Document 1 of 79

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2013/Volume 2

Volume 2

S v Mashungu	2013 (2) ZLR 1 (H)
Nyarumbu v Sandvik Mining and Construction Zimbabwe (Pvt) Ltd	2013 (2) ZLR 10 (S)
Heywood Investments (Pvt) Ltd v Zakeyo	2013 (2) ZLR 16 (S)
S v Zuze	2013 (2) ZLR 25 (H)
S v Maphosa	2013 (2) ZLR 29 (H)
S v Gwingwidza	2013 (2) ZLR 33 (H)
Tamanikwa & Ors v Zimbabwe Manpower Development Fund	2013 (2) ZLR 46 (S)
S v Chinounda	2013 (2) ZLR 62 (H)
Nkomo & Ors v Tm Supermarket (Pvt) Ltd	2013 (2) ZLR 75 (H)
Croco Properties (Pvt) Ltd v Swift Debt Collectors (Pvt) Ltd	2013 (2) ZLR 79 (H)
Deputy Sheriff, Harare v Metbank Zimbabwe Ltd & Anor	2013 (2) ZLR 85 (H)
CFI Holdings Ltd v Nyahora	2013 (2) ZLR 94 (H)
Mutanga v Mutanga	2013 (2) ZLR 103 (H)
Mnangagwa v Alpha-Media Holdings (Pvt) Ltd & Anor	2013 (2) ZLR 116 (H)
Mupazviriwo v Kubeta	2013 (2) ZLR 124 (H)
AL Shams Global BVI Ltd v Equity Properties (Pvt) Ltd	2013 (2) ZLR 131 (H)
Moyo v Mkoba & Ors	2013 (2) ZLR 137 (S)
S v John	2013 (2) ZLR 154 (H)
Masango v Farmers' Commodity Stock Exchange (Pvt) Ltd & Related Cases	2013 (2) ZLR 163 (H)
Godza v Sibanda & Anor	2013 (2) ZLR 175 (H)
Dhlomo-Bhala v Lowveld Rhino Trust	2013 (2) ZLR 179 (H)

Midkwe Minerals (Pvt) Ltd v Kwekwe Consonlidated Gold Mines (Pvt) Ltd & Ors	2013 (2) ZLR 197 (S)
Musevenzo v Beji & Anor	2013 (2) ZLR 203 (H)
Parson & Anor v Chibanda No & Anor	2013 (2) ZLR 209 (H)
William Bain & Co Holdings (Pvt) Ltd v Chikwanda	2013 (2) ZLR 215 (H)
S v Moyo	2013 (2) ZLR 225 (H)
S v Bredenkamp	2013 (2) ZLR 228 (H)
Zimbabwe Congress of Trade Unions v OC Zrp Harare Central & Ors	2013 (2) ZLR 243 (H)
Reserve Bank of Zimbabwe v Zimbabwe Revenue Authority	2013 (2) ZLR 249 (S)
Govere v Ordeco (Pvt) Ltd & Anor	2013 (2) ZLR 257 (S)
Matewa v Zetdc	2013 (2) ZLR 263 (H)
S v Ncube	2013 (2) ZLR 268 (H)
Rushesha No & Anor v Dera & Ors	2013 (2) ZLR 275 (H)
Munyimi v Tauro	2013 (2) ZLR 291 (S)
Delta Beverages v Rutsito	2013 (2) ZLR 298 (S)
Econet Wireless (Pvt) Ltd v Trustco Mobile (Pty) Ltd & Anor	2013 (2) ZLR 309 (S)
Sibanda & Anor v Ochieng & Ors	2013 (2) ZLR 326 (S)
Dominion Trading FZ-LLC v Victoria Foods (Pvt) Ltd	2013 (2) ZLR 332 (H)
Northern Farming (Pvt) Ltd v Vegra Merchants (Pvt) Ltd & Anor	2013 (2) ZLR 343 (H)
Sheriff of the High Court v Mackintosh & Ors	2013 (2) ZLR 352 (H)
Wei Wei Properties (Pvt) Ltd v S & T Export and Import (Pvt) Ltd	2013 (2) ZLR 358 (H)
Chematron Products (Pvt) Ltd v Tenda Transport (Pvt) Ltd & Anor	2013 (2) ZLR 365 (H)
Mutyambizi v Goncalves & Anor	2013 (2) ZLR 375 (H)
Morten v Morten & Anor	2013 (2) ZLR 379 (H)
Standard Chartered Bank Zimbabwe Ltd v China Shougang International	2013 (2) ZLR 385 (S)

Goodliving Real Estate (Pvt) Ltd & Anor v Lin	2013 (2) ZLR 393 (S)
Gurta AG v Gwaradzimba No	2013 (2) ZLR 399 (H)
Stanbic Nominees (Pvt) Ltd & Anor v Remo Investment Brokers (Pvt) Ltd	2013 (2) ZLR 413 (H)
Chikwavira v Sheriff of Zimbabwe & Anor	2013 (2) ZLR 423 (H)
Muchenje & Ors v Stuttafords Removals (Pvt) Ltd	2013 (2) ZLR 430 (H)
Mahlangu v Dowa & Ors	2013 (2) ZLR 440 (H)
Mugano v Fintrac & Ors	2013 (2) ZLR 452 (H)
Barclays Bank of Zimbabwe Ltd v Reserve Bank of Zimbabwe & Anor	2013 (2) ZLR 459 (H)
Chimakure & Ors v Attorney-General	2013 (2) ZLR 466 (S)
Mangenje v Tbic Investments (Pvt) Ltd & Ors; Mangenje v Min of Lands & Ors	2013 (2) ZLR 534 (H)
S v Tafirenyika	2013 (2) ZLR 566 (H)
Wong & Ors v Liu & Anor	2013 (2) ZLR 576 (H)
Nhari v Zimbabwe Allied Banking Group	2013 (2) ZLR 583 (S)
Interfin Banking Corporation Ltd v Veanarcy (Pvt) Ltd	2013 (2) ZLR 589 (H)
Katsande v Welthunger Hilfe & Anor	2013 (2) ZLR 596 (H)
Muzanenhamo v Officer in Charge, CID, Law & Order & Ors	2013 (2) ZLR 604 (S)
Vela v Magolis	2013 (2) ZLR 611 (H)
H v St John's College	2013 (2) ZLR 621 (H)
S v Fata	2013 (2) ZLR 635 (H)
Mushosho v Mudimu & Anor	2013 (2) ZLR 642 (H)
James v Zimbabwe Electoral Commission & Ors	2013 (2) ZLR 659 (CC)
Practice Directive 3 of 2013	2013 (2) ZLR 669 (S)
African Export-Import Bank v Riozim Ltd	2013 (2) ZLR 672 (H)
Mutanda v Attorney-General & Anor	2013 (2) ZLR 683 (S)
Ndava v Takaruwa & Anor	2013 (2) ZLR 692 (S)

Nyemba & Ors v Alshams Building Materials	2013 (2) ZLR 699 (S)
Deputy Sheriff, Harare v Maketshemu & Ors	2013 (2) ZLR 704 (H)
Dreamoss Investments (Pvt) Ltd v National Housing Delivery Trust & Ors	2013 (2) ZLR 709 (H)
Abu-Basutu v Moyo	2013 (2) ZLR 716 (H)
S v Mubaiwa	2013 (2) ZLR 723 (H)
Mapini v Omni Africa (Pvt) Ltd	2013 (2) ZLR 729 (H)
CMED (Pvt) Ltd v First Oil Company & Ors	2013 (2) ZLR 737 (H)
JSC v Ndlovu & Ors	2013 (2) ZLR 743 (H)

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Document 2 of 79

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2013/Volume 2/S v MASHUNGU 2013 (2) ZLR 1 (H)

S v MASHUNGU 2013 (2) ZLR 1 (H)

Citation	2013 (2) ZLR 1 (H)
Case No	Judgment No. HH-375-13
Court	High Court, Harare
Judge	Hungwe J and Assessors
Heard	25 June 2013; 26 June 2013; 2 July 2013; 3 July 2013; *CAV*
Judgment	5 July 2013
Counsel	Ms *M Matsikidze* for the State Ms *M Mandingwa* for the accused
Case Type	Criminal trial
Annotations	No case annotations to date

Flynote

Criminal law – *defences – diminished responsibility – not a complete defence – lack of criminal capacity due to mental disorder or defect – what must be shown – nature of disorder or defect – cause or duration of defect irrelevant – severe emotional and psychological stress – may deprive actor* D *of criminal capacity – bipolar disorder – may remove criminal capacity*

Headnote

"In a proper case . . . a state of diminished responsibility may result in total incapacity and may prevent or reduce the person's legal as well as moral responsibility" (*dicta per* Mubako J in *S v Gambanga* 1997 (2) ZLR 1 (H) at 7 applied).

E Severe emotional and psychological stress may, in certain cases, deprive an individual of the capacity to appreciate the wrongfulness of his or her conduct or to act in accordance with such appreciation and, for this reason it will be sufficient to constitute a complete defence to criminal liability contemplated in s 227 of the Criminal Law (Codification and F Reform) Act [*Chapter 9:23*] ("the Code"), which deals with mental disorder at the time of the commission of the offence.

Criminal capacity is a prerequisite for fault, be it negligence or intent, and without it a person cannot be guilty of an offence. Criminal capacity can be defined in terms of two legs, which are inquired into after it is determined whether the accused at the time of the commission of the G offence suffered from any biological condition that could impact on his criminal capacity or if there was any other circumstance that could have had such san effect. The two legs which must be present and proven in order for a person to be held criminally capacitated are set out in s 218(1)(a) and (b) of the Code. The first is the cognitive ability or the H ability to understand and appreciate the wrongfulness of the act. The

second is the conative ability or the ability to act in accordance with A this understanding.

In terms of s 227 of the Code, the fact that a person charged with a crime was suffering from a mental disorder or defect when he did or omitted to do anything which is an essential element of the crime charged is a complete defence to the charge if the mental disorder or defect made B him (a) incapable of appreciating the nature of his conduct, or that his or her conduct was unlawful, or both; or (b) incapable, notwithstanding that he or she appreciated the nature of his or her conduct, or that his or her conduct was unlawful or both, of acting in accordance with such an appreciation. The cause or duration of the mental disorder or defect is immaterial. C

Section 227 reinforces the subjective test for *mens rea* in specific intent crimes. A plea of diminished criminal capacity, where the evidence shows it, amounts to a claim that, due to overwhelming severe psychological and emotional stress which worked to deprive the accused of the capacity to appreciate the wrongfulness of his conduct, he could not, in that state, form the necessary capacity to act in accordance with the appreciation of the D wrongfulness of his conduct.

Diminished responsibility, on the other hand, does not operate as a complete defence but only serves to mitigate sentence or reduce the crime from a serious one to a less serious one. This common law position is confirmed E in s 218 of the Code.

Bipolar disorder is a condition which is reflected by severe mood swings between manic and depressive moods. A person in the manic phase would not be aware of his mental state or behaviour and may take high risk actions that may endanger himself or those around him without appreciating the effect of those actions. Bipolar mood disorder can be F inherited. It can also be the result of underdeveloped ego which leads to loss of self-esteem later in life due to, possibly, the lack of consistent feedback from the mother or father. The condition may manifest itself in different ways, such as a feeling of hopelessness, worthlessness and helplessness. The patient may show psychotic features such as G hallucinations and delusions of religiosity, presenting themselves as paranoia jealousy. The patient may indulge in self-injurious behaviour as a result of pre-occupation with thoughts of death.

Severe emotional and psychological stress may, in some cases, deprive an individual of the capacity to appreciate the wrongfulness of his conduct H or to act in accordance with such an appreciation and, for this reason, it

Hungwe J

A will be sufficient to constitute a complete defence to criminal liability as contemplated in s 227.

Cases referred to

S v Gambanga 1997 (2) ZLR 1 (H)

S v Laubscher 1988 (1) SA 163 (A)

B *S v Smith* 1990 (1) SACR 130 (A)

S v Wiid 1990 (1) SACR 561 (A)

Legislation considered

Criminal Law (Codification and Reform) Act [*Chapter 9:23*], ss 217, C 218, 226 & 227

Case information

Ms *M Matsikidze* for the State

Ms *M Mandingwa* for the accused

Judgment

Hungwe J: The accused faced a charge of murder as defined in s 47(1) of D the Criminal Law (Codification and Reform) Act, [*Chapter 9:23*] in that on 24 June 2012 at Marindire village, Chief Makumbe, Buhera, she, with actual intent or realizing the real risk that death may result, forced Patience and Panashe Marindire to drink diametheate, a poisonous chemical, from which the two children died. She pleaded not guilty. Most of the facts constituting E the basis of the allegations of this double murder are either common cause or not in serious dispute. I will set them out.

1. The accused is 20 years old. She married at 16.
2. She is an orphan. Her mother died when she was 8 years old; and her father, when she was 10.
3. She F was raised by her maternal grandparents.
4. Upon being married she assumed responsibility to look after two other stepchildren as well as her two children of her own with the husband.
5. On the day in question, allegations regarding her failure to care for the stepchildren had been brought up for discussion by her husband's family G members.
6. She did not respond to the allegations. She later on killed her two children at a nearby river or stream by administering poison to both of them. She also took some of the poison in an apparent attempt at suicide.
7. She was saved after first aid was applied to revive her from a state of H unconsciousness.

Hungwe J

The State alleges that these facts proved that she intended A to kill and, indeed killed, her two children. It urged the court to return a verdict of guilty on both counts as charged.

On the other hand, the defence argued that whilst the act of administering poison is not denied, that act was not accompanied by the necessary *mens rea* so as to constitute the crime of murder by reason of diminished mental B capacity. The defence explained how this came about as follows.

Not only did the accused marry young, she married into an abusive family. She was subjected to both physical and verbal abuse. And one stage when she had decided to go back to her maiden home, she discovered, to her horror, that she was not welcome because of the additional burden her two children C constituted to the elderly grandparents. She went back to her marital home where she had to brace up for and endure more abuse. The last a straw came on 24 June 2012. Her husband verbally abused her over the allegations that she was not taking proper care of the two stepchildren. As if this was not enough his brother came home and confronted her over the same issue. To add salt to injury, Ratidzo Marindire, her sister-in-law, also came and piled D up the pressure on her over the same issue. She was particularly hurt by the accusation of witchcraft against her which was brought up during this saga by Ratidzo Marindire. According to the defence, the sister-in-law claimed that the accused intended to cause the death of her stepson, Tichasangana

Marindire, by unnatural means. Ratidzo threatened that should Tichasangana die, she would ensure that the accused ate the boy's flesh raw. To her dismay E and disbelief, the male relatives of the accused seemed to have adopted Ratidzo's hurtful attitude, notwithstanding that she had previously made an effort to look after the two stepsons as well as their paternal grandmother.

The defense argued that the cumulative effect of all these events was that the accused suffered severe psychological and emotional stress which triggered F a mental disorder, the effect of which was to cause her to preoccupy herself with suicidal and homicidal thoughts. She acted when her mind was so affected. As such she suffered from diminished mental capacity sufficient to negative *mens rea* or the mental element of the crime charged.

This version of her married life was disputed by the State.

For her part, Ratidzo Marindire confirmed that there were issues around the G accused's attitude towards the two stepsons. When Tichasangana, the boy, stole some water melons from a relative's field, it was believed by their family that the reason why the boy had done this was that he was not well fed by the accused. Ratidzo then decided to confront the accused over the issue. Ratidzo denied in her evidence that she had not handled this issue in a proper H

A and sensitive manner. The accused's husband, Kanganisai Marindire, in his evidence also confirmed that upon receiving reports about Tichasangana, he had confronted the accused over whether it was true that she did not leave food for the children when they came from school. According to him, the accused confirmed this. He denied that this issue was not handled in an B appropriate manner. Ilet Makwanza, the accused's mother-in-law, testified that she was not particularly happy about the manner in which the accused took the two stepchildren into her custody. She explained that she had gone for a church meeting. Upon her return she found that the accused had moved the two children into her custody without seeking her permission. She, however, did not seek the children's return. She expressed her unhappiness over the C standard of care afforded to her grandchildren by the accused.

The evidence, in our view, demonstrates that, to a large extent, the accused's in-laws contributed to her abuse, real or perceived. She felt that her in-laws unfairly blamed her even for those things that, objectively, she could not reasonably be blamed for. An example of this, in our view, was the theft of D water melons by Tichasangana. The accused felt, rightly or wrongly, that her husband did not give her the support she needed during her trials and tribulations. She clearly felt that she was a scapegoat of too many problems faced by different family members. Whether her claims are true or not, in my view, is irrelevant in order to make the determination on whether the State E has proved its case beyond a reasonable doubt. In order to put the matter into its proper perspective, the identification of the issue is necessary, that is, the nature of the defence being advanced.

The starting point should be Part III of Chapter XIV of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] ("the Criminal Law Code"), which deals with "Defences and Mitigating Factors Relating to the Mental F Status". Section 217 defines partial mental disorder or defect as follows:

> **"217 Interpretation in Part III of Chapter XIV**
>
> In this Part:
>
> 'partial mental disorder or defect' means a mental disorder or defect as defined in section *two hundred and twenty-six*, the effect of which is not such as to G entirely deprive the person suffering from it of the capacity to appreciate the nature or lawfulness of his or her conduct or to act in accordance with such an appreciation."

Section 226 0f the Criminal Law Code defines mental disorder thus:

> "**226 Interpretation in Part V of Chapter XIV**
>
> H In this Part:

> 'mental disorder or defect' means mental illness, arrested or incomplete A development of mind, psychopathic disorder or any other disorder or disability of the mind."

Generally diminished responsibility, in our law, does not operate as a complete defence but only serves to mitigate sentence or reduce the crime from one serious one to a less serious one. This common law position is confirmed in B s 218 of the Criminal Law Code. It provides:

> "**218 Diminished responsibility to operate in mitigation not as defence**
>
> (1) If at the time when a crime is committed the capacity of the person committing it –
>
> (a) to appreciate the nature of his or her conduct or that his or her conduct was C unlawful; or
>
> (b) to act in accordance with an appreciation of the kind referred to in paragraph (a); is diminished on account of acute mental or emotional stress, or a partial mental disorder or defect, such diminished responsibility shall not be a defence to the crime, but a court convicting such person shall take it into account when imposing sentence upon him or her for the crime. D
>
> (2) If the acute mental or emotional stress, or partial mental disorder or defect, is brought about through the person's own fault, a court may regard such person's responsibility as not having been diminished.
>
> (3) Where the capacity of a person to appreciate the nature or lawfulness of his or her conduct or to act in accordance with such an appreciation is affected by intoxication or provocation, Part IV or IX, as the case may be, shall apply to E such person.
>
> (4) For the avoidance of doubt it is declared that where a mental disorder or defect is such as to negate rather than diminish the capacity of the person suffering from it to appreciate the nature or lawfulness of his or her conduct or to act in accordance with such an appreciation, the person shall be entitled to a complete F defence in terms of section *two hundred and twenty-seven.*"

Section 227 of the Criminal Law Code deals with mental disorder at the time of commission of the offence. It provides that the fact that a person charged with a crime was suffering from mental disorder or defect, when the person did or omitted to do anything which is an essential element of G the crime charged, shall be a complete defence to the charge if the mental disorder or defect made him or her (a) incapable of appreciating the nature of his or her conduct, or that his or her conduct was unlawful, or both; or (b) incapable, notwithstanding that he or she appreciated the nature of his or her conduct, or that his or her conduct was unlawful or both, of acting in accordance with such an appreciation. (s 227(1)). H

2013 (2) ZLR p7

Hungwe J

A In s 227 the Criminal Law Code specifically provides that for the purposes of subs (1) above, the cause or duration of the mental disorder or defect shall be immaterial.

In light of these clear provisions of the criminal code the first question for investigation is: has the accused shown, on a balance of probabilities, that B when she poisoned her children she was suffering from mental disorder or defect?

The defence called Gibson Jiyangwa. He is the psychiatric nurse-in-charge of the Sakubva Provincial Hospital, Mutare. He conducted interviews, tests and observations on the accused. He concluded that the accused suffers from a mental illness which is called bipolar disorder. This is a condition which C is reflected by severe mood swings between manic and depressive moods. According to him, when a person is in a manic phase, he or she would not be aware of his or her mental state or behaviour and may take high risk action that may endanger himself or herself or those around him or her without appreciating the effect of that action. Bipolar mood disorder can be inherited. D It can also be the result of underdeveloped ego which leads to loss of self esteem later in life due to, possibly, the lack of consistent feedback from the mother or father. The condition may manifest itself in different ways such as a feeling of hopelessness, worthlessness and helplessness. The nurse testified that the patient may present with psychotic features such as hallucinations, delusions of gustatory religiosity presenting paranoia jealousy. The subject E may indulge in self-injurious behaviour as a result of pre-occupation with thoughts of death (thanatos). The nurse explained that there are 90 per cent chances of a subject inheriting the disorder from a parent where there is a history of mental illness in the family. In this respect, the nurse noted that the accused's late mother was a known psychiatric patient. In his assessment F of the accused, the condition which she suffered from is of non-pathological origin and, therefore, curable without the necessity of institutionalization.

The defence relies on s 227 of the Criminal Law Code. That section reinforces the subjective test for *mens rea* in specific intent crimes. A plea of diminished criminal capacity amounts to, where the evidence shows it, a statement that due to overwhelming severe psychological and emotional stress which G worked to deprive the accused of the capacity to appreciate the wrongfulness of her

conduct, she could not, in that state, form the necessary capacity to act in accordance with the appreciation of the wrongfulness of her conduct.

The recognized psychological characteristics of criminal capacity were discussed by Joubert JA in *S v Laubscher* 1988 (1) SA 163 (A) at 166D-167A H in the following terms:

2013 (2) ZLR p8

Hungwe J

> "To be criminally liable, the perpetrator must at the time of the commission of A the alleged offence have criminal capacity. Criminal capacity is a prerequisite for criminal liability. The principle of criminal capacity is an independent subdivision of the doctrine of *mens rea* . . . To be criminally accountable, the perpetrator's mental faculties must be such that he is legally to blame for his conduct. The recognized psychological characteristics of criminal capacity are: (1) the ability to distinguish between the wrongfulness or otherwise of his B conduct. In other words he has the capacity to appreciate that his conduct is unlawful; (2) the capacity to act in accordance with the above appreciation in that he has the power to refrain from acting unlawfully; in other words, that he had the ability to exercise free choice as to whether to act lawfully or unlawfully. If either of these psychological characteristics is lacking, the perpetrator lacks criminal capacity, (for example) where he does not have the insight to appreciate C the wrongfulness of his act. By the same token, the perpetrator lacks criminal capacity when his mental powers are such that he does not have the capacity for self control."

In *Laubscher supra* a distinction was drawn between statutory criminal incapacity and non-pathological criminal incapacity of a temporary nature. The latter can be a result of a non-pathological condition that is not attributable D to mental illness or mental defect in the form of a pathological disturbance of the conscious mind. The question as to whether emotional stress could constitute a complete defence was considered in *S v Smith* 1990 (1) SACR 130 (A) and *S v Wiid* 1990 (1) SACR 561 (A*)*. In *S v Smith supra* at 134J-135A, the learned judge expressed himself thus: E

> "I assume that for the present purposes what was described as an 'emotional storm' or 'emotional flooding of the mind' can result in loss of criminal capacity, that such an emotional disturbance could result in a person being, in the words of s 78, incapable of appreciating the wrongfulness of her act or acting in accordance with the position of such."

