of a fine. The remaining 3 months is suspended (*sic)* on condition accused pays a fine of $100.

The matter went for scrutiny before a regional magistrate, who pointed out to the trial magistrate that the sentence was not properly worded. He then B suggested the following and sought the views of the trial magistrate:

> "a fine of $100, in default of payment 3 months' imprisonment. In addition, 3 months' imprisonment is wholly suspended for 5 years on condition accused does not during that period commit any offence involving violence on another person for which on conviction accused is sentenced to imprisonment without the option of a fine."

C This matter was dealt with by a magistrate sitting at the Bulawayo magistrates court. His reply was as follows:

> "He was of the opinion that the wording reflected on the review record was the standing practice. However, I stand guided by the learned regional magistrate."

D These four cases from different magisterial stations reveal that the wording of sentences in that manner has become so common that some of the magistrates now take it as the standing practice, albeit erroneously.

A magistrates court has the power to impose a fine that is within its monetary E jurisdictional limits as provided in the Magistrates Court Act [*Chapter 7:10*] and, as an alternative punishment to a fine, the court may impose a sentence of imprisonment of any duration within the limits of its punitive jurisdiction. This is provided for in s 347(1)(a) of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

The powers of courts as to postponement or suspension of sentences are F enshrined in s 358 of the above Act. Subsection (2) of s 358 provides thus:

> "(2) When a person is convicted by any court of any offence other than an offence specified in the Eighth Schedule, it may –
>
> (a) . . .
>
> (b) pass sentence, but order the operation of the whole or any part of the sentence G to be suspended for a period not exceeding five years on such conditions as the court may specify in the order; or . . ."

Subsection (3) stipulates that the conditions specified in paras (a) or (b) of subs (2) may relate to any one or more of the following matters:

(a) good conduct;

(b) compensation H for damage or pecuniary loss caused by the offence;

Kamocha J

(c) the rendering of some specified benefit or service to any person injured A or aggrieved by the offence;

(d) rendering of service for the benefit of the community or a section thereof;

(e) submission to instruction or treatment.

The suspension of a sentence on condition that the convicted person pays a fine is not one of those conditions upon which a sentence may be suspended. B If the court has decided to impose a fine, coupled with a wholly suspended term of imprisonment, it should proceed as correctly formulated by the regional magistrate as follows:

> "Sentenced to pay a fine of $100 or, in default of payment, to 3 months' imprisonment. In addition, to 3 months' imprisonment which is suspended C for 5 years on condition that the accused does not, during that period, commit any offence of which assault or violence to the person of another is an element for which, on conviction, the accused is sentenced to imprisonment without the option of a fine."

The sentences imposed by the trial courts are hereby set aside and substituted D with the following:

In *S v Nkomo* the accused is sentenced to a fine of $200 or, in default of payment, to 4 months' imprisonment. In addition, to eight months' imprisonment of which four months' imprisonment is suspended for five years on condition that the accused does not, during that period, commit any offence of which violence or malicious damage to property is an element E for which, on conviction, the accused is sentenced to imprisonment without the option of a fine. The remaining four months'

imprisonment is suspended on condition that the accused restitutes the complainant in the sum of $100 on or before 30 July 2013 through the clerk of court Filabusi, if he has not done so by now. F

In *S v Zvingu* the accused is sentenced to a fine of $50 or, in default of payment, to three months' imprisonment. In addition, the accused is sentenced to three months' imprisonment, suspended for five years on condition the accused does not, within that period, commit any offence of which assault or violence to the person of another forms an element for which, upon conviction, the G accused is sentenced to imprisonment without the option a fine.

In *S v Simela* the accused is sentenced to a fine of $400 or, in default of payment, to two years' imprisonment. In addition, to four years' imprisonment, of which two years' imprisonment is suspended for five years on condition that the accused is not, within that period, convicted of any offence of which dishonesty forms an element for which the accused is sentenced H

Kamocha J

A to imprisonment without the option of a fine. The remaining two years' imprisonment is suspended on condition that the accused compensates the complainant in the sum of $1 300 on or before 31 July 2013 through the clerk of court Filabusi, if he has not done so by now.

The altered sentence in the case of *S v Chiwota* is as suggested by the regional B magistrate *supra.* The respective trial magistrates are directed to recall the accused persons and advise them of the alterations made to their sentences. In cases where the presiding officer has left the service the magistrate in charge should do so.

The office of the Chief Magistrate is directed to circulate this review judgment C to all magistrates courts.

Cheda J agrees.

© 2015 Juta and Company (Pty) Ltd.