A substitution of s 227 of the Criminal Law Code for s 78 of the South African F Criminal Procedure Act, 1955, makes clear that the reasoning in *Smith'*s case (*supra*) applies with equal force to the present matter. I therefore consider it good law that severe emotional and psychological stress may, in some cases, deprive an individual of the capacity to appreciate the wrongfulness of his or her conduct or to act in accordance with such an appreciation and, for G this reason, it will be sufficient to constitute a complete defence to criminal liability as contemplated in s 227. I am fortified in this view by the remarks made by Mubako J in *S v Gambanga* 1997 (2) ZLR 1 (H) at 7 where he says:

> "In a proper case, therefore, a state of diminished responsibility may result in total incapacity and may prevent or reduce the person's legal as well as moral liability." H

2013 (2) ZLR p9

Hungwe J

A Criminal capacity is a prerequisite for fault, be it negligence or intent and without the necessary criminal capacity a person cannot be guilty of an offence. Further, it needs no restatement that criminal capacity can be defined in terms of two legs which are inquired into after it is determined whether the accused, at the time of the commission of the offence, suffered from any B biological condition that could impact on his criminal capacity or if there was any other circumstance that could have had such an effect. The two legs, which must be present and proven in order for a person to be held criminally capacitated, are set out in s 218(1)(a) and (1)(b) of the Criminal Law Code. First is the cognitive ability or the ability to understand and appreciate the wrongfulness of the act; and second the conative ability or the ability to act C in accordance with this understanding.

The evidence led on behalf of the accused demonstrates that, in all probability, the crime was committed as the result of non-pathological criminal incapacity of a temporary nature. In our view of the facts before us, the accused's troubled upbringing has a lot to do with her temperamental make-up. The D bizarre nature of the crime, in which the mother kills her own innocent young children by poisoning, can only be explained in terms of some form of mental aberration. The psychiatric nurse's testimony indicates, in our view, that the pre-occupation with death may have

led her to embark on such an action without the full appreciation of the social consequences of such an act. We E were unable to rationalize the sheer callousness and viciousness exhibited by the young mother who embarks upon such a fatal course of action against her own two children. The effect of the evidence of the psychiatric nurse was to lay a firm foundation for a finding that the State has not proved beyond a reasonable doubt that the accused had carried out the act with the necessary F criminal capacity required to constitute the crime charged. In our view, in the particular circumstances of this case, we are not satisfied that it has been shown, beyond a reasonable doubt, that the accused had exhibited both the cognitive and conative ability at the time she committed the unlawful act. In the event, therefore, it cannot be held that the State has proved its case G beyond a reasonable doubt. In the circumstances she cannot be legally held liable for the unlawful act. She must, therefore, be found not guilty and acquitted on both counts of murder.

Attorney-General's Office, for the State

H *Legal Resources Foundation*, for the accused

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Document 3 of 79

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2013/Volume 2/NYARUMBU v SANDVIK MINING AND CONSTRUCTION ZIMBABWE (PVT) LTD 2013 (2) ZLR 10 (S)

NYARUMBU v SANDVIK MINING AND CONSTRUCTION ZIMBABWE (PVT) LTD 2013 (2) ZLR 10 (S)

Citation	2013 (2) ZLR 10 (S)
Case No	Judgment No. S-31-13
Court	Supreme Court, Harare
Judge	Ziyambi JA, Garwe JA & Patel AJA
Heard	7 May 2013; *CAV*
Judgment	9 July 2013
Counsel	*B Makururu*, for the appellant *D Ochieng* for the respondent
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Employment – *disciplinary proceedings – charge – theft – conviction of negligent discharge of duties – not a competent verdict on charge of theft*

Employment – *disciplinary proceedings – penalty – dismissal – code of* D *conduct providing for dismissal for negligence after two previous warnings – dismissal without such warnings ultra vires code*

Headnote

The appellant and a co-employee were charged with the theft of goods from the respondent, their employer, after the goods went missing. The appellant was acquitted in the criminal courts but convicted E following disciplinary proceedings and dismissed. The Labour Court found the appellant not guilty of theft but found him guilty of negligence because of his apparent admission to that effect in the proceedings before the disciplinary committee. The court took the view that negligence was a competent verdict on a charge of theft and convicted him of negligent F performance of duty resulting in loss to the employer. It then confirmed the penalty of dismissal. On appeal:

Held, that as a general rule, the standard of proof required in disciplinary matters is that of a balance of probabilities. A disciplinary tribunal is endowed with a greater measure of flexibility than is a criminal court. Nevertheless, one basic principle that neither a court nor tribunal may G depart from is that the offence that the accused is found guilty of must be commensurable with the offence that he has been charged with: both offences must bear some legally cognisable affinity with one another. In our criminal law, the essential elements of theft and offences based on negligence do not share any meaningful convergence. They are *sui generis* and fundamentally distinct offences. The same applies to H

A the treatment of these offences *qua* acts of misconduct in disciplinary matters. In the applicable code of conduct, theft and negligence were clearly separate and distinct acts of misconduct and fell under different items in the code. A finding of negligence was clearly not a competent verdict on the particular charge of theft preferred against the appellant.

B *Held,* further, that in relation to the offence of negligence specified in the code of conduct, a first offence calls for a written warning and a second offence invites a last written warning. It is only the commission of a third offence of negligence that attracts the ultimate penalty of dismissal. No such previous warnings had been given to the appellant. Thus, even if negligence was a competent verdict on a charge of theft and there was C clear evidence of negligence on the part of the appellant, the penalty of dismissal imposed by the Labour Court was clearly *ultra vires* the code and therefore invalid.

Held, further, that in criminal as well as disciplinary proceedings, a person cannot be found guilty of an offence that has not been preferred against him, unless that offence is a competent verdict on the offence originally D charged. The reason for this is that the accused person must be made aware of the case against him in order to enable him to effectively prepare his defence. Although under s 89(2)(a)(ii) of the Labour Act [*Chapter 28:01*], the Labour Court may, on appeal, confirm, vary, reverse or set aside the decision, order or action that is appealed against, or substitute E its own decision or order, it cannot, *mero motu*, substitute its own charge or make a finding of guilt on an entirely different offence. Sitting as a court of appeal, it can only deal with the matter on the basis of the grounds of appeal that have been raised by the appellant. The grounds of appeal before the Labour Court were confined to theft, without any reference to negligence, and negligence was not canvassed by the parties F in the proceedings before it.

Cases referred to

Zimasco (Pvt) Ltd v Chizema 2007 (2) ZLR 314 (S)

Chikanda v United Touring Company Ltd S-7-99

Legislation considered G

Collective Bargaining Agreement: Engineering and Iron and Steel Industry (SI 301 1996), s 5(6)(b); Schedule, items B(4)(b) & D(c)

Labour Act [*Chapter 28:01*], s 89 (2)

Case information

H *B Makururu*, for the appellant

Patel AJA

D Ochieng for the respondent A

Judgment

Patel AJA: After hearing argument from counsel, we allowed the appeal in this matter and made the following order:

1. The appeal is allowed with costs.
2. The judgment of the Labour Court is hereby set aside and substituted B as follows:
   (i) The appeal is dismissed with costs.
   (ii) The appellant shall reinstate the respondent to his former position without loss of salary and benefits or pay damages to the respondent in lieu of reinstatement. C

We further indicated that the reasons for our decision would follow in due course. These are the reasons.

Background

The appellant was employed by the respondent as a stores clerk. On 12 February 2009, he issued a hydraulic pump to another employee without D recording the issuance in the stores book. After the disappearance of the pump, the co-employee was convicted of theft. The appellant himself was also charged but later acquitted.

Following internal disciplinary proceedings, the appellant was dismissed. The matter was referred to the relevant National Employment Council and E then to an arbitrator. The latter referred the case back to the respondent's disciplinary committee to rehear the matter. The disciplinary committee found the appellant guilty of theft and that decision was confirmed by the respondent's appeals committee. On appeal to the National Employment Council, it was ordered that the appellant be reinstated. The respondent then appealed to the Labour Court on the ground that the appellant should have F been found guilty of theft.

The Labour Court found the appellant not guilty of theft on the basis of what it regarded as purely circumstantial evidence. Instead, it found him guilty of negligence because of his apparent admission to that effect in the proceedings before the disciplinary committee. The court took the view that G negligence was a competent verdict on a charge of theft. It also found that the appellant's negligence had resulted in prejudice to the respondent and therefore constituted a grave offence warranting dismissal for a first offence. The court set aside the conviction of theft and substituted a conviction of negligent performance of duty resulting in loss to the employer. It then confirmed the penalty of dismissal. H

Patel AJA

A The appellant now seeks an order for his reinstatement or damages in lieu thereof. His grounds of appeal are threefold: that the applicable code of conduct only permits dismissal for negligence following two prior warnings; that the court's finding of negligence was not the subject of appeal; and that negligence is not a competent verdict on a charge of theft. I shall deal firstly B with the last ground of appeal.

Negligence as a competent verdict on a charge of theft

As a general rule, the standard of proof required in disciplinary matters is that on a balance of probabilities. This is obviously not as stringent as the standard required in criminal cases. By the same token, a disciplinary tribunal C is endowed with a greater measure of flexibility than that expected before a court of criminal law. Nevertheless, there are certain basic principles that neither a court nor tribunal can depart from. One of those principles is that the offence that the accused is found guilty of must be commensurable with the offence that he has been charged with. In other words, both offences must D bear some legally cognisable affinity with one another.

In our criminal law, as is probably the case in any other legal system, the essential elements of theft and offences based on negligence do not share any meaningful convergence. They are *sui generis* and fundamentally distinct offences. In my view, the same must apply to the treatment of these offences *qua* acts of misconduct in disciplinary matters. This is clearly recognised E in the Employment Code of Conduct applicable in the present matter – as prescribed in the Collective Bargaining Agreement: Engineering and Iron and Steel Industry (SI 301 1996), amending the

principal agreement contained in SI 282 of 1990. The Schedule to the Code sets out four broad categories of misconduct and defines the diverse offences constituting misconduct. F Negligence is identified as an act of misconduct under item B(4)(b), while the specific offence of theft is captured under item D(c). They are clearly separate and distinct acts of misconduct.

The appellant *in casu* was charged with theft as defined in item D(c). The Labour Court found him guilty of negligence. That finding of negligence was G clearly not a competent verdict on the particular charge of theft preferred against the appellant. In this regard, the court patently ignored the specific provisions of the code that should have guided its decision in the matter. In short, as was conceded by Mr *Ochieng* in his curious but not inappropriate reference to a malapropism having been committed, the court's finding was H grossly erroneous.

Patel AJA

Dismissal without prior warnings A

Insofar as concerns the penalties that may be imposed for proven acts of misconduct, the code of conduct is very clear and specific as to what may or may not be done. By virtue of s 5(6)(b):

> "An employee may only be dismissed by the commission of an act of misconduct for which the appropriate penalty in terms of this Code is dismissal." B

In relation to the offence of negligence specified in item B(4)(b) of the Schedule, a first offence calls for a written warning and a second offence invites a last written warning. It is only the commission of a third offence of negligence that attracts the drastic and ultimate penalty of dismissal.

The record *in casu* shows that the appellant was given a "valid warning" in C 2007. However, it is not clear whether this was a first or second warning or whether it was one given in writing. Moreover, there is no indication as to whether this warning was for negligence or some other offence.

Thus, even if it were to be accepted that negligence is a competent verdict on a charge of theft and that there was clear evidence of negligence on the part of the appellant, the penalty of dismissal imposed by the Labour Court was D clearly *ultra vires* the Code and therefore invalid. Again, the court appears to have disregarded the requirements of the Code and thereby committed a further fatal error.

Power to substitute decision or order

Section 89 of the Labour Act [*Chapter 28:01*] regulates the functions, powers E and jurisdiction of the Labour Court. Section 89(2), in its relevant portion, provides that:

> "In the exercise of its functions, the Labour Court may –
>
> (a) in the case of an appeal –
>
> (i) conduct a hearing into the matter or decide it on the record; or F
>
> (ii) confirm, vary, reverse or set aside the decision, order or action that is appealed against, or substitute its own decision or order."

It is axiomatic, in criminal as well as disciplinary proceedings that a person cannot be found guilty of an offence that has not been preferred against him, unless that offence is a competent verdict on the offence originally charged. G The reason for this is obvious, *viz.,* the person accused must be made aware of the case against him in order to enable him to effectively prepare his defence. In this context, notwithstanding the provisions of s 89(2)(a)(ii) of the Labour Act, the Labour Court cannot, *mero motu*, substitute its own charge or make a finding of guilt on an entirely different offence. Any such action would constitute a blatant miscarriage of justice. See *Zimasco (Pvt)* H

Patel AJA

A *Ltd v Chizema* 2007 (2) ZLR (S) 314 at 316E-317G. Furthermore, sitting as a court of appeal, it can only deal with the matter on the basis of the grounds of appeal that have been raised by the appellant. See *Chikanda v United Touring Company Ltd* S-7-99 at p 3.

In the instant matter, it is not in dispute that the appellant was never at any stage charged with negligence. Moreover, the grounds of appeal before the B Labour Court were confined to theft, without any reference to negligence, and negligence was not canvassed by the parties in the proceedings before it. What the court did, by finding the appellant guilty of negligence, was to usurp the functions of the respondent's disciplinary and appeals committees. It follows that the court fundamentally erred in its finding of negligence, as C that was an issue which was clearly not the subject of the appeal before it.

Disposition

It seems necessary before concluding this judgment to make one observation regarding the conduct of the appellant himself. Having regard to the record as a whole, it seems that the Labour Court failed to take into account the D totality of the evidence before it. Quite contrary to its finding on the charge of theft, the facts of the case suggest that there was ample evidence, albeit circumstantial, to indicate that the appellant was indeed guilty of theft. Regrettably for the respondent, it neglected to file any cross-appeal on this point. Had it done so, the outcome of this matter might have been entirely different.

E In any event, the appeal must be allowed on all of the grounds of appeal framed by the appellant. It was for the above reasons that we allowed the appeal and set aside the decision of the Labour Court.

ZIYAMBI JA and GARWE JA concurred

F *Guni & Guni*, appellant's legal practitioners

Coghlan, Welsh & Guest, respondent's legal practitioners

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Document 4 of 79

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2013/Volume 2/HEYWOOD INVESTMENTS (PVT) LTD v ZAKEYO 2013 (2) ZLR 16 (S)

HEYWOOD INVESTMENTS (PVT) LTD v ZAKEYO 2013 (2) ZLR 16 (S)

2013 (2) ZLR p16

Citation	2013 (2) ZLR 16 (S)
Case No	Judgment No. S-32-13
Court	Supreme Court, Harare
Judge	Malaba DCJ, Garwe JA & Gowora JA
Heard	4 February 2013; *CAV*
Judgment	9 July 2013
Counsel	*A Mugandiwa*, for the appellant No appearance for the respondent
Case Type	Labour appeal
Annotations	No case annotations to date

Flynote

Employment – *Labour Court – application to – quantification of damages in lieu of reinstatement – proof of – affidavits by parties not required*

Employment – *wrongful dismissal – damages in lieu of reinstatement – assessment – onus – onus on person claiming damages to prove amounts claimed – quantification of by Labour Court – what court must do – court* D *not entitled to guess amount – need to calculate figure precisely – back pay – period for which back pay may be ordered*

Practice and procedure – *application – interlocutory application – point in limine being raised – duty of court to consider such application before determining merits of matter* E

Headnote

The respondent had been dismissed from his employment by the appellant on the grounds of theft. He successfully appealed to the Labour Court, which ordered that the respondent be reinstated to his former position with full benefits, and that should reinstatement be no longer possible, F he be paid damages in lieu thereof. In the event of the parties failing to agree on the damages they were free to approach the Labour Court for quantification of the damages. The Labour Court's decision was upheld on appeal. The appellant chose not to reinstate the respondent. The respondent filed a court application with the Labour Court for an order for the quantification of damages on the grounds that the appellant had G failed to reinstate him into employment. He itemised the claim under various heads. The Labour Court in due course granted an award, against which the appellant appealed. In its award, damages for loss of salary were not based on the salary which the appellant said would have been paid to someone in the respondent's position at the time of dismissal, nor on what the respondent claimed; the court took the view that in the H

A interests of fairness the average between what was claimed and what was suggested on behalf of the respondent would meet the justice of the case.

The first ground of appeal was that the respondent's application was fatally defective for want of form, in that it failed to comply with the requirements of the Labour Court Rules (SI 59 of 2006), r 14 of which requires that an application to the Labour Court in terms of s 89(2)(b), B (c) or (d) of the Labour Act be in Form LC 1. The Labour Court had held, on this point, that the appellant had no basis for objecting to the manner in which the application was filed and could not raise a defect on the papers presented by the respondent as a defence to the application when the appellant itself had failed or refused to comply with the order C directing it to reinstate the respondent.

The second ground was that the Labour Court misdirected itself in finding that the appellant had not furnished any evidence to controvert the claim by the respondent. The appellant also contended that the court misdirected itself by finding that the appellant bore the onus to disprove the respondent's claims and in finding that the appellant should have D filed affidavits to counter the respondent's claim.

Held, that the Labour Court failed to appreciate the legal issue raised by the point *in limine.* It is incumbent upon a court before which an application is made to determine it. A court before which an interlocutory application has been made should not proceed to determine a matter on the merits E without first determining the interlocutory application. The question of whether the failure to comply with the provisions of r 14 was such as to render the application fatally defective had to be considered in isolation of the alleged failure by the appellant to comply with the order of reinstatement. The refusal by the court to determine the point *in limine* was a misdirection on a point of law.

F *Held*, further, that r 14 does not provide for the filing of affidavits by either party to the dispute. The finding by the Labour Court that the appellant omitted to file affidavits to counter the assertions of the respondent was a misdirection.

Held, further, that it was incumbent upon the respondent to adduce evidence G in support of his claim for damages. The application had attached to it an affidavit in which the respondent made assertions as to the basis upon which he sought to claim damages. There was, however, no evidence placed before the court on the specific heads under which the respondent sought an

order of damages. The Labour Court placed an onus upon the appellant to counter what it clearly found was not evidence. The H court is obliged in terms of s 90A(4) of the Act to ascertain facts in

any proceedings before it and, where necessary, to call parties to give A evidence. It is further empowered to examine any witness appearing before it. What the court is not empowered to do is to award damages in the absence of any evidence in support of such award. The court's reasoning that the appellant should have filed documents or affidavits to contradict the respondent's claim was grossly unreasonable. B

Held, further, that the reasoning of the court that the suggested average was in the interest of fairness and justice was grossly unreasonable and a misdirection on the law. Where damages can be assessed with precision, a plaintiff is expected to adduce sufficient evidence to meet this requirement. Where this cannot be done, the plaintiff must lead such evidence as is available to it (but of adequate sufficiency) so as to C enable the court to quantify his damages and to make an appropriate award in his favour. The court must not be faced with an exercise in guesswork. The evidence of what the rate of earnings applied to an employee in the respondent's grade was readily available in collective bargaining agreements which the respondent could easily have obtained. D The damages were consequently capable of assessment with precision. The court *a quo*, instead, embarked upon conjecture and plucked a figure out of the air.

Held, further, that back-pay cannot legally be awarded in respect of a period after the date of the order of reinstatement is granted. E

Cases referred to

Aaron's Whale Rock Trust v Murray & Roberts Ltd & Anor 1992 (1) SA 652 (C)

Chiriseri & Ors v Plan Intl 2002 (2) ZLR 261 (S)

Ebrahim v Pittman NO 1995 (1) ZLR 176 (H) F

First Mutual Life Assurance Ltd v Muzivi 2007 (1) ZLR 325 (S)

GMB v Muchero 2008 (1) ZLR 216 (S)

Redstar Wholesalers v Mabika S-52-05

Legislation considered

Labour Act [*Chapter 28:01*], s 90A(4) G

Labour Court Rules 2006 (SI 59 of 2006), r 14

Case information

A Mugandiwa, for the appellant

No appearance for the respondent H

Gowora JA

Judgment

A **Gowora JA**: After hearing counsel for the appellant in this matter, we allowed the appeal with costs and ordered that the matter be remitted to the court *a quo* for the application placed before it by the respondent to be determined on the merits. The respondent, despite having been served with a notice of the hearing through his legal practitioners of record, was not represented. It was indicated that reasons would follow in due course. B These are they.

The respondent was employed by the appellant as a security sergeant. On 23 March 2006 he was dismissed from employment on allegations that he had been involved in theft of diesel from a vehicle parked in the premises he was guarding. He successfully appealed to the Labour Court against the C dismissal. The Labour Court ordered that the respondent be reinstated to his former position with full benefits, and that should reinstatement be no longer possible, he be paid damages in lieu thereof. In the event of the parties failing to agree on the damages they were free to

approach the Labour Court for quantification of the damages. The appellant then appealed to the Supreme Court which upheld the decision of the Labour Court on 18 January 2010.

D The appellant chose not to comply with the order of reinstatement. On 19 March 2010 the respondent filed a court application with the Labour Court for an order for the quantification of damages on the grounds that the appellant had failed to reinstate him into employment. His claim for damages was calculated as follows:

(a) leave E days from the date of dismissal being 20 March 2006 to 18 January 2010.

(b) transport and housing allowances at 20 per cent of monthly salary from 20 March 2006 to 18 January 2010.

(c) salaries and annual bonuses from date of dismissal to date of reinstatement at USD300 per month.

(d) shift F allowances at 17.5 per cent of monthly salary.

(e) gratuity at three months for every year of service.

(f) damages equivalent to five years salary.

On 1 April 2011 the Labour Court gave an order in the respondent's favour and ordered the appellant to pay damages as follows:

1. three months' leave pay at USD245 per month.
2. leave G days for three years at 3 times 36 days (108) days (*sic*) at USD245 monthly.
3. salary for the period February 2009 till date of payment at US$245 per month.
4. gratuity of three months' salary per year worked at USD245 per month.
5. damages H of 18 months' salary at USD245 per month.

Gowora JA

The appellant was not satisfied with the result and appealed to this court on a A number of grounds. The first ground was that the application by the respondent was fatally defective for want of form, in that it failed to comply with the requirements of the Labour Court Rules 2006 (SI 59 of 2006) (the Rules).

The appellant is correct that s 14 of the Rules requires that an application to the Labour Court in terms of s 89(2)(b), (c) or (d) of the Act be in Form B LC 1. Contrary to this provision the respondent filed a court application. The learned President held that the appellant had no basis for objecting to the manner in which the application was filed. The court *a quo* was of the view that the appellant could not raise a defect on the papers presented by the respondent as a defence to the application when the appellant itself had failed or refused to comply with the order directing it to reinstate the respondent. C

The court said:

> "The order of this court directs the employer to reinstate the employee (*sic*). I am not sure where the notion of non-compliance with rules arises from when the obligation is upon the employer to comply with the order of this court. In the circumstances I find no basis for the employer to raise any objections to the application. The court will therefore proceed to consider the application for D quantification of damages."

It is correct, as contended by the appellant, that the court *a quo* misdirected itself in its finding that the appellant was not entitled to raise the issue of the respondent's failure to comply with the Rules because the appellant itself had allegedly not complied with the order to reinstate the respondent. It seems E to me that the court *a quo* failed to appreciate the legal issue raised by the point *in limine.* It is incumbent upon a court before which an application is made to determine it. A court before which an interlocutory application has been made should not proceed to determine a matter on the merits without first determining the interlocutory application.

In *Grain Marketing Board v Muchero* 2008 (1) ZLR 216 (S) Garwe JA F stated as follows at 221D-E:

> "Once the application to uplift the bar had been made, the court became seized with the matter. The court was enjoined to make a determination on that application. It did not do so. Instead it proceeded on the basis that there was no such application before the court. In this regard the court erred. I am satisfied that the trial judge erred in disregarding the oral application and G proceeding as if none had been made."

The Labour Court was obliged to consider the question whether in view of the provisions of s 14 requiring an application to be in form LC 1, the failure to comply with the provisions of the rule was

such as to render the application fatally defective. That issue had to be considered in isolation of H

Gowora JA

A the alleged failure by the appellant to comply with the order of reinstatement. The refusal by the court to determine the point *in limine* is a misdirection on a point of law.

It seems to me that it would be appropriate for this court to remit the matter to the Labour Court for a determination of the interlocutory application. B Indeed, Mr *Mugandiwa* made a concession to the effect that this court should order that the matter be remitted to the Labour Court for the determination by that court of the application before it. He did not pray for a dismissal.

The next ground of appeal was that the court *a quo* misdirected itself in finding that the appellant had not furnished any evidence to controvert the claim by the respondent. The appellant also contends that the court misdirected itself by C finding that the appellant bore the onus to disprove the respondent's claims.

This is what the court said:

> "The respondent suggests that salary for persons in applicant's category is USD$190 per month. No supporting document has been provided to show that this is the position. [The] applicant is asking for US$300 per month which the court accepts as evidence under oath. Even though there is no proof from the D applicant in support of the suggested US$190, the court is of the view that in the interests of fairness the average between what is claimed and what was suggested on behalf of the respondent would meet the justice of the case. The average between the two figures is US $245."

and later on:

> "On the claims the respondent position (*sic*) is that the applicant ought to have E submitted proof in support of claims like transport and pension. I agree. The applicant cannot just pluck a figure from the air without support and expect that an unsupported claim will be granted. But again it has to be noted that the applicant supplied an affidavit in support of his application. On the other hand the respondent has not made any effort by way of documents of affidavit to contradict the applicant's claim. The respondent as the applicant's former F employer should have documents in support of its offer. In the absence of such proof from the respondent the court will be guided by the applicant's affidavit."

The application was filed in terms of s 14 of the rules of the Labour Court. The Rules do not provide for the filing of affidavits by either party to the dispute. The finding by the learned President that the appellant omitted to file affidavits to counter the assertions of the respondent clearly amounts G to a misdirection.

It was incumbent upon the respondent to adduce evidence in support of his claim for damages. The court placed an onus upon the appellant to counter what it clearly found was not evidence. The Labour Court is obliged in terms of s 90A(4) of the Act, to ascertain facts in any proceedings before it and H where necessary, to call parties to give evidence. It is further empowered to

Gowora JA

examine any witness appearing before it. What the court is not empowered A to do is to award damages in the absence of any evidence in support of such award.

In *Redstar Wholesalers v Mabika* S-52-05 Ziyambi JA said at p 6 of the judgment:

> "The Labour Court's approach was wrong and its consequent ruling grossly B unreasonable. The court is not entitled to pluck a figure out of a hat because it is of the view that this figure 'meets the justice of the case'. Instead, the court is required to hear evidence as to how long it would reasonably take a person in the position of the dismissed employee to find alternative employment. The fact that the parties have led insufficient evidence to enable the court to arrive at an informed conclusion does not absolve the court from its duty to utilise its powers in terms of s 89(2) of the Labour Act by calling evidence in order to C resolve the issue."

In casu, the position before the court *a quo* was not that the parties had led insufficient evidence on the issue of damages. The application had attached to it an affidavit in which the respondent made assertions as to the basis upon which he sought to claim damages. There was, however, no evidence placed D before the court on the specific heads under which the respondent sought an order of damages. The court's reasoning that the appellant should have filed documents or affidavits to contradict the respondent's claim can only be described as being grossly unreasonable.

In *First Mutual Life Assurance Ltd v Muzivi* 2007 (1) ZLR 325 (S) at 328C-D Cheda JA said: E

> "The suggestion that the employer failed or refused to furnish the respondent with the appropriate salary scale suggests a wrong approach to the issue.
>
> It is the respondent who had the onus to prove his claims.
>
> If he was dismissed when he was in a certain grade, it was for him to tell the court what salary scale applied to him at the time of his dismissal. He could not F just claim that he was a certain grade whose salary scale he did not know. This would suggest that he did not know what he was claiming."

The Labour Court was wrong in the approach it adopted in this matter. The learned President was alive to the fact that the respondent had failed to furnish evidence regarding the salary scale at which the damages had to be assessed. When the respondent was dismissed his salary was pegged G in Zimbabwe dollars. At the time the application was filed in 2010, the preferred currency in use in the country was admittedly the United States dollar. The applicant pegged his salary at USD$300 per month but did not adduce evidence to establish that a person employed by the appellant of equivalent rank and experience to him at the time he was dismissed earned that amount. The appellant suggested that the sum was much lower than that, H

A but that currently it was pegged at USD190 per month. The court decided on the sum of USD245 per month as being the average sum between what was claimed and what was offered.

The reasoning of the court that the suggested average was in the interest of fairness and justice was grossly unreasonable and a misdirection on the law. In *Aaron's Whale Rock Trust v Murray and Roberts Ltd & Anor* 1992 (1) SA 652 (C) B at 655 Berman J said:

> "Where damages can be assessed with exact mathematical precision, a plaintiff is expected to adduce sufficient evidence to meet this requirement. Where, as is the case here, this cannot be done, the plaintiff must lead such evidence as is available to it (but of adequate sufficiency) so as to enable the court to quantify his damages and to make an appropriate award in his favour. The court must C not be faced with an exercise in guesswork; what is required of a plaintiff is that he should put before the court enough evidence from which it can, albeit with difficulty, compensate him by an award of money as a fair approximation of his mathematically unquantifiable loss."

The Labour Court clearly fell into error by importing in its calculation of damages a rate of pay which was completely divorced from what the respondent D was in receipt of at the time that the court ordered his reinstatement, that is, 29 October 2008. The court further misdirected itself by finding that the appellant had suggested that employees in respondent's grade were earning US$190 and using this figure to arrive at what it referred to as the average.

The evidence of what the rate of earnings applied to an employee in the E respondent's grade was readily available to the respondent under collective bargaining agreements which the respondent could easily have obtained. The damages were consequently capable of assessment with exact mathematical precision. The court *a quo*, instead, embarked upon conjecture and plucked a figure out of the air in so far as the rate of pay was concerned. In *Ebrahim v Pittman NO* 1995 (1) ZLR 176 (H) Bartlett J quoted with approval the F remarks by Berman J in *Aaron's Whale Rock Trust (supra)* at 656D where the learned judge said:

> "… it is not competent for a court to embark upon conjecture in assessing damages where there is no factual basis in evidence, or an inadequate factual basis, for an assessment, and it is not competent to award an arbitrary approximation of damages to a plaintiff who has failed to produce available evidence upon which G a proper assessment of the loss could have been made."

None of the amounts awarded to the respondent by the court *a quo* was supported by evidence. The court also made an order for back pay which could not be justified on the facts before it. It ordered that the respondent be paid salary and benefits from February 2009 to date of payment. The judgment H upon which the respondent had based his claim for damages had ordered his

reinstatement without loss of benefits, or, in the alternative damages in lieu A of reinstatement. The judgment was dated 29 October 2008.

Back-pay cannot legally be awarded in respect of a period after the date of the order of reinstatement is granted. This principle was applied by Sandura JA in *Chiriseri & Ors v Plan International* 2002 (2) ZLR 261 (S) at 265D-G where he stated: B

> "As this court stated in *Leopard Rock Hotel Co (Pvt) Ltd v van Beek*, *supra*, at 254H-255A:
>
> > '… "back-pay" and "damages" are indeed different concepts, but only in the sense that "damages" is a wider concept. It will normally include back-pay, but may include, for example, compensation for loss of promotion prospects, interest, and other elements as appropriate.' C
>
> However there is no basis for awarding the appellants back-pay and benefits in respect of the period after 29 March 1995, the date on which the order of reinstatement was issued …
>
> Accordingly, each appellant is entitled to (a) net back-pay and benefits from 20 July 1994 to 29 March 1995, a period of about eight months and (b) net salary and benefits for eighteen months." D

In addition, an award of damages should take into account the question of tax. In *Chiriseri & Anor v Plan International (supra*) at 265H-266B Sandura JA went on to say:

> "The next issue to consider is whether this matter should be remitted to the Tribunal for the calculation of the damages payable to each appellant. As the record of proceedings in the Tribunal shows the gross salary and benefits of each E appellant, and gives no indication of the net salary and benefits, I was initially tempted to remit the matter to the Tribunal. However, I am concerned that that course would unduly delay the finalisation of this matter."

In my view, the court *a quo* misdirected itself in various respects on questions of law and its decision cannot stand. The appeal therefore succeeds. It is ordered as follows: F

1. The appeal is allowed with costs.
2. The judgment of the court *a quo* is set aside.
3. The matter is remitted for the court to determine the point *in limine* raised by the appellant, namely that the respondent had adopted the wrong procedure in respect of the quantification of damages. In the event G that the point *in limine* fails, the court should then proceed to properly quantify the damages due to the respondent.

MALABA DCJ and GARWE JA concurred.

Wintertons, appellant's legal practitioners H

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Document 5 of 79

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2013/Volume 2/S v ZUZE 2013 (2) ZLR 25 (H)

S v ZUZE 2013 (2) ZLR 25 (H)

Citation	2013 (2) ZLR 25 (H)
Case No	Judgment HH- 274-13
Court	High Court, Harare
Judge	Uchena J
Heard	10 July 2013
Judgment	10 July 2013
Counsel	Details not supplied
Case Type	Criminal review

Annotations No case annotations to date

Flynote

Court – *judicial officer – conduct and ethics – requirement to act with absolute honesty – alteration of record in criminal matter following query by scrutinising regional magistrate – impropriety of*

Criminal procedure – *record – alteration of – impropriety of altering record* D *in response to query by scrutinising magistrate*

Headnote

Judicial office calls for absolute honesty. A judicial officer's record of proceedings must be trustworthy. It should not be treated with caution because of a judicial officer's lack of integrity. His or her record must be trusted and relied on as the truth of what happened during the proceedings. E before him or her. He or she should never alter the record when issues are raised by the scrutinising regional magistrate or reviewing judge. All he or she can do is explain what happened without altering the record. If anything is to be changed that can only be done by a reviewing judge. F Tampering with a record of proceedings is an offence and might result in prosecution.

Cases considered

S v Charuma 1992 (2) ZLR 162 (H)

S v Liver 1992 (2) ZLR 323 (H)

Legislation considered G

Criminal Procedure and Evidence [*Chapter 9:07*], s 271

Domestic Violence Act [*Chapter 5:16*], ss 3 and 4

H Magistrates Court Act [*Chapter 7:10*], s 58

2013 (2) ZLR p26

Uchena J

Judgment

Uchena J: The accused person, whom I will refer to as the convicted A person, was charged with a contravention of s 4(1), as read with 3(1)(a), of the Domestic Violence Act [*Chapter 5:16*]. The facts on which he was charged are that he assaulted Velonica Mushambadoro several times on the face, with clenched fists. He pleaded guilty and was convicted on his own plea, the court having proceeded in terms of s 271(2)(a) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] ("the Act"). He was sentenced B to a fine of US$150, in default of payment 30 days' imprisonment.

The record of proceedings was forwarded to the senior regional magistrate, Harare, for scrutiny, who raised the issue of the appropriateness of the fine of US$150, as the magistrate had proceeded in terms of s 271(2)(a) of the Act. In his response, the trial magistrate argued that he had proceeded in C terms of s 271(2)(b). The senior regional magistrate did not accept that explanation. He forwarded the record of proceedings for review, pointing out the obvious alterations the trial magistrate had made to the record, after it had been referred back to him by the scrutinising senior regional magistrate.

Section 271(2)(a) of the Act is applicable when the sentence to be imposed D is not one of imprisonment without the option of a fine, and if the fine to be imposed does not exceed level 3. That section provides as follows:

> "(2) Where 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 –

(a) the court may, if it is of the opinion that the offence does not merit punishment E of imprisonment without the option of a fine or of a fine exceeding level three, convict the accused of the offence to which he has pleaded guilty and impose any competent sentence other than –

(i) imprisonment without the option of a fine; or

(ii) a fine exceeding level three;

or deal with the accused otherwise in accordance with the law;". F

The provisions of s 271(2)(a) are so notorious that any magistrate is expected to be aware of them. In this case the magistrate imposed a fine which far exceeded that which can be imposed in terms of s 271(2)(a) (ii). A fine under level 3 should not exceed US$20.

This case would not have warranted a review judgment but for the intransigency G of the trial magistrate which calls for the reinforcement of judicial ethics, and the sanctity of a court record. The senior regional magistrate raised the issue of the fine exceeding level three. Instead of conceding his error, the magistrate altered and falsified the record. He changed the "(a)" to a "(b)" on the record of proceedings, but forgot to alter the 271(2)(a) he had recorded at the back of the charge sheet. In his response to the senior regional H

Uchena J

A magistrate he argued that he had proceeded in terms of s 271(2)(b). To justify his argument he purported to have canvassed the essential elements, after he had already convicted the accused. The magistrate's notes reads as follows;

"Q How do you plead,

A Guilty s 271(2)(b) CPEA

C 1

B Guilty as pleaded."

This was followed by what the senior regional magistrate said was not part of the record when it was first submitted for scrutiny. The senior regional magistrate's recollection that the canvassing of the elements was not part of the record which he initially received for scrutiny is confirmed by the C apparent alteration of the "(a)" to "(b)". The loop of the former (a) remains visible and the (b) is clearly a result of several repeated acts of changing an (a) to a (b), which leaves the letter (b) prominently darker than the rest of the magistrate's handwriting. It was a shoddy attempt at misleading the senior regional magistrate. The attempt is further exposed by what he endorsed at the back of the charge sheet, and the canvassing of essential elements after D convicting the offender.

Judicial office calls for absolute honesty. A judicial officer's record of proceedings must be trustworthy. It should not be treated with caution because of a judicial officer's lack of integrity. His record must be trusted and relied on as the truth of what happened during the proceedings. A judicial E officer becomes *functus officio* on concluding the proceedings before him. He cannot, and should never, alter the record when issues are raised by the scrutinising regional magistrate or reviewing judge. All he can do is explain what happened without altering the record. If anything is to be changed that can only be done by a reviewing judge. In terms of s 58(3)(b) of the F Magistrates Court Act [*Chapter 7:10*], the regional magistrate should refer the proceedings for review if he thinks anything in the proceedings has to be corrected. Section 58(3)(b) provides as follows:

"(3) The regional magistrate shall, as soon as possible after receiving the papers referred to in subsection (1), upon considering the proceedings –

(a) …

(b) if G it appears to him that doubt exists whether the proceedings are in accordance with real and substantial justice, cause the papers to be forwarded to the registrar, who shall lay them before a judge of the High Court in chambers for review in accordance with the High Court Act [*Chapter 7:06*]."

The alteration of the record of proceedings after it has been send back to H the trial magistrate by the scrutinising regional magistrate or reviewing

Uchena J

judge was dealt with in *S v Liver* 1992 (2) ZLR 323 (H) at 333B-C where A Mutambanengwe J said:

> "I entirely agree and for everyone's benefit would like to draw attention to the fact that tampering with a record of proceedings is an offence and might result in prosecution.
>
> Once the magistrate has finalised the matter, as was the case here, he or she is B *functus officio* and any errors that need to be corrected must be referred to the High Court."

The same sentiments were expressed by Chinengundu J in *S v Charuma* 1992 (2) ZLR 162 (H) at 163A-B, where he said:

> "The trial magistrate should have known that he had no right to tamper with the record of proceedings by destroying certain papers and replacing them with others C as he did in this case. He can not just tamper with the record of proceedings as he wishes. If he had realised later that he had made a mistake he should have drawn this to the attention of the regional magistrate for corrective measures to be taken. Alternatively, he should have sought advice and guidance from other senior members of the bench which is the normal course to follow when in doubt." D

It is unfortunate that a judicial officer, whose office must be respected and fully trusted, can tamper with and falsify the record of proceedings. It is not necessary for a judicial officer to pretend that he or she cannot make a mistake. The fact that mistakes can be made is demonstrated by the provision of scrutiny, review and appeal procedures. It is in fact honourable to admit E a mistake and learn from it. A good judicial officer can even voluntarily point out his or her mistakes and refer the case for review so that the errors can be corrected. This is consistent with the need to dispense justice to all litigants, as every judicial officer takes an oath to do justice to all those who appear before him or her.

The trial magistrate therefore acted contrary to his oath of office, and F committed an act which can lead to his prosecution.

The trial magistrate sentenced the convicted person to an incompetent sentence. The maximum fine he could have imposed, after proceeding in terms of s 271(2)(a) of the Act is US$20.

In the result, the sentence imposed by the trial magistrate is set aside. The G convicted person is sentenced to a fine of US$20, in default of payment five days' imprisonment.

The amount of US$130 by which the appropriate fine was exceeded must be refunded to the convicted person.

Chitakunye Jconcurs. H

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Document 6 of 79

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2013/Volume 2/S v MAPHOSA 2013 (2) ZLR 29 (H)

S v MAPHOSA 2013 (2) ZLR 29 (H)

Citation	2013 (2) ZLR 29 (H)
Case No	Judgment No. HH-323-13
Court	High Court, Harare
Judge	Hungwe J and Mavangira J
Heard	11 July 2013
Judgment	11 July 2013

Counsel *G C Manyurureni,* for the appellant
R Chikosha, for the respondent

Case Type Criminal appeal

Annotations No case annotations to date

Flynote

Appeal – *criminal matter – distinction from review – appeal court confined to considering matters contained in record*

Criminal procedure – *review – distinction from appeal procedure – need to seek review, rather than appeal, when issues complained of do not appear ex facie the record*

Headnote

D The essential difference between review procedure and appeal procedure indicates that where the grievance is that the judgment or order of the magistrate is not justified by the evidence, and there is no need to go outside the record to ventilate the particular grievance, then the more E appropriate procedure to follow for relief is by way of appeal. However, where issues are raised challenging the propriety of the proceedings of an inferior tribunal and facts, which have to be proved in order to support the issues, do not appear as established on the face of the record, proceedings should be by way of review.

Cases referred to F

Belchem v Jarvis NO & Garnett NO 1952 SR 140

R v Chitrin 1915 SR 169

S v Machona & *Ors* 1982 (1) ZLR 87 (S)

R v Ngombe 1964 RLR 231 (A)

G *R v Stevens* 1969 (2) RLR 143 (A)

Legislation considered

Gold Trade Act [*Chapter 21:03*], ss 3(1) and 30

Case information

G C Manyurureni, for the appellant

H *R Chikosha,* for the respondent

Hungwe J

Judgment

Hungwe J: The appeal in the matter is against the minimum mandatory A sentence imposed on the appellant for illegal possession of gold in contravention of s 3(1) as read with s 30 of the Gold Trade Act [*Chapter 21:03*] ("the Act").

Three grounds of appeal against sentence are advanced:

(a) that the court misdirected itself in imposing the minimum mandatory B sentence without carrying out an exhaustive enquiry into the existence of special circumstances:

(b) that the court *a quo* did not help an unrepresented accused in the development of his submissions on special circumstances;

(c) that the court adopted a narrow interpretation of special circumstances C and unduly limited the appellant's scope of submissions as the inquiry was conducted in vernacular.

It will be seen from the above that none of the grounds advanced by the appellant attack the correctness of imposing the minimum mandatory sentence. What is under attack is the procedure by which the court arrived D at the sentence.

The question to ask is whether an appeal was the procedure to adopt. It happens so very often that grounds of appeal and review do sometimes appear inextricably linked to each other that the decision regarding what route to take becomes a vexed one. E

I will assume that the appellant adopted the correct approach, which I doubt, for reasons I will give later.

The facts show that the appellant admitted being in possession of gold in contravention of the law. He was duly convicted on his own plea. The Act provides for a minimum mandatory sentence unless the person so convicted F can show that there are special circumstances in his case, which special circumstances shall be recorded. If the court makes a finding that special circumstances existed in a particular case, then it may impose another punishment than the minimum mandatory sentence.

The record shows that the trial court explained the concept of special circumstances and invited the appellant to make submissions. In his G submissions the appellant indicated that a person, whom he could not identify, had deposited the gold in his pocket as the commuter omnibus was taking off and left.

This explanation of how he came to possess gold was predictably and correctly, rejected by the court *a quo*. It therefore found that there were no H

Hungwe J

A special circumstances in the case. Upon this finding the court was duty bound to impose the mandatory sentence.

This is what happened.

The appellant, who was a self-actor, was unhappy. He engaged counsel.

Upon being engaged, counsel presumably used the record and oral instructions B to draw the relevant notice and grounds of appeal, as he was duty bound to do.

The choice made by counsel was indicated first by the record of proceedings and second by oral brief from client.

An election to appeal confines the legal practitioner to matters reflected in the record of proceedings. On the other hand, were he to proceed by way of C notice of motion seeking a review of the proceedings, then counsel would have brought under review other matters which do not appear *ex facie* the record by way of affidavit.

Had he chosen this course, the appellant would probably have been able to demonstrate that there was no exhaustive enquiry into the existence or otherwise of special circumstances.

D The appellant would have been able to show that the magistrate did not adequately help the unrepresented appellant in understanding and presenting his defence or make submissions regarding special circumstances.

The appellant would have been able to demonstrate why he believes that the court *a quo* adopted a narrow interpretation of special circumstances and E how it unduly limited the appellant's scope of submissions by conducting the inquiry in the vernacular.

The essential difference between review procedure and appeal procedure indicates that where the grievance is that the judgment or order of the magistrate is not justified by the evidence, and there is no need to go outside the record F to ventilate the particular grievance, then the more appropriate procedure to follow for relief is by way of appeal. See *R v Stevens* 1969 (2) RLR 143 (A).

However, an appeal against sentence, on the ground of irregularity in the proceedings of the magistrates court, cannot be entertained unless the irregularity appears on the face of the record. See *R v Chitrin* 1915 SR 169.

When an applicant desires leave of court to refer back to the magistrate in order G to lead further evidence which was not led at the trial, the correct procedure is to make an application on notice of motion to the Attorney-General in the course of prosecution of the appeal. The application will be

granted only in exceptional circumstances, as where, if the conviction is left undisturbed, there is a possibility amounting to a probability, that a miscarriage of justice H will take place. See *Belchem v Jarvis & Garnett NNO* 1952 SR 140.

2013 (2) ZLR p32

Hungwe J

To lay a proper foundation for the exercise of the court's discretion in an A application to remit the matter for the hearing of further evidence, the court should be acquainted with the nature of the evidence proposed to be led and the reasons for the failure to lead it at the proper time. See *R v Ngombe* 1964 RLR 231 (A).

As I indicated, in my view the appellant ought to have adopted the review B procedure in order to be able to ventilate the grounds he had put forward on appeal. These grounds do point, or amount, to gross procedural irregularity regarding how special circumstances were canvassed. I am fortified in my conclusion that the appellant would have enjoyed better prospects of success if he had adopted the review procedure since, by his own admission, he does not seek to quash the sentence imposed but seeks a remittal of the matter back C to the court *a quo* for leading of further evidence on special circumstances.

Without demonstrating that a miscarriage of justice will occur if the conviction is not disturbed, the appeal court will be very slow to accede to such a request. In any event, the appellant does not seek to attack the conviction but only a review of the sentence. D

In *S v Machona & Ors* 1982 (1) ZLR 87 (S) it was held that where issues are raised challenging the propriety of the proceedings of an inferior tribunal and the facts which have to be proved in order to support these issues do not appear as established on the face of the record proceedings should be by way of review (at p 90). E

From the facts recorded by the magistrate regarding special circumstances, this court has no basis to interfere with the finding that there were no special circumstances found to be existing. An appeal is determined within the four corners of the record.

I do not find any merit in the appeal. It is therefore dismissed. F

MAVANGIRA J concurred.

Manyurureni & Co, appellants' legal practitioners

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

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Document 7 of 79

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2013/Volume 2/S v GWINGWIDZA 2013 (2) ZLR 33 (H)

S v GWINGWIDZA 2013 (2) ZLR 33 (H)

2013 (2) ZLR p33

Citation	2013 (2) ZLR 33 (H)
Case No	Judgment No. HH-434-13
Court	High Court, Harare
Judge	Hungwe J & Mavangira J
Heard	19 March 2013; *CAV*

Judgment 12 July 2013

Counsel *S Mushonga,* for the applicant
R Chikosha, for the respondent

Case Type Criminal appeal

Annotations No case annotations to date

Flynote

Criminal law – *offences under Criminal Law Code – theft – of stock – progeny of stray cow – stray cow duly registered and sent to pound but calf retained – whether calf capable of being stolen from original owner of cow – whether keeping calf constituted contrectatio – accused's belief* D *that entitled to retain calf in return for looking after its mother – such belief negativing animus furandi*

Headnote

Three stray cattle wandered into the appellant's herd. He reported this fact to the authorities, who registered the cattle. The cattle were eventually E collected by the poundmaster and auctioned in terms of the law. In September 2011, he again registered a stray cow which had joined his herd the previous year. On 10 December 2011 the police, together with district council officials, approached the appellant to collect the stray cow. He did not disclose that the cow had dropped a calf whilst under F his care. The calf remained in his possession.

The appellant was charged with stock theft, the charge averring that the calf was the property of the State. When asked about why he did not register the calf, he explained that the reason he had not registered it was that he did not know the procedure of dealing with the progeny of a stray beast. The magistrate convicted him, holding that the only G reasonable and plausible explanation for his failure to disclose the calf to the authorities was the motivation to deprive the State permanently of the progeny of the stray cow.

Held, that the averment that the calf belonged to the State was fatal. Such an averment betrays the accepted status of the stray cow. If it belonged H to the State it would not be classified as stray. The correct position is

that the calf belonged to the owner of the stray cow who was, to the A prosecutor, unknown.

Held, further, that an error of fact may be a complete defence, negativing *mens rea*. The appellant was in lawful possession of the *res* and laboured under a genuine and reasonable mistake of fact regarding his ownership of the calf. Judicial notice may be taken of the fact that, under customary B law and practice, a person who has taken care of another's herd of cattle, whether under agreement or not, was entitled to a portion of the progeny, depending on the length of the period for which such care was undertaken. Such a defence amounts to a claim of right. The appellant had a *bona fide* belief that he was entitled to keep the calf, as that calf was not subject to the same status as the cow. His evidence in court was C not shown to be false nor his belief to be dishonest. The fact that he had openly possessed the bullock must negative any intention to deprive the owner permanently of his ownership of the bullock.

Held, further, that the mental element for theft, *animus furandi* (the intention to steal), could not have been met in circumstances where the appellant D had taken steps to notify several people of the existence of, firstly, the cow and, later, the calf. He believed he was entitled to some benefit of his agency for the pound master.

Held, further, that although our law recognises assumption of control as sufficient indication of the element of *contrectatio* required for theft, it was debatable whether the appellant effected *contrectatio* by merely E assuming control of the newly-born calf.

Held, further, that an accused can, in various situations, escape conviction because of his *bona fide* belief that he was entitled to act in the way he did. The fact that a belief is unreasonable would

no more than evidence of a lack of good faith.

Held, further, that there was no proof that the subject matter was property F capable of being stolen in the particular circumstances of this case. Our law recognises that *res nullius* are things unowned but capable of ownership. They may be acquired by *occupatio.* Two categories relevant to this enquiry are *res derelictae* and wild animals. *Res derelictae* cannot be stolen. However, for a thing to be classed as a *res derelicta*, it must G not merely have been lost to the owner, but the owner must have written it off or lost all hope of recovering it in every sense. Where, however, the property was merely lost and not abandoned, and thus capable of being stolen, the critical question is always whether the accused effected *contrectatio* with the intention to steal it in two aspects; i.e (a) did he intend to deprive the owner of the full benefit of his ownership or merely H

A to look after the res pending enquiries; and (b) did he genuinely believe it to have been abandoned? The appellant was saying he was not aware whether he was obliged by law to register the calf and therefore to surrender it together with its dam. This was clearly a plea of mistake of fact as well as mistake of law.

Held, further, that although by *accessio*, the calf accrued, as fruit, to the B owner of the cow, here there was no owner of the cow at the time of the coming into being of the "fruit" and, therefore the lawful possessor of the cow at the time became the legal owner of the fruit by *occupatio.* The appellant should not have been charged with theft of the property as it was incapable of being stolen in these circumstances.

Cases referred to C

S v Banet 1973 (1) RLR 335 (A); 1973 (4) SA 430 (RA)

S v de Blom 1977 (3) SA 513 (A)

R v Geddes 1964 RLR 288 (A); 1964 (4) SA 48 (SRA)

S v Lungu 1989 (3) ZLR 27 (S)

D *S v Machokoto* 1996 (2) ZLR 190 (H)

S v Modise 1966 (4) SA 680 (GW)

R v Ncube 1968 (2) SA 476 (R)

S v Sam 1980 (4) SA 289 (T)

Legislation considered E

Criminal Law (Codification and Reform) Act [*Chapter 9:23*], s 114(2)(a) & (3)

Stock Trespass Act [*Chapter 19:14*], s 17

Case information

S Mushonga, for the applicant

F *R Chikosha,* for the respondent

Judgment

Hungwe J This appeal raises the question whether by remaining with possession of progeny of stray beasts such a possessor commits stock theft.

Background

G The appellant was convicted of stock theft as defined in s 114(2)(a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] and sentenced to nine years' imprisonment. During his trial, the following facts were established. Three stray cattle wandered into his herd. He reported this fact to the authorities who registered the same. The stray cattle were H eventually collected by the pound-master and auctioned in terms of the

Hungwe J

law. In September 2011, he again registered a stray cow which had joined A his herd the previous year. On 10 December 2011 the police, together with the Bindura Rural District Council authorities, approached the appellant to collect the stray cow. He did not disclose that the cow had dropped a calf/bullock whilst under his care. Someone in the community who was aware of the fact alerted the police and the appellant was charged with stock theft. B The appellant appeals against conviction as well as sentence.

The evidence

These facts are common cause or are not in serious dispute. The question is whether the appellant had the necessary *mens rea* to commit the crime of stock theft. During trial the appellant gave the following defence. When C the cow joined his herd, he had notified the authorities as he had previously done. Later after the cow dropped a bullock, he had notified the village head and the dip tank attendant of the fact. When the police and council officials came to collect the cow, he had not advised them of the existence of the calf as he had not yet registered the calf. The village head and the dip tank attendant, who were familiar with the issue, were not present. When asked D about why he did not register the calf, he explained that the reason he had not registered it was that he did not know the procedure of dealing with the progeny of a stray beast.

The trial court convicted the appellant on the basis that he had no defence as he ought to have known better by virtue of the fact that he was a police special constabulary. The court reasoned thus: E

> "It is also clear that accused did not disclose to the police who came together with the officials from council to collect the stray cow, that the stray cow had an offspring. Evidence was led to the effect that he was asked to collect his beasts from the grazing area and place them in his cattle pen before pointing out the stray beast to the police and the council officials. He could not give a reasonable explanation as to why that offspring remained behind when the stray cow was F collected. Accused is not an ordinary person, he is a member of the special constabulary, he is someone who is expected to know better. He was given his share from the proceeds of the sale of the stray cow. The only reasonable and plausible conclusion is that his failure to disclose this was motivated by an intention to deprive the State of this offspring . . ."

The court concluded that the only reasonable and plausible explanation for G his failure to disclose the calf to the authorities was the motivation to deprive the State permanently of the progeny of the stray cow. It is now trite that the averment that the calf/bullock belonged to the State is fatal to the charge. Such an averment betrays the accepted status of the stray cow. If it belonged to the State it would not be classified as stray. The correct position is that the calf belonged to the owner of the stray cow who was, to the prosecutor, H

Hungwe J

A unknown. See *S v Machokoto* 1996 (2) ZLR 190 (H). The calf, dropped by the cow which was in his lawful possession could not be treated in the same way as the stray cow since the owner must have, to his knowledge, lost and written off only the cow. The cow was now in the appellant's lawful possession but registered as stray with the authorities. What is the status of its progeny? The answer to this question is by no means an easy one. The B facts in *Machokoto supra* do not provide an answer to this question.

The old authorities shed some light as to what the correct position at law may be. That an error of fact is a complete defence where a person, as in the case of a man who fondles a woman with the *bona fide* but mistaken belief that he was doing so on the woman who had earlier on accepted his C proposition and who had invited him to her house, cannot be doubted. In *S v Lungu* 1989 (3) ZLR 27 (S) Dumbutshena CJ discussed the issue at length. He cited with approval at p 29F-G the remarks by Myburgh J in *S v Sam* 1980 (4) SA 289 (T) where, having reviewed authorities on the defence of an error of fact or an error of law and the requirement of *mens rea* he went on:

> "I need not repeat all the cases reviewed in that judgment. It will, for present D purposes, suffice to repeat what the learned judge said at 293F-294B. The judgment is in Afrikaans. The official translation reads:

'The subjective concept in a case of offences for which dolus is required has now already been totally accepted. (See further *R v Ndara* 1955 (4) SA 182 (A) at 184; *R v De Ruiter* 1957 (3) SA 361 (A) at 364; *R v Churchill* 1959 (2) SA 575 (A) at 581; *S v Griffin* 1962 (4) SA 495 (EC); E *R v Geddes* 1964 (4) SA 48 (SRA); *S v Fouche* 1974 (1) SA 96 (A); the article by A Levin "Die Bewyslas met Betrekking tot *Mens Rea* by Statutere Misdrywe" *De Rebus* June 1980.)

In the well known case about the dead pig, *S v Modise* 1966 (4) SA 680 (GW), Jacobs J approached the matter as follows:

> "It is clear that the accused did not deny that he had taken the dead pig, but it is also clear that, by pleading not guilty, he placed at issue the F question whether he had taken it with the intent to steal and the State therefore had to prove that intent beyond reasonable doubt. If it is reasonably possible that the accused had *bona fide* believed that the carcass was *res derelicta*, then he could not have been convicted of theft. It is true that in *S v Griffin* 1962 (4) SA 495 (EC) de Villiers JP decided that on a charge of theft a belief that a thing was *res nullius* G must not only be *bona fide* but also reasonable before it can serve as a defence. The learned Judge President, however, unwillingly came to that conclusion, but he felt himself bound by *dicta* in certain Appeal Court decisions such as *R v Mbombela* 1933 AD 269; *R v Ndara* 1955 (4) SA 182 (A); *R v Churchill* 1959 (2) SA 575 (A); as well as Voet 22.6.6, where reasonableness is laid down as a requirement for a defence H of mistake. I must immediately say that, just as de Villiers JP, I find

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2013 (2) ZLR p38

Hungwe J

> it difficult to see how an objective factor, such as the reasonableness A of a perpetrator's attitude, can play any role where his actual mental attitude is investigated except that the unreasonableness of the attitude can of course be such that it reflects upon his *bona fides* (See *also R v Geddes* 1964 (4) SA 48 (SRA)). I am, however, in respectful agreement with the writer of the article which appears in 80 *SALJ* at 46 *et seq* that the *dicta* to the Appeal Court in the cases referred to by de Villiers JP B and to which he felt himself bound, must be regarded as *obiter*. In my opinion it is in fact the only basis on which the decision in *R v Mkize* 1951 (3) SA 28 (A), in which reference is indeed made to *Mbombela*'s case, can be reconciled with the last-mentioned case. It is also clear to me that in *R v De Ruiter* 1957 (3) SA 361 (A) Hoexter JA did not answer the question whether a mistake must be *bona fide* as well as reasonable, because at 364 he says: C
>
> > 'This approach excludes the legal question whether the appellant could have relied upon a belief which was only *bona fide* but not reasonable.'
>
> I am also in respectful agreement with the writer of the said article in SA Law Journal that the view expressed in Voet 26.6.6. and 7, in so far as it requires a mistake of fact to be reasonable before it can serve D as a defence in a criminal case, cannot hold good today where intent is accepted as a subjective inclination of the perpetrator"".

The present matter can be distinguished from *Machokoto*'s case in that in the present case the appellant was in lawful possession of the *res* unlike in that case. In my view this strengthens the argument that the appellant laboured under a genuine and reasonable mistake of fact regarding his ownership E of the calf. This argument will be even more forceful if judicial notice is taken of the fact that under customary law and practice a person who has taken care of another's herd of cattle, whether under agreement or not, was entitled to a portion of the progeny depending on the length of the period for which such care was undertaken. This defence amounts to a claim of right. *Mr Mushonga*, for the appellant, urged this court to hold that since F the appellant dealt with the other stray animals in a manner consistent with accepted practice regarding stray cattle, he could not have decided to deal with this calf differently but for the unclear status of the progeny of a stray cow at law. The trial court dismissed the defence of a claim of right without realising that this was the defence relied upon by the appellant. G

From the evidence on the record it seems to me that the appellant had a *bona fide* belief that he was entitled to keep the calf as that calf was not subject to the same status as the cow. His evidence in court was not shown to be false nor his belief to be dishonest. The trial court did not apply its mind to the defence apparent from the evidence tendered. It decided the matter purely on the basis that as a special constabulary member, the appellant ought to have H

2013 (2) ZLR p39

Hungwe J

A known better. What he ought to have known and known better is not made clear as is the basis for this conclusion. The fact that the appellant had openly possessed the bullock must, in my view, negative any intention to deprive the owner permanently of his ownership of the bullock. Whether the magistrate implied that special constabulary has special knowledge regarding the issue is not clear but he did not investigate the question himself. There is a body B of evidence pointing to the existence of a claim of right reposing in a person in the appellant's position. What would have been regarded as *res derelicta* would have been the cow but if the cow is bulled by the appellant's bull then he has a claim to the calf as the possessor of both the cow and the bull.

Were the essential elements of the offence of theft met?

B I have already dealt with the fatal defect regarding the averment of the ownership of the calf as reposing in the State. The State did not own or possess the calf, otherwise it would not be classified as stray. A stray animal is one whose owner is, to the prosecutor, unknown, although he is there somewhere. That is not all. The court had to be satisfied that the accused took or somehow effected *contrectacio* sufficient to meet the requirement of D the element of taking. The evidence does not show how the appellant "took" or otherwise effected removal or *contrectacio*. The calf is progeny of stock within his herd. In other words, he viewed it as a natural increment of his herd through the stray cow in his lawful possession.

There is a suggestion in the heads of argument that the appellant was asked by E a police officer in the presence of Ashby Kambamura whether the stray cow had a calf after he noted its agitated behaviour, which behaviour indicated that it had been separated from its offspring. The suggestion is that, by concealing the fact that the stray cow had a calf, the appellant had constructive intention to steal. The evidence on the record is that Ashby Kambamura overheard the police officer make inquiry regarding whether the cow had offspring F for which it was mooing. When the response he got was that it was mooing as it had been separated from the other part of the herd, the police officer did not bother himself with his unanswered query regarding the existence or otherwise of the calf. With hindsight, the State witnesses now infer that his lack of honesty at the opportunity to come clean on the issue ought to be regarded as evidence of intention to conceal the calf and therefore steal G it. That may be a reasonable inference to be drawn from these facts but it is by no means the only reasonable inference which a reasonable person can draw from the same facts. As I pointed out above, the appellant believed he was entitled to the offspring and felt under no obligation to reveal the fact of the progeny of the stray calf to the authorities. This inference is a H reasonable one given the background that the calf was not stray. Further,

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Hungwe J

the Stock Trespass Act [*Chapter 19:14*] which the pound master Ashby A Kambamura was well versed with, is silent on this issue. Ashby Kambamura, being the interested party in this whole affair, would have closely followed up the unanswered question regarding the existence or otherwise of the calf if the law on the subject was as clear as he pretended it to be in the court *a quo*. The police officer, James Makuvatsine, was allowed by the court to B lead inadmissible evidence regarding what other villagers told him about the calf and the appellant. That evidence should not have been allowed in the record. It does not add any probative value to the issues to be decided. The matter ought to have been decided in terms of the Stock Trespass Act. Had the pound master acted within the time limits set out in the Act, the situation in which a stray cow dropped a calf whilst held on behalf of the C pound master would not have arisen. The Act requires a person in charge of land on which a stray stock has trespassed to send such trespassing stock to the pound within a week (s 17). The Act does not specifically deal with the situation under discussion for which the appellant has been convicted of stock theft. It seems to me that since the calf was dropped by a stray cow, the State ought to have restricted its treatment of the appellant within the D four corners of the Act rather than prefer a more serious charge when the law was silent on the issue. In charging the appellant for theft, the State chose to pitch its onus so high that it needed to prove the essential elements for theft or risk an acquittal. In my respectful view, there was no proof beyond a reasonable doubt that the appellant acted with intent to steal. E

The mental element, *animus furandi*, the intention to steal, could not have been met in circumstances where the appellant had taken steps to notify several people of the existence of first the cow and later the calf. He believed he was entitled to some benefit of his agency for the pound master. I say so for the following reasons. F

Section 114(2)(a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*], which creates the statutory offence of "stock theft", states:

> "Any person who –
>
> (a) takes livestock or its produce:
>
> (i) knowing that another person is entitled to own, possess or control the livestock or its produce or realising that there is a real risk or G possibility that another person may be so entitled; and
>
> (ii) intending to deprive the other person permanently of his or her ownership, possession or control, or realising that there is a real risk or possibility that he or she may so deprive the other person of his or her ownership, possession or control;
>
> shall be guilty of stock theft." H

2013 (2) ZLR p41

Hungwe J

A Clearly the charge preferred indicates that the State intended to prove each and every element of the crime of theft. The essential elements of this offence are set out in the section. They follow very closely their common law cousin "theft". Put in another way, in order to prove theft of stock, one has to prove the following essential elements:

(a) *contrectatio* B

(b) unlawfulness

(c) intent to steal, and

(d) property capable of being stolen.

Gardner and Lansdown defines common law theft in a manner which, by C design, is meant to exclude all possible defences. They write thus:

> "Theft is committed when a person fraudulently and without a claim of right made in good faith, takes or converts to his use anything capable of being stolen, with intent to deprive the owner thereof of his ownership or any person having any special property or interest therein of such property or interest. *R v Sibiya* 1955 (4) SA 247 at 250-1."

D Whether one can say the appellant effected *contrectatio* by merely assuming control of the newly-born calf is debatable. Our law recognises assumption of control as sufficient indication of the element of *contrectatio* required for theft. In *R v Ncube* 1968 (2) SA 476 (R) this court (*per* Young J) held that although failure to report the presence of the animal to someone in authority would be a suspicious feature if the accused's conduct had been in any way E secretive, where this was not the case, it is no basis to infer *animus furandi*. Further it is to be observed that an accused has no intention to steal unless the State proves that he knew (or foresaw the possibility) that he was not lawfully entitled to effect *contrectatio*. Generally speaking, there are four circumstances where an accused can escape conviction because of his *bona* F *fide* belief that he was entitled to act in the way he did. These are;

(i) where he erroneously supposed the property to be *res nullius* on the ground that it was abandoned: *R v Geddes* 1964 RLR 288 (A); 1964 (4) SA 48 (SRA);

(ii) where the accused erroneously supposed the thing to be his own or free from *ius in re aliena*.

(iii) where G he erroneously thought that the owner had consented or else would have consented had he known what was being done. *S v Banet* 1973 (1) RLR 335 (A); 1973 (4) SA 430 (RA);

(iv) or cases in which even though the owner had not consented or would not have consented, he thought he had the legal right to effect *contrectatio*. H *R v Geddes, supra* at 49.

2013 (2) ZLR p42

Hungwe J

In the fourth category the accused's error precludes intent to steal. Such are A cases where an accused acts under a mistake of fact or (since the decision in *S v de Blom* 1977 (3) SA 513 (A) at 529) one of law.

Whether the accused's belief must be not only *bona fide* but also reasonable has long been a vexed question. From my reading of the case law, it would appear that those cases which have insisted on reasonableness appeared to B have misunderstood the effect of certain South African Appellate Division *dicta*, to have overlooked the Appellate Division *dicta* to the opposite effect, and to have ignored the fact that the vast majority of theft judgments in our courts have only looked for *bona*

fides. In my view, the proper approach, which approach has found consistency in our courts, is that approach which confirms the principle that there should be no criminal liability without C fault, which in turn insists that an accused must be measured only against a standard that was practically within his reach. The test for foreseeability generally in offences requiring *mens rea* becomes a subjective one, especially in those offences where the punishment is undoubtedly severe. In the line of theft cases where the accused raised a defence of a claim of right in our D jurisdiction, there has been a recognition that reasonableness is not required. (*S v Machokoto supra*). The fact that a belief is unreasonable is no more than evidence of the lack of good faith (*S v Banet, supra*).

Even if I were wrong in concluding that this appeal must succeed for lack of proof of intent to steal, I still would have come to the same conclusion on the basis that there was no proof that the subject matter was property capable E of being stolen in the particular circumstances of this case. I come to this conclusion on the following basis. Our law recognises that *res nullius* are things unowned but capable of ownership. They may be acquired by *occupatio.* Two categories come to mind for the present purpose, *viz. res derelicta* and wild animals. It is trite that abandoned property (*res derelicta)* cannot be stolen. However in order to qualify as *res derelicta*, it must not merely have F been lost to the owner, but the owner must have written it off or lost all hope of recovering it in every sense. Where, however, the property was merely lost and not abandoned, being capable of being stolen, the critical question is always whether the accused effected *contrectatio* with the intention to steal it in two aspects, i.e.: G

(i) did he intend to deprive the owner of the full benefit of his ownership or merely to look after the *res* pending enquiries;

(ii) did he genuinely believe it to have been abandoned?

The facts which the trial court found proved indicate that the appellant kept a stray cow and reported to the authorities about the cow. He kept it after notifying the village head, the cattle dip attendant as well as his neighbours. H

2013 (2) ZLR p43

Hungwe J

A By the time police and the rural district council officials came to collect the stray cow it had dropped a calf. He did not notify these same officials of the existence of the progeny. His reason for this was that since the cow, the only subject of the collection had been registered and the calf had not been registered, it was not subject to the same treatment as the cow. In other words, the appellant was saying he was not aware as to whether he B was obliged by law to register the calf and therefore to surrender it together with its fore-bearer. In my view this was clearly a plea of mistake of fact as well as mistake of law.

Evidence led during trial indicates that the appellant had notified the village head and the dip tank attendant of the calf's existence soon after it was C dropped. In other words, the appellant had openly possessed the calf. He did not procure its presence amongst his herd by covert methods nor did he attempt to hide it from public knowledge. As the cow which had dropped the calf was in his lawful possession, the calf's fortuitous presence presented a real conundrum as to its status. He was in a practical dilemma as regarding D the calf. If he had contrived the dropping of the calf into his herd before the cow was collected, then his possession or control of it might have, in those circumstances, in my view, required a convincing explanation. I venture here to express the view that, if regard is had to civil law of property, it is arguable that the appellant had by the time the cow was collected, acquired ownership of the calf by *occupatio* following his open and innocent possession of the cow. E Put in another way, the appellant raised a defense that he erroneously believed that since he was in lawful possession of the stray cow, he was entitled to ownership, or, at the very least, possession of its progeny. He never claimed ownership of the cow, nor did he claim ownership of the calf. In this regard it is difficult to infer, as the trial court did, that he had intention to deprive F the owner permanently of the calf. The owner must have written the cow off. In other words he had erased it from all memory. However the owner never lost a calf. He never possessed it by any stretch of reasoning. The calf was dropped years after by an abandoned cow in the lawful possession of the appellant. Although by *accessio*, the calf accrues, as fruit, to the owner of the cow, I am constrained to distinguish the applicability of this principle G in that there was no owner of the cow at the time of the coming into being of the fruit and, therefore, in my respectful view, the lawful possessor of the cow at the time, became the legal owner of the fruit by *occupatio.* If this reasoning is as sound as I make it to be, then the appellant could not have been charged with theft of the property as it was incapable of being stolen H in these circumstances.

Hungwe J

Even if I am wrong in my reasoning, I am constrained to come to the same A conclusion that the appellant's assumption of control of the calf, at the time it was dropped, was under the erroneous but *bona fide* belief that he was entitled to own or possess it. The calf was progeny of *res derelicta,* the cow, which was subsequently registered with the authorities. The Rural District Council assumed ownership of just the cow through registration. As with the original B owner, the council could only own that which at law was in its register and about which it was mentally aware of. As the calf was not so registered with the council at the time the cow was collected by council officials in terms of the Stock Trespass Act*,* these officials could not have lawfully driven the calf away as it was not registered as council property. Legally, it did not belong to the council. They did not enquire as to whether it had calved C whilst in his possession. They could have done so if there were signs that it had recently dropped a calf. Since they did not, it must be assumed, at the risk of speculation and in the appellant's favour, that there was a reason. It could be that there was no basis to treat the non-disclosure of the calf by the appellant, which was fending for itself, as giving rise to an inference of D *animus furandi.* Cattle which attach themselves to another herd are known to resist any attempt to separate them from that newly-found herd. As such nothing could be inferred from a mooing cow in the circumstances where the stray cow was being separated from the appellant's herd.

In all the circumstances of this case, therefore, the appellant ought not to have E been convicted of stock theft. Had the conviction been proper, I would have been constrained to interfere with the sentence as the trial court approached the subject on a wrong principle. I say this for the following reasons. The record of proceedings indicates that the appellant's counsel submitted, when addressing the court in mitigation, that there were no special circumstances in this case. This constitutes a serious error of judgment by the appellant's F counsel. The facts of the case show that the appellant did not go out of his way to plan theft of a bovine. He had found a stray cow and reported the fact to the authorities like every good citizen ought to. That stray cow later dropped a calf whilst moving with his herd. It was not a stray calf nor was his possession of both the cow as well as the calf covert. As he was in lawful G possession of the cow the facts required that argument for the finding of the existence of special circumstances be made in favour of the appellant. It was not. The court should have raised the issue with the legal practitioner appearing for the appellant. A serious miscarriage of justice occurred in that the appellant, if he was guilty, ought to have benefited from a more discretionary sentencing open to the court in terms of s 114(3) of the Criminal H

Hungwe J

A Law (Codification and Reform) Act [*Chapter 9:23*]. He would have escaped the minimum sentence set out in s 114(2)(e).

However, in light of the above, I find that the conviction is unsafe. The appeal against both conviction and sentence succeeds. In the result the appeal against both conviction and sentence is allowed. The appellant's conviction is quashed and the sentence imposed in the court *a quo* is set aside.

B Mavangira J concurred.

Mushonga & Associates, appellant's legal practitioners

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

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Document 8 of 79

Source:

TAMANIKWA & ORS v ZIMBABWE MANPOWER DEVELOPMENT FUND 2013 (2) ZLR 46 (S)

Citation	2013 (2) ZLR 46 (S)
Case No	Judgment No. S-33-13
Court	Supreme Court, Harare
Judge	Ziyambi JA, Gowora JA & Omerjee AJA
Heard	15 October 2012; *CAV*
Judgment	16 July 2013
Counsel	*G Machingambi*, for the appellants *C Mucheche*, for the respondent
Case Type	Labour appeal
Annotations	No case annotations to date

Flynote

Employment – *Labour Court – appeal to – right of appeal – who has such right – all persons to whom Labour Act applies having right of appeal – dismissal in terms of statutory instrument not providing for appeal* D *to Labour Court – such dismissal unfair and appealable – regulations not overriding Act*

Interpretation of statutes – *ambiguity – conflicting provisions in same or another statute – when later provision may be said to have impliedly repealed earlier one – need for inconsistency to be manifest – court's duty to try to reconcile provisions to avoid conflict – acquired rights –* E *need for intention to remove such rights to be manifest*

Headnote

The respondent was a statutory body created in terms of s 47 of the Manpower Planning and Development Act [*Chapter 28:02*]. In terms of s 69 of the Act, the Minister enacted the Zimbabwe Manpower Development Fund F (Conditions of Service and Misconduct) Regulations (SI 258 of 1996). The appellants, who were employed by the respondent, were charged with disciplinary offences, found guilty of the charges and dismissed from employment. They appealed to the Trustee, the Minister of Higher and Tertiary Education, in terms of s 44 of the Regulations and were G unsuccessful. They then noted an appeal to the Labour Court, which held that there was no right of appeal to the Labour Court provided for in the Regulations and that an appeal to the respondent's Trustee was final and unappealable. It held that, although s 3 of the Labour Act [*Chapter 28:01*] provided that the Act applied to all employees except those specifically excluded in that section, it did not confer jurisdiction H

A upon the court to hear and determine appeals arising out of dismissals effected under the Regulations.

The appellants contended that, notwithstanding the provisions of s 44(1) of the Regulations under which they were charged and dismissed from employment, they were, by virtue of the provisions of the Labour Act, entitled to be heard by the Labour Court by way of appeal and that B consequently, their appeal was properly before the court *a quo*. They contended further that the inconsistencies within the legislation did not oust the jurisdiction of the Labour Court to entertain their appeal. With regard to the conflict between the Regulations and the provisions of the Act,

they contended that in view of the provisions of s 2A of the Act, C the Act prevailed over the Regulations and consequently there existed a right of appeal to the Labour Court.

Held, that in terms of s 3, the Labour Act applies to all employers and employees except for those whose conditions of employment are governed by the Constitution or the Public Service Act [*Chapter 16:04*]. The finding by the lower court that the Act applied to the appellants D was clearly contradictory to the subsequent finding that the court did not have jurisdiction to determine the appeal filed by the appellants. It followed, therefore, that under s 89(1) employers and employees whose conditions of employment are covered under s 3 have the right to appeal to the Labour Court. It is only those employers and employees who are excluded by s 3 who cannot have access to the Labour Court for the E resolution of disputes.

Held, further, that despite the absence of a provision in the Regulations for an appeal process against the decision of the Trustee, the appellants were not deprived of a remedy against their dismissals under the Regulations. An appeal lay to the Labour Court, which had jurisdiction in terms of F ss 2A, 3 and 92D of the Act. Although the provisions of s 44(1) of the Regulations were inconsistent with the Act (in particular ss 3 and 2A thereof), the Regulations were subservient to the Act in relation to the manner of termination of employment, and in particular s 2A(3). This subsection provides that Act shall prevail over any other enactment inconsistent with it.

G *Held*, further, that the general rule of statutory interpretation is that where two statutes are in conflict with each other, the later statute is deemed to be the superior one on the basis of implied repeal, it being presumed that when the legislature passed the latter Act it had knowledge of the earlier Act. This applies only when the language used in the subsequent H statute is so manifestly inconsistent with that employed in the former

legislation that there is a repugnance and contradiction, so that the one A conflicts with the other, to the extent that the court is justified in coming to the conclusion that the earlier Act has been repealed by the later one. Otherwise, the law will not allow the revocation or alteration of a statute by construction when the words may have their proper operation without it.

Held, further, that in view of the provisions of s 3 and s 2A(3) of the Act, the B only logical conclusion was that the Act applied to the appellants and, that consequently they would be entitled to redress under the provisions of the Act and that the Labour Court would have jurisdiction to entertain the appeal. The absence of an appeal process to the Labour Court in the Regulations could not have overridden, and was never intended by the legislature to override, the peremptory provisions of s 2A, which the C court *a quo* should have had recourse to. To the extent that an apparent conflict would be manifest due to absence of a specific provision in the Regulations for an appeal beyond the Trustee, the Labour Act prevailed over the Regulations, suggesting an implicit repeal of the Regulations.

Held, further, that in any event, the Regulations, being subsidiary legislation, D were subordinate legislation and an inferior form of legislation. As a consequence, s 44 of the Regulations was subservient to the Act and by virtue of s 2A(3) the Act must supersede the Regulations.

Held, further, that s 12B of the Act made it mandatory for any dismissal to be effected in terms of a registered code of conduct or the Labour National Employment Code of Conduct (SI 15 of 2006). The issue was whether E the appellants could claim a right of appeal directly to the Labour Court despite being dismissed under a statutory instrument which was not an employment code as defined by the Act. On the face of it, s 92D of the Act was in conflict with s 3 of the Act, which conflict stemmed from the fact that s 92D appeared to exclude from its ambit any employee whose grievance did not emanate from a determination made under an F employment code. This would suggest further that an employee in the same position as the appellants who was dismissed except in terms of an employment code had no right to appeal to the Labour Court.

Held, further, that it is a well-established canon of construction that courts should endeavour to reconcile *prima facie* conflicting statutes as well as G apparently conflicting provisions in the same statute. Courts therefore do not readily come to the conclusion that there is a conflict; by using all means at their disposal, they attempt to effect a reconciliation. It is also an established canon of construction that different parts of the same statute should, if possible, be construed so as to avoid a conflict between them. Accordingly, where there are two sections in an Act which seem H

A to clash but which can be interpreted so as to give full force and effect to each, then such an interpretation is to be preferred as opposed to an interpretation that will partly destroy the effect of one of them. It is also an elementary principle of construction that the legislature will not be presumed to take away any acquired rights. The intention to do so must be expressed or very clearly implied from the language of the statute. It B cannot have been the intent of the legislature to exclude any employee from obtaining access to an appeal upon the termination of his employment. The appellants were, under s 3, guaranteed a right to redress from the Labour Court. It would therefore amount to an absurdity to find that in terms of s 92D they could not have their appeal heard on the grounds C that their dismissal was not effected in terms of an employment code.

Held, further, that there were obvious contradictions between the provisions of s 3 and those of s 12B and 92D of the Act. If regard were had to the provisions of ss 2A, 3, 12B and 92D of the Act, it was evident that there was discord and contradiction in the Act, requiring legislative intervention.

Held, further, that the right to an appeal under the Act could not be taken D away through a provision inconsistent with the clear and unambiguous provisions of ss 3 and 2A. Despite the provisions of s 92D, the Labour Court had jurisdiction to determine the appeal filed by the appellants and accordingly the appeal was properly before it.

Held, further, that in terms of s 12B a dismissal must be in terms of an E employment code or the national code. A dismissal effected other than in terms of that section is an unfair dismissal and the appellants would have recourse to the Labour Court on the basis of the unfair dismissal in terms of s 12B. The Regulations, which provided for dismissal other than in terms of s 12B, were to that extent in conflict with s 12B and the provisions of s 12B should prevail. Any disciplinary procedures which F were effected outside the peremptory provisions of s 12B were clearly unlawful. The dismissal of the appellants was therefore null and void. Consequently, the appellants were entitled to an order of reinstatement to their former positions without loss of salary and benefits.

Cases referred to

G *Amal Packagging Industires Ltd v Hutt & Anor* 1975 (4) SA 943 (A)

de Wet v Deetlefs 1928 AD 286

Heavy Tpt & Plant Hire (Pty) Ltd v Min of Tpt Affairs & Ors 1985 (2) SA 597 (W)

Kent NO v SAR & Anor 1946 AD 398

H *Mutare, City of v Matamisa* 1998 (1) ZLR 512 (S)

Gowora JA

Mutare, City of v Mudzime & Ors 1999 (2) ZLR 140 (S) A

Principal Immigration Officer v Bhula 1931 AD 323

R v Pashda 1923 AD 281

Wendywood Development (Pty) Ltd v Rieger & Anor 1971 (3) SA 28 (A)

Legislation considered B

Labour Act [*Chapter 28:01*], ss 2, 2A, 3, 12B, 89(1), 92D & 92E

Supreme Court Act [*Chapter 7:13*], s 25

Zimbabwe Manpower Development Fund (Conditions of Service and Misconduct) Regulations (SI 258 of 1996), s 44

Case information

G Machingambi, for the appellants C

C Mucheche, for the respondent

Judgment

Gowora JA: This appeal from a decision by the Labour Court concerns the interpretation of seemingly conflicting provisions within the Labour Act [*Chapter 28:01*], and, additionally the conflict between the Labour Act itself ("the Act") and the Zimbabwe Manpower Development Fund D (Conditions of Service and Misconduct) Regulations 1996 (SI 258 of 1996), "the Regulations".

The respondent is a statutory body which is created in terms of s 47 of the Manpower Planning and Development Act [*Chapter 28:02*]. In terms of s 69 of the same Act, the Minister is empowered to enact regulations, which, in E the opinion of the Minister, would enhance the performance of the functions of the respondent. In the exercise of those powers the Minister caused the promulgation of the Regulations.

The appellants were employed by the respondent in various capacities. On 18 August 2009, the appellants were given instructions to sign declarations F of secrecy following upon the leakage of information of a confidential nature from the respondent's office. All of the appellants refused to sign the declarations and they were charged with disobeying a lawful instruction. A second charge of hindering or obstructing another employee in the performance of his duties which was preferred against the second appellant could not be sustained and was dismissed. Following upon disciplinary proceedings, G all the appellants were found guilty of the charges and dismissed from employment. Dissatisfied with their dismissal, they appealed to the Trustee, who is the Minister of Higher and Tertiary Education, in terms of s 44 of the Regulations and were unsuccessful. Dissatisfied with the dismissal of that appeal, they noted an appeal to the Labour Court. They were unsuccessful before the Labour Court which held that there was no right of appeal to the H

A Labour Court provided for in the Regulations. They have as a consequence, appealed to this court.

The appellants have in their appeal to this court raised issues on alleged inconsistencies as relates to the interpretation of ss 2, 3, 12B and 92D of the Act and s 44(1) of the Regulations. The grounds upon which the appeal B is premised are the following:

1. The court *a quo* erred in ruling, as it did, that it had no jurisdiction to hear the appeal by the appellants.
2. Having correctly ruled that the Labour Act [*Chapter 28:01*] applies to the appellants, the learned president *a quo* erred in declining to exercise jurisdiction to hear the appeal by the appellants.
3. The C court *a quo* further erred in concluding that s 44(1) of the Regulations provides that an appeal to the respondent's Trustee is final and unappealable.
4. The proceedings taken by the respondent under the Regulations 1996 were null and void *ab initio* and of no force and effect by virtue of the D application of s 5(a) and (b) of SI 15 of 2006, as read with the peremptory provisions of s 12B of the Act. Accordingly the court *a quo* erred in refusing to entertain the appeal.

The learned president in the court *a quo* found that the Act applied to the appellants. The learned president was unable to find that the Act confers E jurisdiction on the Labour Court to entertain the appeal, principally due to the wording of s 44 of the Regulations, which does not bestow a right of appeal beyond that of the Trustee.

The finding by the court *a quo* was to the effect that, whilst s 3 of the Act provided that the Act applied to all employees except those specifically F excluded in the said section, it did not confer jurisdiction upon the court to hear and determine appeals arising out dismissals effected under the Regulations. The court said the following:

> "Section 3 does not confer jurisdiction on any court to apply the provisions of the Labour Act. The question we are dealing with here is whether the Labour Court has jurisdiction to hear appeals determined in terms of SI 258 of 1996 where the statutory instrument does not provide for an appeal to the Labour G Court? The Labour Court is a creature of statute and its jurisdiction is derived from the statute creating it."

The appellants contend, however, that, notwithstanding the provisions of s 44(1) of the Regulations under which they were charged with misconduct and dismissed from employment, they are, by virtue of the provisions of the H Labour Act, entitled to be heard by the Labour Court by way of appeal and

Gowora JA

that consequently, their appeal was properly before the court *a quo*. They A contend further that the inconsistencies within the legislation do not oust the jurisdiction of the Labour Court to entertain their appeal. With regard to the conflict between the Regulations and the provisions of the Act, it is contended by the appellants that, in view of the provisions of s 2A of the Act, the Act prevails over the Regulations and consequently there exists a B right of appeal to the Labour Court.

The Labour Court is a creature of statute and can exercise only those powers that it has bestowed upon it by its enabling Act. The powers of the Labour Court in relation to appeals are spelt out in s 89(1) of the enabling Act. They are stated as follows:

> "The Labour Court shall exercise the following functions: C
>
> (a) hearing and determining applications and appeals in terms of this Act or any other enactment."

In my view, the starting point in determining the dispute is s 3 of the Act, which provides as follows:

> **"3 Application of Act** D
>
> (1) This Act shall apply to all employers and employees except those whose conditions of employment are otherwise provided for in the Constitution.
>
> (2) For the avoidance of any doubt, the conditions of employment of members of the Public Service shall be governed by the Public Service Act [*Chapter 16:04*].
>
> (3) This Act shall not apply to or in respect of –
>
> (a) members of a disciplined force of the State; or E
>
> (b) members of any disciplined force of a foreign State who are in Zimbabwe under any agreement concluded between the Government and the Government of that foreign State; or
>
> (c) such other employees of the State as the President may designate by statutory instrument." F

As is evident from the provisions of s 3, the Act applies to all employers and employees except for those whose conditions of employment are governed by the Constitution or the Public Service Act [*Chapter 16:04*]. The precursor to the Labour Act, the Labour Relations Act 16 of 1985, provided in s 3 thereof:

> **"3. Application of Act** G
>
> This Act shall apply to all employers and all employees except those whose conditions of employment are otherwise provided for by or under the Constitution."

As a consequence of the above provision, prior to its amendment, in construing the section, courts within this jurisdiction concluded that the Act was not of universal to all employees in Zimbabwe. See *City of Mutare v Matamisa* 1998 (1) ZLR 512 (S), wherein despite the wording of the section providing that H

Gowora JA

A the Act applied to all employees, this court held that it was not obligatory for the City of Mutare to obtain the approval of the Minister as provided for in s 2 of the Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations SI 371 of 1985. Effectively, therefore, the court found that employees of urban councils were not covered by the Act. [1]

B Subsections 2 and 3 of the current Act were promulgated by Act 7 of 2005 and as a consequence, with the exceptions of those specifically excluded by the section, all employees were brought under the umbrella of the Act. In the circumstances of this case it seems to me that the finding by the court that, in terms of s 3 thereof, the Act applied to the appellants was clearly C contradictory to the subsequent finding that the court did not have jurisdiction to determine the appeal filed by the appellants.

It follows therefore that under s 89(1) employers and employees whose conditions of employment are covered under s 3 are impliedly given the right to appeal to the Labour Court. It is only those employers and employees D who are excluded by s 3 who cannot have access to the Labour Court for the resolution of disputes.

It is the contention of the appellants, which contention finds favour with me, that, notwithstanding the absence of a provision in the Regulations for an appeal process against the decision of the

Trustee, the appellants are E not deprived of a remedy against their dismissals under the Regulations. The appellants contend that an appeal lies to the Labour Court, which has jurisdiction in terms of ss 2A, 3 and 92D of the Act.

The appellants suggest that the failure to provide for an appeal process beyond the Trustee is inconsistent with s 3 of the Act, wherein every employee, except F those specifically excluded therein, is provided for. As there is no specific provision denying the appellants a right of appeal to the Labour Court, it is the contention of the appellants that the court has jurisdiction to entertain an appeal under the circumstances of this particular case. I agree.

The appellants have argued that the provisions of s 44(1) of the Regulations G are inconsistent with the Act, in particular ss 3 and 2A thereof. They argue, further, that the Regulations are subservient to the Act in relation to the manner of termination of employment, and in particular s 2A(3). Section H 2A provides as follows:

Gowora JA

"2A Purpose of Act A

(1) The purpose of this Act is to advance social justice and democracy in the workplace by –

(a) giving effect to the fundamental rights of employees provided for under Part II;

(b) …

[Paragraph repealed by section 3 of Act 7 of 2005] B

(c) providing a legal framework within which employees and employers can bargain collectively for the improvement of conditions of employment;

(d) the promotion of fair labour standards;

(e) the promotion of the participation by employees in decisions affecting their interests in the work place; C

(f) securing the just, effective and expeditious resolution of disputes and unfair labour practices.

(2) This Act shall be construed in such manner as best ensures the attainment of its purpose referred to in subsection (1).

(3) This Act shall prevail over any other enactment inconsistent with it. D

[Subsection substituted by section 3 of Act 7 of 2005]
[Section inserted by section 4 of Act 17 of 2002]"

In terms of s 2A(3) thereof, the Labour Act shall prevail over any other enactment the provisions of which are inconsistent with its own. The Regulations do not permit any appeal beyond the Trustee. Section 44(1) is worded as follows: E

"(1) An employee who is aggrieved by a decision of the Director or the Chief Executive may, within fourteen days of being notified of such decision appeal –

(a) in the case of a decision by the Director, to the Chief Executive;

(b) in the case of a decision by the Chief Executive, to the Trustee."

There is a general rule of statutory interpretation that where two statutes F are in conflict with each other, the later statute, by virtue of the principle of *lex posterior derogat e priori,* is deemed to be the superior one on the basis of implied repeal. This is because it is presumed that when the legislature passes the latter Act it is presumed to have knowledge of the earlier Act.

In *Heavy Transport & Plant Hire (Pty) Ltd & Ors v Minister of Transport Affairs & Ors* 1985 (2) SA 597 (W) at 604B-D, Nestadt J stated: G

"The principle is that statutes must be read together and the later one must not be so construed as to repeal the provisions of an earlier one or to take away rights conferred by an earlier one unless the later statute expressly alters the provisions of the earlier one in that respect, or such alteration is a necessary inference from the terms of the later statute. The inference must be a necessary one and not merely a possible one. (*Kent NO v South African Railways & Anor* H

Gowora JA

A 1946 AD 398 at 405). As Kotzé AJA stated in *New Modderfontein Gold Mining Co v Transvaal Provincial Administration* 1919 AD 367 at 400:

'It is only when the language used in the subsequent statute is so manifestly inconsistent with that employed in the former legislation that there is a repugnance and contradiction, so that the one

> conflicts with the other, that we are justified in coming to the conclusion that the earlier Act has been B repealed by the later one.'"

In *Wendywood Development (Pty) Ltd v Rieger & Anor* 1971 (3) SA 28 (A), Diemont AJA stated at 38A-C:

> "That s 30 must be modified to give it efficacy can hardly be gainsaid. Indeed Mr Smallberger, who appeared for the respondent, conceded that some modification was necessary, but I am not persuaded that the modification need be so extensive C as to make it impossible to reconcile the sections. It is necessary to bear in mind a well-known principle of statutory construction, namely, that statutes must be read together and the later one must not be so construed as to repeal the provisions of the earlier one, unless the later statute expressly alters the provisions of the earlier one or such alteration is a necessary inference from the provisions of the later statute."

D Diemont AJA in the *Wendywood* case had occasion to quote with approval the remarks of Watermeyer CJ in *Kent NO v South African Railways and Anor* 1946 AD 398, to the following effect: [2]

> "The language of every enactment must be so construed as far as possible to be consistent with every other which it does not in express terms modify or repeal. E The law, therefore, will not allow the revocation or alteration of a statute by construction when the words may have their proper operation without it. But it is impossible to will contradictions; and if the provisions of a later Act are so inconsistent with or repugnant to those of an earlier Act that the two cannot stand together, the earlier stands impliedly repealed by the later."

In view of the provisions of s 3 and s 2A(3), the only logical conclusion F is that the Labour Act applies to the appellants and, that consequently they would be entitled to redress under the provisions of the Act and that the Labour Court would have jurisdiction to entertain the appeal. In my view the absence of an appeal process to the Labour Court in the Regulations could not have overridden, and was never intended by the Legislature to override, G the peremptory provisions of s 2A, which the court *a quo* should have had recourse to. To the extent that an apparent conflict would be manifest due to absence of a specific provision in the Regulations for an appeal beyond the Trustee, then it seems to me that the Labour Act prevails over the Regulations, H suggesting an implicit repeal of the Regulations.

2013 (2) ZLR p56

Gowora JA

The Regulations were promulgated in 1996 and, when read together with A s 2A of the Act, in view of the provisions of s 2A the only construction available to the court is that s 44(1) of the Regulations has been repealed by implication, not merely because s 2A is a later statutory provision, but also by virtue of the wording of s 2A, which provides that the Labour Act prevails over any other statute or piece of legislation whose provisions are B inconsistent with its own. In any event, the Regulations, being subsidiary legislation are subordinate legislation. They are not an Act of Parliament. They are made under delegated powers. In *Maxwell on the Interpretation of Statutes* 12 ed p 74 P St J Langan refers to statutory instruments as being an inferior form of legislation. As a consequence, s 44 of the Regulations is subservient to the Act and by virtue of s 2A (3) the Act must supersede C the Regulations.

I am further fortified in this view by the fact that the Regulations are not an employment code and, in terms of s 12B, the Labour Act makes it mandatory for any dismissal to be effected in terms of a registered code of conduct or the Labour National Employment Code of Conduct SI 15 of 2006. D

The appellants have not argued that their appeal to the Labour Court was premised under the Regulations in terms of which they were dismissed. Indeed, it is accepted that the Regulations do not provide for an appeal process beyond that provided for to the Trustee. The issue is whether they could claim a right of appeal directly to the Labour Court despite being E dismissed under a statutory instrument which was not an employment code as defined by the Act.

The Regulations do not deny an appeal process beyond that available to the Trustee. They are silent and, in my view, the omission to provide for such an appeal process to the Labour Court is not in itself constitutive of the denial F of a right of appeal. What would be of importance is if a right of appeal is provided for in the Labour Act itself.

The issue that then arises is whether in the Act itself there is provided a right of appeal in favour of the appellants. The right of an employer or an employee to appeal to the Labour Court is encapsulated in ss 92D and 92E G of the Act which provide:

"92D Appeals to the Labour Court not provided for elsewhere in this Act

A person who is aggrieved by a determination made under an employment code, may, within such time and in such manner as may be prescribed, appeal to the Labour Court." H

2013 (2) ZLR p57

Gowora JA

A **92E Appeals to the Labour Court generally**

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

(2) An appeal in terms of subsection (1) shall not have the effect of suspending the determination or decision appealed against.

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

The respondent has conceded that the Regulations under which the appellants were dismissed is not an employment code. Clearly, the appellants are not amongst the species of employees whose conditions of employment are governed by the Constitution or the Public Service Act. It stands to reason C therefore that their conditions of employment are governed by the Labour Act. The logical conclusion therefore is that they would have the right to approach the Labour Court by way of appeal.

However, on the face of it, s 92D seems to be in conflict with s 3 of the Act, which conflict stems from the fact that s 92D appears to exclude from its ambit D any employee whose grievance does not emanate from a determination made under an employment code. This would suggest further that an employee in the same position as the appellants who is dismissed except in terms of an employment code has no right to appeal to the Labour Court.

It is a well established canon of construction that courts should endeavour to reconcile *prima facie* conflicting statutes as well as apparently conflicting E provisions in the same statute. Courts therefore do not readily come to the conclusion that there is a conflict and by using all means at their disposal they attempt to effect a reconciliation. It is also an established canon of construction that different parts of the same statute should, if possible, be construed so as to avoid a conflict between them. See *Amalgamated Packaging Industries* F *Ltd v Hutt & Anor* 1975 (4) SA 943 (A) at 949H.

Accordingly, where there are two sections in an Act which seem to clash but which can be interpreted so as to give full force and effect to each, then such an interpretation is to be preferred as opposed to an interpretation that will partly destroy the effect of one of them. It is also an elementary principle of construction that the Legislature will not be presumed to take away any G acquired rights. The intention to do so must be expressed or very clearly implied from the language of the statute. In *Principal Immigration Officer v Bhula* 1931 AD 323 at 335 Wessels JA stated:

"It would be extremely difficult in such a case to say that Parliament has by implication in a later section modified rights which in an earlier section it H safeguarded explicitly. The implied intention of Parliament must be so clear as

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2013 (2) ZLR p58

Gowora JA

to leave no doubt whatever in the mind of the court. The Legislature is presumed A to be consistent with itself.

…

Moreover, where there are two sections in an Act which seem to clash, but can be so interpreted as to give full force and effect to each, then such an interpretation is to be adopted rather than one which will partly destroy the effect of one of B them. More especially in this case, where the interpretation of the later statute would violate or modify rights which had been safeguarded in the former section."

In casu, it cannot have been the intent of the Legislature to exclude any employee from obtaining access to an appeal upon the termination of his employment. The appellants have, under s 3, been guaranteed a right to redress from the Labour Court. It would therefore amount to an absurdity C to find that in terms of s 92D they cannot have their appeal heard on the grounds that their dismissal was not effected in terms of an employment code. It would be difficult for this court to state, in the circumstances of this case, that Parliament has, by implication, in s 92D modified rights which it had guaranteed in an earlier section of the Act. The implied intention of the D Legislature must be so

clear as to leave no doubt in the mind of the court as the Parliament is presumed to be consistent with itself.

In *R v Pashda* 1923 AD 281 at 304, Innes CJ stated:

> "It is competent for Parliament to oust the jurisdiction of courts of law if it considers such a course advisable in the public interest. But where it takes away the right of an aggrieved person to apply to the only authority which can E investigate and, where necessary, redress his grievance, it ought surely to do so in the clearest language. Courts of law should not be astute to construe doubtful words in a sense which will prevent them from doing what is *prima facie* their duty, namely, from investigating cases of alleged injustice or illegality."

Consequently, the rights and obligations set out in the Act govern the terms F and conditions of the employment relationship between the appellants and the respondent. In view of the provisions of s 3 therefore, employees covered by the Act are entitled to the rights, benefits and obligations provided for in the Act as read with s 2A thereof, which rights include the access to an appeal process to the Labour Court.

It is appropriate in construing the pertinent sections to have regard to s 12B G in order to place a proper perspective on the intention of the legislature as regards the Act in issue. Section 12B reads:

> **"12B Dismissal**
>
> (1) Every employee has the right not to be unfairly dismissed.
>
> (2) An employee is unfairly dismissed – H

Gowora JA

> *(a)* if, A subject to subsection (3), the employer fails to show that he dismissed the employee in terms of an employment code; or
>
> (*b*) in the absence of an employment code, the employer shall comply with the model code made in terms of section 101(9)."

In my view, the intent of the legislature as manifested in the provisions of s 12B is to ensure that no employee is dismissed unfairly by making it mandatory B that any dismissal be effected in accordance with a registered employment code. Added to this, it is my view that, a perusal of ss 2, 3 and 92D leads to an inescapable conclusion that the intent of the Legislature, in enacting the provisions in question was, to ensure that the employment relationship was governed by the provisions of one Act and that disputes were settled in C terms of procedures regulated by the provisions of that Act. I am bolstered in this view by reference to the provisions of s 12B of the Act, requiring that no dismissal be effected in the absence of an employment code. There is thus an obvious contradiction between the provisions of s 3 and those of s 12B and 92D of the Labour Act. If regard is had to the provisions of ss 2A, 3, 12B and 92D of the Act, it becomes evident that there is discord and D contradiction in the Act. There is a suggestion of a lack of cohesion. I would venture to suggest that the law giver consider the need to bring cohesion to the entire Act in order to avoid instances where persons whose rights are covered and guaranteed under the Act fail to access such rights by virtue of the unintended inconsistencies within the legislation.

E It seems to me that the right to an appeal under the Act cannot be taken away through a provision which is inconsistent with the clear and unambiguous provisions of ss 3, and 2A. It is a well-recognised rule in the interpretation of statutes that, in order to oust the jurisdiction of a court of law, it must be clear that such was the intention of the Legislature. See *de Wet v Deetlefs* 1928 AD 286 at 290.

F It is accordingly, inconceivable that the Legislature would have intended to oust the jurisdiction of the Labour Court to determine appeals in respect of employers and employees whose conditions of employment are governed by the Labour Act. I find therefore that notwithstanding the provisions of s 92D of the Act the Labour Court had jurisdiction to determine the appeal G filed by the appellants and accordingly the appeal was properly before the court *a quo*.

Although, the appellants have not argued as such, the Labour Court is empowered with review jurisdiction. In terms of s 89(1)(d1) the Labour Court shall "exercise the same powers of review as would be exercisable by the H High Court in respect of labour matters". In the exercise of its powers the

Gowora JA

court *a quo* was therefore empowered to enquire into the manner in which A the appellants were dismissed from employment.

As already adverted to earlier on in this judgment, in terms of s 12B a dismissal must be in terms of an employment code or the national code. A dismissal effected other than in terms of that section is an unfair dismissal. The appellants would have recourse to the Labour Court on the basis of the B unfair dismissal in terms of s 12B. The only conflict lies in the provisions of the Regulations which provided for dismissal other than in in terms of s 12B. To that extent the Regulations are in conflict with s 12B and the provisions of s 12B should prevail.

The appellants have contended that the proceedings under which they were C found guilty of misconduct were null and void by virtue of the fact that the respondent did not proceed under an employment code as required under the law. They premise this argument on the provisions of s 12B of the Act which places an onus upon an employer to establish that the dismissal of an employee was not effected unfairly. The section further provides that if an employee is dismissed in the absence of an employment code then such D dismissal constitutes unfair dismissal for purposes of the Act. The respondent is not in a position to show that the dismissal of the appellants was effected in terms of a registered code of code as required by s 12B of the Act. To the extent that s 44(1) of the Regulations which provides for the dismissal of employees of the respondent in contradiction with the provisions of ss 12B E and 92D and most importantly s 2A of the Act, then it is taken as having been repealed and not to be given effect to.

The contention by the appellants as to the alleged irregularity of the proceedings invites this court to review the proceedings under which the appellants were dealt with by the respondent and subsequently dismissed. This court derives F the power of review in this instance from s 25 of the Supreme Court Act which reads in relevant part:

> **"25 Review powers**
>
> (1) Subject to this section, the Supreme Court and every judge of the Supreme Court shall have the same power, jurisdiction and authority as are vested in the High Court and judges of the High Court, respectively, to review the proceedings G and decisions of inferior courts of justice, tribunals and administrative authorities.
>
> (2) The power, jurisdiction and authority conferred by subsection (1) may be exercised whenever it comes to the notice of the Supreme Court or a judge of the Supreme Court that an irregularity has occurred in any proceedings or in the making of any decision notwithstanding that such proceedings are, or such decision is, not the subject of an appeal or application to the Supreme Court. H

Gowora JA

> A (3) Nothing in this section shall be construed as conferring upon any person any right to institute any review in the first instance before the Supreme Court or a judge of the Supreme Court, and provision may be made in rules of court, and a judge of the Supreme Court may give directions, specifying that any class of review or any particular review shall be instituted before or shall be referred or remitted to the High Court for determination."

B The respondent failed to comply with the provisions of S12B of the Act. An employer who terminates the contract of employment with an employee must proceed either in terms of a registered employment code or the Labour National Employment Code SI 15 of 2006. The respondent utilised the Regulations and it has failed to establish that the dismissals were effected in terms of the provisions of S12B. Any disciplinary procedures which have C been effected outside the peremptory provisions of s 12B are clearly unlawful. The dismissal of the appellants was therefore null and void.

The appellants have prayed that the appeal be allowed with costs and in addition that the matter be remitted to the court *a quo* for a determination on the merits. In view of the conclusion that the proceedings conducted by the respondent were null and void the inevitable result is that the dismissals are D of no force and effect by operation of law. As a consequence, the appellants are entitled to an order of reinstatement to their former positions without loss of salary and benefits.

The appeal is allowed with costs.

The judgment of the court *a quo* is set aside and substituted with the following:

E It is ordered as follows:

1. The dismissal of the appellants by the respondent from employment be and is hereby set aside.
2. The respondent be and is hereby ordered to reinstate the appellants to their former positions without loss of salary and other benefits.
3. The F respondent shall bear the appellants' costs for the appeal.

ZIYAMBI JA and OMERJEE AJA concurred.

G Machingambi Legal Practitioners, appellant's legal practitioners

G *Matsikidze & Mucheche*, respondent's legal practitioners

1 This decision was followed in *Mutare City Council v Mudzime & Ors* 1999 (2) ZLR 140 (S).
2 At 405 (quoting from *Maxwell Interpretation of Statutes* 4 ed p 233)

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Document 9 of 79

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S v CHINOUNDA 2013 (2) ZLR 62 (H)

Citation	2013 (2) ZLR 62 (H)
Case No	Judgment No. HH-218-13
Court	High Court, Harare
Judge	Hungwe J & Mavangira J
Heard	17 July 2013
Judgment	17 July 2013
Counsel	*D Matimba,* for the appellant Mrs *S Fero,* for the respondent
Case Type	Criminal appeal
Annotations	No case annotations to date

Flynote

Criminal law – *offences under Criminal Law Code – kidnapping (s 93) –* C *elements of crime – no different from common law position – irrelevance of whether victim an adult or a child – consent of child – not a defence – different sentence may be imposed if victim is a child*

Headnote

The common law crime of kidnapping consists of unlawfully and intentionally D depriving a person of liberty of movement and/or his custodian of control. The offence is thus an attack on, and the

infringement of, the personal liberty of the individual. The law is concerned with two things: the protection of personal liberty (a) from any interference and (b) from any restraints on the freedom of movement. The relevant ingredient of the E crime is the absence of consent of the person who is taken, even where that person is a child. The seizure of a person with evil intent without his or her consent, however transient, is an interference with his or her personal liberty. The length of time for which a child may be removed may be of importance as showing the intention of the parties. Even a very short time may be sufficient to show that there was the intention F of removing the child out of the custody of his or her parents. The time would only become irrelevant in cases where the de minimis non curat lex principle is applicable.

The intent involved in kidnapping may be said to differ according to whether the victim is an adult or a child. The case of a child, the child's consent is G not relevant. Section 93 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] has not in any way altered the common law position regarding the crime of kidnapping. Consistent with the common law position, the Code, in s 93(3), provides for distinct recognition of the offence as it relates to children and addresses its implication on parental authority. The fact that the child consents to his or her removal or spiriting H

A away is not a defence. Parental control is specifically recognised where a child is involved. The statutory provisions are consistent with Zimbabwe's regional, as well as international, treaty obligations.

Cases cited

S v Adams & Ibrahim 1911 CPD 863

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

S v Bentham & Ors (1972) All ER 271 (CA)

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

S v Chitiyo 1987 (1) ZLR 235 (H)

S v F 1983 (1) SA 747 (O)

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

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

S v Long 1970 (1) RLR 1 (A); 1970 (2) SA 153 (RA)

S v Masawi & Anor 1996 (2) ZLR 472 (S)

S v Masuku & Anor 1989 (3) ZLR 33 (S)

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

D *S v Mellar* 1990 (1) SACR 347 (W)

S v Mokoena 1932 OPD 79

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

Legislation considered

E Criminal Law (Codification and Reform) Act [*Chapter 9:23*], s 93

Criminal Procedure and Evidence Act [*Chapter 9:03*], s 269

Supreme Court (Magistrates Court) (Criminal Appeals) Rules 1979 (SI 504 of 1979), rr 22, 23,24 & 27

African Charter on the Rights and Welfare of the Child 1990, arts 2, 15, 16, 21, 27, 28 & 29

F Canadian Criminal Code, s 279

Case information

D Matimba, for the appellant

Mrs *S Fero,* for the respondent

Judgment

G **Hungwe J**: This appeal concerns a mother who hid her young daughter's friend from her parents who had been frantically searching for her everywhere. The two young friends had left the complainant's residence and went to the appellant's residence. Although she was confronted by the complainant's parents regarding their daughter's whereabouts, the appellant denied sheltering H and secreting the victim away.

Hungwe J

Background A

The appellant was convicted on one count of kidnapping as defined in s 93(1)(b) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] ("the Code") and three other counts of aggravated indecent assault as defined in s 66 of the Code. She was sentenced to seven years' imprisonment on each count, making a total of 28 years. Of that sentence, eight years were suspended for B five years on condition of good behaviour. Dissatisfied, she noted an appeal to this court against both conviction and sentence on 27 August 2008.

Heads of argument

I observe that the original notice and grounds of appeal did not comply with r 22(1) of the Supreme Court (Magistrates Court) (Criminal Appeals) Rules C 1979 ("the Rules") in that the grounds did not "clearly and specifically set out the grounds of appeal". First ground recited that:

> "It is humbly submitted that the court *a quo* misdirected itself in law and fact when it held that the appellant kidnapped the complainant."

In *S v Jack* 1990 (2) ZLR 166 (S) the Supreme Court held that a "notice of appeal" without meaningful grounds of appeal is not a notice of appeal and D cannot be amended. In terms of r 47 if the notice is a nullity and the time for noting an appeal has lapsed, the right to appeal must be deemed to have lapsed. See also *S v McNab* 1986 (2) ZLR 280 (S). This court has for some time decried the failure by legal practitioners to comply with the Rules in this regard. Time has surely come for this court to non-suit offending "appellants". E The appellant realised this short-coming in complying with the Rules. She filed an "amended notice and grounds of appeal" on 14 November 2008, some three months later. The amendments to the grounds of appeal are governed by r 23(3), which requires such amendments to be effected within seven days of the filing of the magistrate's comments on the grounds of appeal. In this case there were no comments from the trial magistrate as she has since left F the service. She would, in all probability, have pointed out that there was no appeal. In terms of r 47, if an appeal is a nullity and the time of noting an appeal has elapsed, the right to appeal must be deemed to have lapsed. See *Jack's* case *supra* at 168. Where the presiding magistrate does not point out that an appeal is a nullity, then the Attorney-General, as the respondent, G should have done so. Regrettably, the respondent has not taken this point.

The heads of argument filed on behalf of the appellant on 6 September 2012 had attached to them a transcription of the record of proceedings in the trial of the appellant's husband. Mr *Matimba,* for the appellant, could not demonstrate the relevance of this record, nor could he point to any rule or authority upon which he relied for the irregular filing of heads of argument H

Hungwe J

A and transcription of a record of a different trial. What constitutes the record of proceedings for the purposes of an appeal is governed by r 24(2) of the Rules. Only the original record of proceedings and certified copies of that record, prepared by the clerk of court in terms of the Rules, constitute the record of appeal. In the event, any reference to the record of proceedings was excised from the heads of argument, as was the record itself.

B The heads of argument raised one new ground and repeated the grounds of appeal specified in the abandoned notice and grounds of appeal, in addition to those that appear in the amended notice and grounds of appeal dated 14 November 2008. This new additional ground was framed thus:

"(v) It is further submitted that the court *a quo* erred in law and in fact in C failing to adequately apply the cautionary rule, given the inconsistencies in the complainant's evidence and her suspicious state of mind."

The appellant was not legally represented in the original trial until after the evidence was led. She secured legal counsel before judgement was rendered. Counsel applied for the recalling of witnesses. This indulgence was granted but counsel did not take it up, preferring instead to make written closing D submissions on the appellant's behalf. Those submissions do not seem to have received the attention of the trial magistrate. Recognising the need to protect, afford, promote and uphold the appellant's fair trial rights, I decided to overlook the deficiencies regarding the notice of appeal as well as lack of compliance with r 22(1) of the Rules regarding the heads of argument and E to proceed to deal with the merits of the appeal in the following manner.

The evidence

The record reflects that the appellant was convicted on the following facts, which were either common cause or not seriously in dispute. The complainant was a friend of the appellant's daughter. They regularly visited each other's F respective homes. As would be expected, their respective parents were aware of this friendship. The complainant's father would, at times, pay school fees for the appellant's daughter if the need arose. On 16 December 2006, the complainant and the appellant's daughter left the complainant's residence together. When she did not return home, the complainant's father was worried. He went out to the appellant's home in search of his daughter. G On five occasions the complainant's father approached the appellant. On the first occasion the appellant denied that the complainant and her daughter had been home. On one occasion she deflected attention from herself by claiming that her husband was pursuing wrong leads. The complainant's father then received an anonymous telephone call which convinced him that H his daughter was detained at the appellant's residence. He engaged the police.

Hungwe J

Even in the presence of the police, the appellant professed ignorance on the A whereabouts of the complainant. On the final occasion, the complainant's father and mother visited the appellant's residence in search of their daughter. The complainant's father spoke to the appellant's husband. He was assured by the appellant's husband that he would see his daughter the following day. As they were leaving, someone in their company heard his daughter's voice B coming from the appellant's residence. She was found at the complainant's residence on 25 January 2007.

The appellant's defence was that when the complainant and her daughter arrived from complainant's home they told her that the complainant's mother wanted to assault the complainant. She then gave the complainant refuge. The complainant implored the appellant not to disclose her presence at her C residence since she feared further assaults from her mother. This was the reason why she kept the complainant away from her parents. She denied inserting her fingers into the complainant's vagina.

The evidence placed before the court consisted of the medical examination report on the complainant and the oral evidence from both the complainant D and her father. The medical examination conducted on 23 February 2007 revealed that the complainant's hymen was open and that her vagina admitted one finger. The report also gave her mental state as normal. Her age is given in the medical report as 17 years. The trial court also found that the complainant was kept under guard and prevented from regularly taking a bath. She, however, would be taken from one prophet to another under E one guise or another. She was never left alone. She was lured away from her parent's home by the appellant's daughter, her friend. The same friend, together with her elder sister, on one occasion, assaulted her in order to prevent her from making good her escape. All this occurred, the trial court found, at the behest of the appellant. F

The trial magistrate, in her judgment, rejected the claim by the appellant that she gave the complainant motherly care. The magistrate wondered why, if indeed that were so, the complainant came up with the story she gave to the court. In the trial court's assessment of the appellant's credibility it noted that in one encounter with the complainant's parents, who were making frantic G efforts to find the complainant, the appellant had given them the complainant's clothes but persisted in her denial that the complainant was in her custody. Consequently, the magistrate rejected the appellant's plea that she behaved foolishly when she denied that the complainant was in her custody.

The grounds of appeal put forward by the appellant raise an important question regarding the nature of the crime of kidnapping in our jurisdiction. H

Hungwe J

A The question is whether the Code modified the definition of the common law crime of kidnapping, so as to make the age of the victim an essential element of that offence.

What constitutes kidnapping at common law?

The common law crime of kidnapping was considered in *S v Dzimuri & Ors* B 1997 (2) ZLR 27 (H) where this court stated:

> "In Hunt's *South African Criminal Law and Procedure* vol II the definition of kidnapping is given as 'unlawfully and intentionally depriving a person of liberty of movement and/or his custodians of control'".

In *S v Masuku & Anor* 1989 (3) ZLR 33 (S) at 37 the following appears:

> "Kidnapping is defined in Hunt *South African Criminal Law and Procedure* vol C II 2 ed p 509 thus:
>
> > 'Kidnapping consists in unlawfully and intentionally depriving a person of liberty of movement and/or his custodians of control.'"

Clearly, then, the nature of the offence is an attack on, and the infringement of, the personal liberty of the individual. The law is concerned with two things: D the protection of personal liberty (a) from any interference and (b) from any restraints on the freedom of movement. So the relevant ingredient of the crime is the absence of consent of the person who is taken, even where that person is a child. A seizure of a person with evil intent without his consent, however transient, is an interference with his personal liberty.

E In *R v Long* 1970 (1) RLR 1 (A) at 11; 1970 (2) SA 153 (RA) at 160H, MacDonald JA (as he then was) quoted with approval the following passage from the judgment of Maasdorp JP in *R v Adams & Ibrahim* 1911 CPD 863, to illustrate that the relevance of time may be of importance as providing evidence of the accused's intention:

> "It was argued that there must, at least, be the intention permanently to remove F the girl from the custody of her father. Now, the length of time for which a girl may be removed in a case of this kind may be of importance as showing the intention of the parties. A very short time may be sufficient to show that there was the intention of removing the girl out of the custody of her father. It may be very difficult, if the time is very short, to say what was actually the intention, but here the intention was not only to take the girl to the house where she was kept for a considerable period – some hours – but after that she was to be further G conveyed to Port Elizabeth. That intention was only frustrated by the girl being followed up by her relatives."

In *S v F* 1983 (1) SA 747 (O), the judgment of which is in Afrikaans, the headnote reads as follows:

> "In regard to the crime of manstealing (kidnapping) of a young child, as soon H as there is an intention to violate the parental authority and effect is given to

Hungwe J

> that intention by removing the child, with or without the consent of the child, A the offence is committed and the period of time for which the kidnapper plans to remove the child from the parental authority is not relevant except in cases where the *de minimis non curat lex* principle is applicable."

Modern South African authority now recognises that the intent involved in kidnapping may be said to differ according to whether the victim is an adult B or a child. Thus in Hunt *South African Criminal Law and Procedure* vol II 3 ed by Milton, at p 547, it is said that:

> "X must intend (actually or legally) to deprive Y of liberty or his custodian of control."

The definition of the offence which appears in Milton's edition of Hunt as: C

> "… kidnapping consists in unlawfully and intentionally depriving a person of liberty or movement and/or his custodians of control"

similarly acknowledges both species of the offence and has been cited with approval in numerous South African and Zimbabwean cases, for instance in *S v Mellor* 1990 (1) SACR 347 (W) at 351I and in the *Masuku* case *supra* and has been adopted in both jurisdictions. The concept was referred to in

D passing in the *Masuku* case *supra* where Korsah JA opined that a seizure of a person with evil intent without his consent, however transient, is an interference with his personal liberty.

As soon as there is disclosed an intention to infringe the parental authority and effect is given to that intention through the removal of the child, with or E without the child's consent, the crime is committed. I can perceive no reason why the period of time for which the kidnapper contrives to remove the child from the parental authority is relevant save in cases where the principle *de minimis non curat lex* is applicable. If the above is a correct statement of the common law position, what has the Code changed? Put differently the F question is; has the Code altered the common law position?

Has the Code altered the common law position?

The relevant provision of the Code in s 93 states:

> **"93 Kidnapping or unlawful detention** G
>
> (1) Any person who:
>
> (a) …
>
> (b) not being the lawful custodian of the child concerned;
>
> (i) deprives a child of his or her freedom of bodily movement, intending to cause such deprivation or realising that there is a real risk or possibility that such deprivation may result; or H

Hungwe J

> (ii) detains A or keeps a child, intending to deprive the child's lawful custodian of his or her control over the child or realising that there is a real risk or possibility that such deprivation may result;
>
> shall be guilty of kidnapping or unlawful detention and liable:
>
> A. to imprisonment for life or any shorter period, except in a case referred to in sub-paragraph B; or
>
> B. where B the kidnapping or unlawful detention was committed in the mitigating circumstances referred to in paragraph (b) of subsection (3), to a fine not exceeding level seven or imprisonment for a period not exceeding two years or both.
>
> (2) An accused may be convicted of kidnapping or unlawful detention:
>
> (a) whatever the manner in which the accused deprived the adult or child of his C or her freedom of bodily movement or the lawful custodian of his or her control, whether by the use of threats or force or by the use of fraudulent misrepresentation or otherwise; and
>
> (b) whatever the period over which the accused deprived the adult or child of his or her freedom of bodily movement or the lawful custodian of his or her control."

D The simple answer is that it has not. It seems to me that useful insight is gained by making regional and international comparatives regarding whether the above provision made the inroad suggested by the appellant and, if so, its effect.

Whilst the Code provides for a distinction in paras (a) and (b) of subs (1) E between an adult and a child victim, in my view it is a distinction without a difference. The true distinction is apparently for the purpose of sentencing, which is captured is s 93(3). The same yardstick is still applicable in deciding whether the crime of kidnapping, as defined in the Code, has been committed. It is important to note the domestic provisions in s 93 are consistent with Zimbabwe's regional, as well as international, treaty obligations. At the F regional level, the preamble to the African Charter on the Rights and Welfare of the Child 1990 states that "the child occupies a unique and privileged position in the African society" and requires legal protection as well as "particular care with regard to health, physical, mental, moral and social development. A child is defined as "every human being below the age of 18 years" (art 2). Children should also be protected against all forms of G economic exploitation and from performing work likely to be hazardous (art 15) and against all forms of torture, maltreatment and abuse (art 16); harmful social and cultural practices (art 21); all forms of sexual exploitation or abuse (art 27); the use of narcotics and illicit drugs (art 28); and abduction, sale, trafficking, and use in begging (art 29). It is also important to observe H that the African Charter on the Rights and Welfare of the Child is modelled

Hungwe J

on the provisions of the UN Convention on the Rights of the Child, 1989, A which is the most comprehensive document on the rights of children. See also the Legal Age of Majority Act, 1982. At the international level, the 2009 version of Canada's Criminal Code, in s 279, defines the offence of "kidnapping" as follows:

> "Every person commits an offence who kidnaps a person with intent to cause the B person to be confined or imprisoned against the person's will; or to cause the person to be unlawfully sent or transported out of Canada against the person's will; or to hold the person for ransom or to service against the person's will."

The Canadian Code adds that "the fact that the person in relation to whom the offence is alleged to have been committed did not resist is not a defence unless the accused proves that the failure to resist was not caused by threats, C duress, force or exhibition of force." The Canadian Code bears similar wording with the Zimbabwean Code and admits of similar interpretation.

The evidence placed before the trial court shows that the complainant was 17 years old. Her age was never put in dispute. Even if she was older, for which there was no evidence placed before the court, the propriety of the D conviction would not have been affected as the offence of kidnapping has been proved. The nature of the offense of kidnapping is an attack on, and infringement of, the personal liberty of the individual. The offence contains four ingredients as follows: the taking or carrying away of one person by another, by force or by fraud, without the consent of the person so taken or carried away and without lawful excuse. E

The Code, in my view, has not in any way altered the common law position regarding the crime of kidnapping. Consistent with the common law position, the Code provides for distinct recognition of the offence as it relates to children and addresses its implication on parental authority. The fact that the child consents to his or her removal or spiriting away is not a defence. Parental control is specifically recognised where a child is involved. *In casu*, in any F event, the complainant's age of 17 years was accepted during trial by the appellant, as well as by the court and the legal practitioner who represented the appellant later. That this was her age must be taken as undoubtedly accepted by the appellant from the outset, since the complainant was a friend of the appellant's daughter. The appellant was well aware of the complainant's G apparent age as she was familiar with her. The State outline, as well as the medical report, both give her age as 17. The trial proceeded on that basis. The complainant was a friend of the appellant's child. She therefore knew or ought to have realised that the complainant was not an adult, as much as her own daughter, who was the complainant's friend, was not. In any event, the charge as framed, alleged that the appellant, not being "the lawful H

Hungwe J

A custodian of a child named Leocardia Sithole, detained and deprived her of her freedom of bodily movements". The wording, in my view, wholly captures and incorporates the essential elements that constitute the crime of kidnapping. I am not persuaded that there was no evidence of the age of the complainant. Nor am I persuaded to accept that such evidence as there was did not meet the criteria required by the Code. The evidence led at the trial B showed the method by which the complainant was lured and subsequently enmeshed in the appellant's nefarious activities. The complainant described the sordid details regarding the appellant's predatory behaviour towards her, which included inserting her finger into the complainant's vagina.

The conviction on this count is, in my view, therefore proper.

C **Did the court adopt an appropriate approach to single witness evidence in sexual offence?**

In terms of s 269 of the Criminal Procedure and Evidence Act [*Chapter 9:03*] an accused may be convicted on the evidence of a single competent witness. There is no rule of thumb test or formula to apply when it comes D to the consideration of the credibility of a single witness. The question is what weight, if any, must be given to the evidence of a single witness. The correct approach in determining the guilt of an accused is, as pointed out in *S v Chabalala* 2003 (1) SACR 134 (SCA) at 139i-j to 140a , to weigh up all the elements which point towards the guilt of the accused against all that are indicative of his or her innocence, taking proper account of inherent strengths E 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).

In arriving at its decision the trial court relied on the evidence of a single witness, namely, the complainant and found her to be an honest witness. This court accepts that the trial court was better placed to make such a finding on credibility. It is, however, trite that a trial court should not readily rely on the evidence of a single witness. In such cases the court has to apply the cautionary rule. See D T Zeffert *The South African Law of Evidence* 2 ed at p 961.

The dictum of de Villiers JP in *R v Mokoena* 1932 OPD 79 at 80 is to the effect that, in such instances, the evidence of a single witness must be "clear and satisfactory in every material respect". As I have stated above, 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 the evidence,

will consider its merits and demerits and, having done so, will decide whether it is trustworthy and whether, despite the fact that there are shortcomings or defects or contradictions in the testimony, he or she 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 was well founded". It has been said more than once that the exercise of caution must not be allowed to displace the exercise of common sense. See also *S v Banana* 2000 (1) ZLR 607 (S).

In the present matter the magistrate took into account the tender years of the complainant, both at the time of the incidents and at the time she testified. She dealt carefully and thoroughly with the inconsistencies in the evidence of the complainant. She commented fairly on her demeanour, a finding in which an appeal court is slow to interfere. A perusal of the evidence of the complainant confirms the finding of the magistrate that she was a good witness who satisfied the cautionary rule relating to young and single witnesses. She did not overstate her evidence. I agree with the magistrate that her evidence could only support a finding that there were three occasions on which she could identify the appellant as having sexually interfered with her.

It is not clear what the appellant meant in the submission that the complainant was of "suspicious state of mind." Reference is made in the heads to complaints about dizziness by the complainant and what the appellant said regarding her "real" mother. How this translates to a "suspicious state of mind" escapes me. There was no suggestion that the complainant did not fully appreciate the nature of the proceedings before which she was testifying nor did anyone involved in the trial doubt her sanity. There is no sound basis, in the trial proceedings, for this ground to have been raised. It is dismissed. Consequently, I am therefore satisfied that the conviction on the charge of aggravated indecent assault was proper.

I am consequently satisfied that there is no merit in the appeal against conviction on the crimes charged.

The sentence

However, the appeal against sentence calls for attention. The magistrate correctly took a dim view of the appellant's conduct. She remarked that the appellant kidnapped her daughter's friend and went on to administer unknown herbs, the purpose of which is not known, into her private parts. Her conclusion that the complainant is no longer herself is, however, not supported by evidence nor is her acceptance as fact that the complainant now sees mysterious things. It is an established fact that different types of

abuse may trigger a range of different psychological responses. Whether this is the case here would have required expert evidence before the court could proceed to sentence the appellant on the basis that the complainant now suffers from these claimed effects. The trial court felt that a sentence of seven years on each count was deserved in the circumstances. In assessing sentence

from this perspective, the magistrate misdirected herself. This court B is therefore at large on sentence.

In *S v Masawi & Anor* 1996 (2) ZLR 472 (S) a sentence of 15 years was found to be appropriate where the victim of kidnapping was not found. In *S v Chitiyo* 1987 (1) ZLR 235 (H) a sentence of nine years on each count was imposed on two counts of kidnapping where the accused was also convicted C of other counts of armed robbery among other crimes. The sentences were ordered to run concurrently. In *Chitiyo supra* at 240 Dumbutshena CJ wrote:

> "The correct approach to sentencing an accused person for a number of different crimes was well put by Cairns LJ in *R v Bentham & Anor* [1972] 3 All ER 271 (CA) who stated at 276e-g:
>
> > 'But when a man is being sentenced at the same time for a number of different D crimes, it is necessary, when fixing the length of each sentence, to take into account whether it is going to be made consecutive to or concurrent with other sentences. Thus when a man is being sentenced for, say, four separate burglaries, it is not unusual for him to be sentenced to three years on each count concurrent. While each count, considered alone, merits three years' imprisonment, 12 years would be too severe a punishment for the whole E course of crime. Now we considered that the trial judge was right to impose on the appellants Bentham and Baillie sentences on count 9 which were consecutive to those on count 1, but the court reached the conclusion that the addition of five years to 12 years in Baillie's case and of four years to 11 years in Bentham's resulted in a total period of imprisonment which in all the circumstances was excessive."

F The above passage applies in the instant case with equal force. Whilst the sentence of seven years for the one count of kidnapping cannot be said to be too severe, it is the seven years for each count of aggravated indecent assault which we find, when ordered to run consecutively, to be too severe to be appropriate in all the circumstances of the case. The proximity of the three counts in respect of the time and place and the victim call for an approach G in which a reduction of the effect of each count is achieved by treating all three counts as one for the purposes of sentence. In the result therefore, the appeal against sentence succeeds. The sentence imposed in the court *a quo* is set aside and the following is substituted:

> "The accused is sentenced as follows:
>
> H Count 1:7 years' imprisonment

Hungwe J

> Count 2, 3 & 4: Treated as one count for the purpose of sentence: A 7 years' imprisonment.
>
> Of the total 14 years' imprisonment, 4 years' imprisonment is suspended for five years on condition the accused is not convicted of an offence of a sexual nature or kidnapping for which she is sentenced to imprisonment without the option of a fine." B
>
> Total effective sentence: 10 years' imprisonment.

MAVANGIRA J concurred.

Matipano & Matimba, appellant's legal practitioners C

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

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Document 10 of 79

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2013/Volume 2/NKOMO & ORS v TM SUPERMARKET (PVT) LTD 2013 (2) ZLR 75 (H)

NKOMO & ORS v TM SUPERMARKET (PVT) LTD 2013 (2) ZLR 75 (H)

Citation 2013 (2) ZLR 75 (H)

Case No Judgment No. HB-113-13

Court	High Court, Bulawayo
Judge	Cheda J
Heard	3 July 2013; *CAV*
Judgment	18 July 2013
Counsel	Applicants in person Mrs *Ngwenya* for the respondent
Case Type	Civil application
Annotations	No case annotations to date

Flynote

Arbitration – *arbitral proceedings – arbitrator's relationship to one of the parties – bias – reasonable to view such relationship as bias – duty upon the arbitrator to recuse himself*

Court – *judicial officer – recusal – grounds – bias – test for – sufficient if* D *reasonable person would believe judicial officer would be biased*

Headnote

The test for bias is whether the person challenged has so associated himself with one of the two opposing views that there is a real likelihood of bias or that a reasonable person would believe that he would be biased. E The reason is plain enough: justice must be rooted in confidence. Such confidence is destroyed when right minded people go away thinking: "the judge was biased." Where a presiding officer's relation to one party can reasonably be viewed as biased in favour of that party, such a presiding officer should without more ado recuse himself. While a judicial officer is trained to dispense justice without bias, fear or prejudice, human nature F being what it is, he should not rigidly cling to office and completely shut out from his mind the likelihood of bias based on his perception of a litigant. Where such likelihood exists, a judicial officer should consider the motives of the application. Where the application is actuated by the best motives, the judicial officer should no doubt recuse himself.

Cases referred to G

Barnard v Jockey Club of South Africa 1984 (2) SA 35 (W)

City and Suburban Tpt (Pty) Ltd v Local Bd, Road Transportation, Johannesburg 1932 WLD 100

Head & Fortuin v Woollaston & de Villiers NNO 1926 TPD 549

H *Metropolitan Properties (FGC) Ltd v Lannon and Ors* [1969] 1 QB 577

Cheda J

Rose v Johannesburg Local Road Transportation Bd 1947 (4) SA 272 (W) A

Sithole v Khumalo HB-125-09

Slade v Pretoria Rent Bd 1943 TPD 246

Case information

Applicants in person

Mrs *Ngwenya* for the respondent B

Judgment

Cheda J: This is an application for the nullification and registration of an arbitration award dated the 23 October 2012 and other relief. The order sought is couched as follows:

> "1. The stay/suspension of the Arbitral Award granted by the Honourable President Mr Nare on 10 January 2013 is hereby up-lifted/nullified. C
> 2. The Arbitral/Award of the Arbitrator dated 23 October 2012 be registered as the Order of this Honourable High Court.
> 3. Total amount of the Award is US$2 390 each.
> 4. Respondent is further ordered to pay extra US$1 320 each for under claiming.
> 5. Costs and interests be in the cause." D

The applicants are employed by the respondent as section managers at TM Supermarket, Lobengula Street Branch, Bulawayo.

Sometime in November 2011 they discovered that there were salary disparities between them and other TM Supermarket managers elsewhere. Aggrieved by this anomaly, they approached the Ministry of Labour for consideration. E However, this effort did not realise satisfactory results and the matter was eventually referred to an arbitration process, which was done and an award was handed down on 23 October 2012 in the applicants' favour.

The respondent filed a notice of appeal with the Labour Court on 14 November 2012 and also filed an application for the suspension of the operation of the arbitral award on 19 November 2012, which application was granted on 10 F January 2013 by the President of the Labour Court, Mr Nare.

On 7 December 2012 the applicants filed a chamber application with this court for the registration of the arbitral award at this court and it was granted on 10 January 2013.

On 23 January 2013 the respondent applied for a stay of execution of an G order of this court granted by this court on 10 January 2013 and the said application was granted on 24 January 2013.

The applicants have submitted that the Labour Court President was biased against them as he had some commercial dealings with the respondent, that, as such he had some pecuniary interest in the outcome of the matter. H

Cheda J

A The allegations against Mr Nare are very serious and deserving of an urgent resolution. It is for that reason that, in my opinion, this matter invokes a need to delve into the merits and the gravamen of this application and henceforth dispense with the preliminary points raised. It is in the interest of justice to do so without further ado.

B The points *in limine* raised by Mrs *Ngwenya* should in my view be dealt with and properly so by delving into how the whole issue was handled by the presiding officer. The allegation of wrongdoing is being alleged against an administrator of justice and such allegation can not be taken lightly.

A person who is placed in a position of deciding the rights of others is disqualified if he has a bias which interferes with his impartiality. It is for that C reason that this matter should be dealt with expeditiously, without religiously looking at technicalities which will tend to further prolong its finalisation.

The applicants have produced as evidence, cash sale vouchers which bear Mr Nare's name. This is *prima facie* proof that he was engaged with respondent in some commercial activity. There is evidence that he received cash payment D for agricultural produce as far back as 16 May 2012, receipt number 068979, well before this matter came before him for determination.

The question that falls for determination is whether or not Mr Nare was biased or not when he presided over this matter. In other words, was there absence of bias (*nemo iudex in propria causa*)? The test for bias is clearly laid down in E *City and Suburban Transport (Pty) Ltd v Local Board, Road Transportation, Johannesburg* 1932 WLD 100 at 106 where Greenberg J stated;

> "The test appears to be whether the person challenged has so associated himself with one of the two opposing views that there is a real likelihood of bias or that a reasonable person would believe that he would be biased."

To buttress this point, I find solace and fully associate myself with remarks F by Lord Denning, that doyen of English jurisprudence, in *Metropolitan Properties Co (FGC) Ltd v Lannon* [1969] 1 QB 577 at 599 where he succinctly stated:

> "Suffice it that reasonable people might think that he [was biased]. The reason is plain enough. Justice must be rooted in confidence: the confidence is destroyed when right minded people go away thinking: 'the Judge was biased'."

G Where a presiding officer's relation to the other party can reasonably be viewed as biased in favour of the other party such a presiding officer should without more recuse himself. In the matter of *Head and Fourtuin v Woollaston and de Villiers NN*O 1926 TPD 549 at 558 Stratford J stated:

> "If I understand the authorities aright, (*sic*) the disqualification arises whereas H the judges' relation to the parties is such, or his interest in the case is such or

> his knowledge of the facts of the case or antecedents of the parties is such as A would tend to bias his mind at the trial. In short, any condition of things which, reasonably regarded, is liable to destroy his impartiality should disqualify him."

The same principle was adopted in *Slade v Pretoria Rent Board* 1943 TPD 246. I hold the same opinion as I stated in *Sithole v Khumalo* HB-125-09, wherein I stated:

> "While a judicial officer is trained to dispense justice without bias, fear or B prejudice, human nature being what it is, he should not rigidly cling to the oath of office and completely shut out from his mind the likelihood of bias based on his perception of a litigant. Where such likelihood exists, a judicial officer should consider the motives of the application, where the application is actuated by the best motives, it should no doubt recuse him or herself".

Our courts have indeed adopted this approach in deciding the question of C bias. It is as clear as daylight that Mr Nare had a pecuniary interest in the respondent's affairs. The amounts involved are quite negligible but it is not a question of the amount, but the pecuniary interest which ushers in a reasonable apprehension or a real likelihood of bias: *Rose v Johannesburg Local Road Transportation Board* 1947 (4) SA 272 (W) at 287 and *Barnard* D *v Jockey Club of SA* 1984 (2) SA 35 (W) at 46-47.

I detect a real likelihood of bias in this matter, which conclusion, in my opinion, a reasonable man cannot avoid to make.

It is for that reason that, despite all the technicalities that can be raised by the respondent, the inescapable and irresistible conclusion is that Mr Nare E should not have presided over this dispute. The whole process is in my view tainted and, as such, there is no way it can be defended by employment of any preliminary arguments.

The applicants have therefore made a good case for themselves.

The following is the order:

(1) The order granted by the Hon Mr S Nare, President of the Labour Court F on 10 January 2013 be and is hereby set aside.

(2) The respondent is to pay costs of suit.

Coghlan and Welsh, respondent's legal practitioners G

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Document 11 of 79

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2013/Volume 2/CROCO PROPERTIES (PVT) LTD v SWIFT DEBT COLLECTORS (PVT) LTD 2013 (2) ZLR 79 (H)

CROCO PROPERTIES (PVT) LTD v SWIFT DEBT COLLECTORS (PVT) LTD 2013 (2) ZLR 79 (H)

Citation	2013 (2) ZLR 79 (H)
Case No	Judgment No. HH-220-13
Court	High Court, Harare
Judge	Mathonsi J
Heard	16 July 2013; *CAV*
Judgment	24 July 2013
Counsel	*T Mpofu*, for the applicant *T Magwaliba*, for the respondent
Case Type	Civil application
Annotations	No case annotations to date

Flynote

Practice and procedure – *process – service – proof of – return of service prima facie evidence of matters stated therein – return of service challenged – need for deputy sheriff to assist court to determine truthfulness of return*

Headnote

In an application for rescission of a default judgment, the applicant averred that it was not in wilful default because it had not been served with the summons initiating the action and so had no knowledge of the claim. According to the deputy sheriff's return of service, the summons was served on a named receptionist who accepted service on behalf of the applicant at the latter's place of business. Apart from the affidavit of a director of the applicant that the company had no employee by the name mentioned in the return, an affidavit from the company's receptionist was submitted. She stated that she was at the reception desk on the date of alleged service but was never served with the summons or any court process. In answer, an affidavit from the assistant deputy sheriff repeated, almost word for word, the impugned return of service.

Held, that while in terms of s 20(3) of the High Court Act [*Chapter 7*:*06*], the deputy sheriff's return of service is *prima facie* evidence of the matters stated therein, once the return has been challenged, the deputy sheriff must do more than just refer to the return. He must assist the court to determine the truthfulness of the return of service. His explanation was unhelpful as it merely repeated what was in the return of service. After the return of service was impugned, the erstwhile assistant needed to do more than that. For instance, more details of the location of the applicant's address, the appearance of the reception where the summons was served

and a description of the recipient would have enhanced his credibility. Rescission would therefore be granted.

Cases referred to

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

du Preez v Hughes NO 1957 R&N 706 (SR)

Georgias & Anor v Standard Chartered Finance Zimbabwe Ltd 1998 (2) ZLR 488 (S)

Govha v Ashanti Goldfields Zimbabwe Ltd HH-48-12

Gundani v Kanyemba 1988 (1) ZLR 226 (S)

Mazuva v Simbi & Ors HB-155-11

Stockil v Griffiths 1992 (1) ZLR 172 (S);

Wattle Co (Pvt) Ltd v Inducom (Pvt) Ltd 1993 (2) ZLR 108 (H); C

Legislation considered

High Court Act [*Chapter 7:06*], s 20(3)

Case information

T Mpofu, for the applicant D

T Magwaliba, for the respondent

Judgment

Mathonsi J: The applicant seeks a rescission of a default judgment of this court issued against it on 22 May 2012, *per* Mutema J, for payment of storage charges of US$641 a day from 9 March 2009, together with interest E at the prescribed rate calculated from the date of judgment to date of payment in full and costs of suit.

The circumstances leading to the grant of that order are that the respondent instituted summons action against the applicant in HC 1916/12 for payment of the aforementioned claim, which summons, according to the deputy sheriff's return of service, was served on 22 February 2012 at the applicant's place of F business at 1 Telford Road, Graniteside, Harare, upon Eileen, the receptionist, who accepted service on behalf of the applicant. When no appearance was entered, the respondent moved for default judgment which was granted.

At the hearing of this application, Mr *Magwaliba*, who appeared for the respondent, took two points *in limine*, namely that the signature on the G founding affidavit and the answering affidavit of Zvikomborero Chawonza, the applicant's director, is significantly different such that it cannot be said that the same person deposed to the two affidavits. He urged the court to find that a fraud had been perpetrated upon the court and that the applicant be refused audience on that basis. Secondly, Mr *Magwaliba* took the point that Mr *Mpofu,* appearing for the applicant, had made reference in his heads of H

Mathonsi J

A argument to remarks about the merits of the application made by Chidyausiku CJ in a related application involving the parties at the Supreme Court. In his view, those remarks are not contained in any record, there is no evidence of them being made and as such they should be expunged from the record.

Mr *Mpofu* opposed the points *in limine*. He submitted that this court is being B asked to make a factual finding that the signatures are different when no evidence exists to prove that point. In addition, the court cannot reject the application on the basis of a *prima facie* impression that the signatures are different when the cardinal principle is that this court makes a finding on a balance of probabilities and not on *prima facie* evidence.

I have examined the signatures on the two affidavits as urged by counsel C but I am unable to say that they were not appended by the same person. Other than the fact that the signature on the founding affidavit is a longer impression of the deponent's initials and surname, while the one on the answering affidavit is a shorter version of the same, I am unable to say that the two were appended by different people. In any event, it was always going D to be difficult for the court to rely on its visual impression of the signatures without the benefit of evidence of a handwriting expert.

On the second point, relating to the contents of the applicant's heads of argument, there is no basis in law for expunging submissions made by counsel. The respondent can only make counter-submissions pointing to why those E submissions should be rejected in favour of its own. I agree with Mr *Mpofu* that those submissions are his own opinion of the case which he is entitled to make in asking the court to find in favour of the applicant.

Both points *in limine* are without merit and it is for that reason that they are dismissed.

F In its founding affidavit deposed by its director, Chiwonza, the applicant stated that the summons was never served upon it as it does not have a receptionist or employee by the name of Eileen. For that reason, the summons was never brought to its attention which explains the reason why no appearance was entered. The applicant challenged the deputy sheriff to prove that the summons was served as alleged in the return of service. It submitted a G supporting affidavit by Tinotenda Mhonyera, who stated that she has been employed by the applicant for the past four years as a receptionist and that she is the one who was at the reception desk on 22 February 2012 but was never served with the summons or any court process. She went on to say that there is no one by the name Eileen amongst all the receptionists, insisting H that no service of process was ever made as alleged.

2013 (2) ZLR p82

Mathonsi J

Chawonza stated further in the founding affidavit that the applicant never A had knowledge of the claim until 6 June 2012 when the deputy sheriff came to attach property pursuant to a writ of execution issued against the applicant and as such, it was not in wilful default. He stated that a defence to the claim exists as the applicant is not liable for the storage costs which should have been recovered from Tel Access, the owner of the property which was stored. B He questioned why the respondent continued storing the property for such a lengthy period of time without receiving payment instead of selling it to defray expenses. It is noted that the respondent received the goods for storage in March 2009, only to institute proceedings almost three years later. The applicant took issue with the reasonableness of the claim maintaining that it was not even substantiated. C

In its opposing affidavit deposed to by Sijabulisiwe Simbisai Shumba, its director, the respondent contended that service of the summons was effected in compliance with the High Court Rules and that the deputy sheriff's return of service is *prima facie* evidence of such service. Shumba contested the veracity of the affidavit of Mhonyera, insisting that she is an interested party, D being a low level employee of the applicant. According to the respondent the applicant was simply negligent in failing to enter appearance and reliance was placed on the affidavit deposed to by Maxwell Chakawarika on 12 June 2012 in a related application for a stay of execution in HC 6222/12 in which he stated:

> "I Maxwell Chakawarika hereby make oath and state that: E
>
> I am employed by the deputy sheriff for Harare as an assistant deputy sheriff. My duties with the deputy sheriff are to serve court process including summons.
>
> On 22 February 2012 I served summons on the applicant at number 1 Telford Road, Graniteside Harare. The summons were (*sic*) received by a lady who was at the reception who advised me that her name was Eileen and that she accepted the summons on behalf of the applicant. See the remarks on my return of service F attached to the applicant's founding affidavit."

Significantly, Chakawarika's affidavit introduces nothing new. It merely repeats, almost word for word, the impugned return of service. To that extent it is unhelpful. On the *bona fides* of the applicant's defence, the respondent submitted that it is the applicant, through its legal practitioners, who instructed G the deputy sheriff to deliver the goods to the respondent for storage following the eviction of Tel Access from its premises. For that reason it should foot the storage bill. The respondent made reference to an order of this court dated 23 March 2009 which was obtained by Tel Access. It directed, *inter alia*, that the property in question was not to be disposed of by the applicant until it had taxed its costs after which it was to be released to Tel Access. H

2013 (2) ZLR p83

Mathonsi J

A The respondent alluded to an invoice which it issued on 13 April 2012 to the applicant, showing that the amount of storage charges due in terms of the default order from 9 March 2009 to 13 April 2012 is US$725 762.70.

This is an application made in terms of r 63 of this court's rules which requires that an applicant for rescission of judgment must show only a good and sufficient cause for the rescission of the judgment granted in default. It has B long been accepted that the court has a very wide discretion in determining what constitutes "good and sufficient cause." In *Deweras Farm (Pvt) Ltd & Ors v Zimbank* 1998 (1) ZLR 368 (S) at 369E-370A the Supreme Court pronounced as follows on "good and sufficient cause":

"While it may generally be true to say that when there is wilful default there will usually not be good and sufficient cause, I believe we fetter our discretion C improperly if we lay down a fixed rule that when there is wilful default there is no room for good and sufficient cause. I favour the definition of wilful default offered by King J in *Maujean* t/a *Audio Video Agencies v Standard Bank of South Africa Ltd* 1994 (3) SA 801 (C) at 803 H-I:

> 'More specifically, in the context of a default judgment, "wilful" connotes deliberateness in the sense of knowledge of the action and of its consequences, D i.e its legal consequences and a conscious and freely taken decision to refrain from giving notice of intention to defend, whatever the motivation, for this conduct might be.'

See also *Morkel v ABSA Bank Ltd & Anor* 1996 (1) SA 899 (C).

But it is precisely in the 'motivation' mentioned in that passage that one might find 'good and sufficient cause.' I respectfully agree with the *dicta* of Innes J E in the oft-cited case of *Cairns Executors v Gaarn* 1912 AD 181 at 186 *passim*. In particular, His Lordship said:

> 'It would be quite impossible to frame an exhaustive definition of what would constitute sufficient cause to justify the grant of indulgence. Any attempt to do so would merely hamper the exercise of a discretion which the Rules have purposely made very extensive and which it is highly desirable not F to abridge'".

In the exercise of its wide discretion whether to grant an indulgence to an applicant for rescission of judgment, the court has regard to essentially three factors, namely the reasonableness of the explanation for default, the *bona fides* of the application; and the *bona fides* of the defence on the merits which G *prima facie* carries some prospect of success: *Stockil v Griffiths* 1992 (1) ZLR 172 (S); *Mazuva v Simbi & Ors* 2011 (2) ZLR 319 (H) at 322; *Govha v Ashanti Goldfields Zimbabwe Ltd* HH-48-12. All these factors must be considered in conjunction with each other and with the application as a whole. An unsatisfactory explanation for one may, in fact, be strengthened by a very strong defence on the merits: H *Georgias & Anor v Standard Chartered Finance Zimbabwe Ltd* 1998 (2) ZLR 488 (S) at 493C; *du Preez v Hughes*

Mathonsi J

NO 1957 R&N 706 (SR) at 709A-F. The applicant must show what entitles A him to an indulgence.

In casu, the applicant insists that it was not served with the summons. In that respect, what I have is the applicant's word against that of the assistant deputy sheriff who says he served the summons. I have said that the latter's explanation under oath is unhelpful as it merely repeats what is in the return of B service. I agree with Mr *Mpofu* that after the return of service was impugned, the erstwhile assistant needed to do more than that. For instance, more details of the location of the applicant's address, the appearance of the reception where the summons was served and a description of the recipient would have enhanced his credibility. Therefore, while the deputy sheriff's return of service is *prima facie* evidence of the matters stated therein in terms of C s 20(3) of the High Court Act [*Chapter 7*:*06*] (*Wattle Co (Pvt) Ltd v Inducom (Pvt) Ltd* 1993 (2) ZLR 108 (H); *Gundani v Kanyemba* 1988 (1) ZLR 226 (S) at 229C), I take the view that once the return has been challenged, the deputy sheriff must do more than just defer to the return. He must assist the court determine the truthfulness of the return of service.

On the merits, the respondent claims storage charges of $725 762.70 in D respect of goods belonging to a third party which it kept for almost three years without taking any action. Its entitlement to that large amount, in particular to $641 per day, has not been clarified. On the face of it the claim appears excessive, bringing to the fore the need, in the interest of justice, to interrogate those charges. Also of paramount importance is the question of E who is liable to pay between the applicant and Tel Access.

For these reasons, and in the exercise of my very wide discretion, I am of the view that the applicant is entitled to the indulgence of the rescission of the judgment entered on 22 May 2012.

Accordingly, I make the following order:

1. The default judgment entered against the applicant in case number HC F 1916/12 be and is hereby rescinded.
2. The applicant is hereby granted leave to file its notice of appearance to defend within ten days of the date of this judgment.
3. The costs of suit shall be costs in the cause. G

Manase & Manase, applicants' legal practitioners

Matipano & Associates, respondents' legal practitioners H

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Document 12 of 79

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2013/Volume 2/DEPUTY SHERIFF, HARARE v METBANK ZIMBABWE LTD & ANOR 2013 (2) ZLR 85 (H)

DEPUTY SHERIFF, HARARE v METBANK ZIMBABWE LTD & ANOR 2013 (2) ZLR 85 (H)

Citation	2013 (2) ZLR 85 (H)
Case No	Judgment No. HH-230-13
Court	High Court, Harare
Judge	Chigumba J
Heard	2 April 2013; *CAV*
Judgment	24 July 2013
Counsel	*F Girach*, for the judgment creditor *T Mpofu*, for the respondent
Case Type	Interpleader proceedings
Annotations	No case annotations to date

Flynote

Bank – *account – monies in name of account holder – whether capable of attachment*

Bank – *account – escrow account – nature of such account*

D **Practice and procedure** – *execution – attachment – monies deposited in escrow account – not capable of attachment – funds not property of account holder – only right, title or interest capable of attachment*

Headnote

An escrow account, being a trust account, is different from normal and E ordinary bank accounts. The escrow agent, the bank, is bound by the stipulated terms of the escrow agreement, and cannot invoke normal banking laws or practices to override or nullify the escrow agreement. The money held in trust by the escrow agent may be released only in accordance with the strict procedures agreed by the parties. In the absence of written instructions to the escrow agent on how or when to release F the money from the parties, the escrow monies can validly be released in accordance with an order of a competent court.

The attachment of escrow monies by the deputy sheriff is invalid because money in an account held by a bank is incapable of attachment, being fungible. Even if the judgment debtors have an account with the escrow G agent, only their right, title or interest in that account is capable at law of attachment in execution, but not the actual funds.

Cases referred to

Bishi v Secretary for Education 1989 (2) ZLR 240 (H)

GMB v Muchero 2008 (1) ZLR 216 (S)

H *Kircos v Standard Bank of SA Ltd* 1958 (4) SA 58 (SR)

Chigumba J

Maheya v Independent African Church 2007 (2) ZLR 319 (S) A

ZRA & Anor v Murowa Diamonds (Pvt) Ltd 2009 (2) ZLR 213 (S)

Case information

F Girach, for the judgment creditor

T Mpofu, for the respondent

Judgment

Chigumba J: These are interpleader proceedings brought by the applicant, B the Deputy Sheriff of Harare, in terms of r 205 of the High Court Rules 1971.

The relief that the applicant seeks is for the claimant and/or alternatively the judgment creditor's claim to be dismissed, with costs following the cause.

The background giving rise to this matter is as follows. C

During the course and scope of carrying out his duties as Deputy Sheriff of Harare, namely, the execution of a writ in the case between Ecobank Zimbabwe Ltd, Borlscade Investments (Pvt) Ltd and 3 Others, case no. HC 10435/11B, the applicant attached certain funds being held in trust by Metbank Zimbabwe (hereinafter referred to as Metbank).

The writ of execution had been issued on 8 June 2012, and, according D to the notice of seizure and attachment Borlscade Investments (Pvt) Ltd (hereinafter referred to as Borlscade) was indebted to Ecobank Zimbabwe Ltd (hereinafter referred to as Ecobank) in the sum of US$3 862 360 in respect of capital and costs, and a total sum of US$5 431 321.42 when interest and E commission were added.

The claimant, Metbank, admitted that judgment in default was obtained by the respondent Ecobank against Borlscade, Cecil Rhanniel Chengetai Muderede and Michelle Fadzai Muderede (the debtors) under case no. HC 7640/11, on 2 May 2012. Metbank averred that it entered into an escrow agreement with Far Eastern Zimbabwe Holdings Ltd, Borlscade Investments (Pvt) Ltd, F Metcash Trading Africa (Pty) Ltd, and Cecil Rhanniel Muderede, in terms of which it is holding a sum of US$2 500 000 in trust, for part payment of the purchase price of US$7 000 000 in respect of shares in Jaggers Wholesalers (Pvt) Ltd (hereinafter referred to as Jaggers). Metbank contended that the debtors in case no. HC 10435/11B are not entitled to the US$2 500 000 that G it holds in the escrow account. It averred that, although Borlscade and Cecil Rhanniel Muderede are party to the escrow agreement, the funds it holds are held in a joint account and do not belong to any of the joint account holders. Metbank contended that it cannot release the funds at the instance of only one of the joint account holders, and consequently instructed the Deputy Sheriff to institute interpleader proceedings in order to protect itself against H

Chigumba J

A a lawsuit by one of the joint account holders, in the event that it releases the funds without a determination of whether it may lawfully do so.

The respondent, Ecobank, vigorously opposed the averments in Metbank's affidavit, and stated that, in May 2010, it gave Borlscade a loan in the sum of US$2 500 000 for the specific purpose of making a down payment for the B purchase of shares in Jaggers. The shares in Jaggers required exchange control approval to be bought or sold, as they were owned by a non-resident. The respondent averred further, that the judgment that was sought to be executed by it against Borlscade arose from the loan it made to Borlscade, as afore stated, and in terms of which the

parties had agreed that the US$2 500 000 be held in trust by Gill, Godlonton and Gerrans, Legal Practitioners, pending C exchange control approval of the sale of shares in Jaggers.

Ecobank contended that Borlscade and Cecil Rhanniel Muderede wrongfully caused the US$2 500 000 to be removed from Gill, Godlonton & Gerrans, and to be deposited with Metbank, to Ecobank's prejudice, which is why the applicant has now been instructed by Ecobank, to attach those funds in execution. Ecobank averred further that Metbank is and has always been D aware that the funds it holds in an escrow account emanated from a loan given by it to Borlscade in that exact same amount. Ecobank submitted that exchange control approval of the sale of shares has not been obtained to date, that Jaggers has gone into final liquidation, and that there is no way the sums loaned to Borlscade can or ever will be utilized for their intended purpose. E It is Ecobank's contention that the US$2 500 000 ought to be returned to Borlscade in terms of the escrow agreement. Ecobank denies that the escrow account is a joint account, and disputes that there are any competing claims to the funds which it claims to have validly attached.

The issues that fall for determination are:

1. What F are the terms of the escrow agreement which govern the rights and obligations of the parties in the event that the agreement for the sale of shares in Jaggers fails to be concluded?
2. Which party is entitled to the monies in the escrow account?
3. Whether money which is in a bank account can be attached in execution.

G Ecobank raised a point *in limine* that Metbank was barred from the proceedings because it had filed its notice of opposition out of time. It was contended that consequently Metbank was not properly before the court, unless an application for condonation and upliftment of the bar in terms of r 233(3), as read with rr 83 and 84 of the rules of this court was filed and determined in its favour. Metbank did not dispute this, it advised the court that such an H application had been made by it after reading Ecobank's heads of argument

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where this point was made. At the hearing of the matter, it was agreed that A the chamber application for condonation of late filing of opposing papers and extension of time within which to file opposing papers under case no. HC 11039/13. Case no. HC7831/12, would be heard first, and determined, before a consideration of the merits of the matter.

The matter was postponed to enable the court to locate the record in which B the application for condonation had been filed. The parties subsequently reconvened before me, and I proceeded to hear argument in respect of that application.

Metbank applied for condonation of late filing of opposing papers and extension of time within which to file opposing papers, and relied on *GMB v Muchero* 2008 (1) ZLR 216 (S) at 220R-G, where Garwe JA held that, C in an application such as this one, the applicant must explain the delay and thereafter convince the court that it has a *bona fide* defence on the merits. It was held, further, that the court must postpone the decision on the merits pending the determination of the application to uplift the bar.

Metbank averred that it was served with interpleader notice sometime in D July 2012, on a date unknown to it, because the copy which was left at its offices after service had been effected was not date stamped, resulting in it only becoming aware of the date of service through Ecobank's heads of argument filed in the main matter. Metbank admits the time for filing its opposing papers lapsed on 3 August 2012, and that it subsequently filed the papers on 6 August 2012, one day out of time. Metbank contended that the E delay was not deliberate, or wilful, but was based on a genuine error arising from internal system failure. It was submitted that no prejudice would be suffered by Ecobank because of a delay of one day. Metbank expressed regret for any inconvenience caused.

Ecobank opposed the application for condonation on the basis that it was F improbable that Metbank was not aware of the date when the interpleader notice was served upon it due to internal system failure. It contended that, if the court accepted that such errors were reasonably capable of occurring, it ought to find that the error was nevertheless grossly negligent. Ecobank submitted that Metbank was not entitled to retain the funds that it was holding and that, it could not participate in the interpleader proceedings since it was G holding the funds on behalf of others, not for itself.

According to Herbstein & van Winsen *Civil Practice of the Supreme Court of South Africa* 4 ed at p 897-898, the considerations that the court takes into account in considering an application for condonation include:

1. The degree of non-compliance. H

Chigumba J

2. The A explanation for the non-compliance.
3. The importance of the case.
4. The prospects of success
5. The respondent's interest in the finality of judgment.
6. The convenience of the court.
7. The avoidance of unnecessary delay in the administration of justice.

B See *Maheya v Independent African Church* 2007 (2) ZLR 319 (S).

In *Bishi v Secretary for Education* 1989 (2) ZLR 240 (H) at 242G, it was held that no one factor is inherently more important than the other. Each factor is weighed against the other and an overall assessment made.

I am unable to agree with Ecobank that Metbank has no prospects of success C in the main matter, because much turns on the court's interpretation of the escrow agreement. I am persuaded by the submission that Metbank needs to protect itself against possible litigation against it, by any of the parties to the escrow agreement, should it wrongfully release the funds that it holds. I find that a delay of one day, while significant because of the non-compliance with D the rules, in this case has not been shown to have caused serious prejudice to Ecobank. I find the explanation for the delay reasonable, the reception area of such a large institution as Metbank will occasionally experience an internal system failure such as the one described here. In my view, the delay was not deliberate or wanton, the issue in the main matter is important to all the parties concerned and to members of the public in general. The sum of money E involved is substantial and there should be finality in the administration of justice by determining the merits of the main matter once and for all. Having carefully weighed all the relevant factors, I hereby grant the application for condonation of late filing of opposing papers and extension of time within which to file opposing papers.

F Having granted condonation, I now turn to the merits of the main matter.

The rights and obligations of the parties to the escrow agreement

The escrow agreement was entered into between 20 and 24 June 2011. The parties to the agreement are:

1. Far Eastern Zimbabwe Holdings Ltd.
2. Borlscade G Investments (Pvt) Ltd.
3. Metcash Trading Africa (Pty) Ltd.
4. Cecil Rhanniel Muderede.
5. Metropolitan Bank of Zimbabwe Ltd.

Clause 2.2.10 defines an escrow account (in the name of the seller and H Metcash), in the form of an interest bearing US denominated account to be

Chigumba J

opened by the Escrow Agent and governed by the terms and conditions of A the escrow agreement.

Clause 2.2.11 states that the escrow agent is Metropolitan Bank of Zimbabwe Ltd (Metbank).

Clause 1.1.12 defines the escrow monies as:

> "… an amount of US$2 500 000 paid by the purchaser (in reduction of the B purchase price of US$7 500 000) payable by it in terms of the sale agreement and at present retained in escrow by Gill, Godlonton & Gerrans pending the grant of approvals together with all interest accrued thereon during the period of retention in escrow…"

Clause 6.4 of the escrow agreement states that:

> "The escrow agent shall be obliged to release the escrow monies together with C interest to the seller and to Metcash (in such proportions as they may in writing direct) immediately upon receipt by it of the necessary documentation evidencing the grant of the approvals. Save as foresaid, the escrow agent shall not be entitled to release the escrow monies or any portion thereof without the joint written instructions of the seller, or Metcash (duly represented by the seller's attorney), the purchaser and Muderede, or an order of a competent court". D

It is common cause that the escrow monies were being held as part payment for the purchase of shares in Jaggers, pending the grant of exchange control approvals, whereafter the parties were expected to authorize the escrow agent (Metbank), jointly and in writing, whether to release the monies, in what sum, and whom to release the monies to. It also common cause that this has not transpired, to date. My reading of clause 6.4 of the escrow agreement E is that, unless the monies are released by way of joint written instructions, Metbank is obliged to release the money in any of three ways:

(a) in accordance with the joint written instructions of the seller and Metcash; or

(b) in accordance with the joint written instructions of the purchaser and F Muderede; or

(c) on an order of a competent court.

Nothing in the papers before me or in the submissions made by both counsel suggests that either Metcash and the seller, or Muderede and the purchaser, have instructed Metbank in writing to release any of the escrow monies, to G date. That leaves one option open, that of an order of a competent court. The averment made by Ecobank that Jaggers has been placed under final liquidation, has not been challenged by Metbank. In my view, the definition of escrow money in clause 1.1.12 is affected if there are no longer any shares to be purchased in Jaggers because Jaggers has been liquidated. My interpretation of the escrow agreement is that the escrow monies can be H

A released at any time, by way of any of the stipulated methods. The release of the monies is not contingent upon the cancellation of the escrow agreement, or the agreement of sale of shares in Jaggers.

Entitlement to the funds in the escrow account

At the hearing of the matter counsel for Metbank argued that, when the B applicant purported to attach the funds in the escrow account, he did not state that he had attached the right, title and interest in the account, belonging to any of the defendants named on the writ, Borlscade Investments (Pvt) Ltd, Cecil Rhanniel Muderede, and Fadzisai Muderede (who is not a party to the escrow agreement).

It was submitted that the applicant merely stated that he had attached the C judgment debtor's funds, which is incompetent at law, and renders the attachment invalid. It was submitted further, that funds in a bank account belong to the bank not to the account holder, who merely has a credit balance. It was argued on behalf of Metbank that a bank and its customer have a debtor-creditor relationship in terms of which the bank is loaned money for D its consumption, subject to availability on demand. Money deposited in an account therefore belongs to the bank. See *ZRA & Anor v Murowa Diamonds (Pvt) Ltd* 2009 (2) ZLR 213 (S) at 220B-D where it was stated that:

> "As stated by McNally JA in *Meman & Anor v Controller of Customs & Excise* 1987 (1) ZLR 170 (S) at 173F, strictly speaking a person does not own the money in his bank account".

E And at 174A where the same court stated that:

> "…money in your bank account is not strictly your money but it is money at your disposal, and that is so whether you have earned it or been given it, or borrowed it…"

Metbank's submissions are also supported by F *Kircos v Standard Bank of South Africa Ltd* 1958 (4) SA 58 (SR) at 60A, where Morton J stated that:

> "The relationship between banker and customer is that of debtor and creditor: *Foley v Hill* (1848) 9 ER 1002. The bank undertakes to receive money and collect bills for its customers account. The bank borrows the proceeds so obtained and undertakes to repay them to the customer on demand."

The court is being asked to declare the purported attachment of the escrow G monies invalid because money in an account held by a bank is incapable of attachment, being fungible. It was submitted that the judgment debtors do not have an account with Metbank, but that if they did, only their right, title or interest in that account was capable of attachment in execution, at law, not the actual funds. I accept that these submissions are correct. The purported attachment of funds in an account held at Metbank is incompetent H at law and therefore invalid. The applicant ought to have attached the right

Chigumba J

title and interest in the account, on behalf of the judgment creditor. Further, A the account was not in the name of any of the judgment debtors, so it was incompetent to purport to attach that account to satisfy the judgment debt.

However, I am inclined to agree with the submission made by Ecobank that the matter ought to turn simply on the interpretation of the escrow agreement. An escrow account, being a trust account, is different from normal and ordinary B bank accounts. Metbank, as the escrow agent, is bound by the stipulated terms of the escrow agreement, and cannot invoke normal banking laws or practices to override or nullify the escrow agreement. According to the escrow agreement, there is a sum of US$2 500 000 being held in trust by Metbank, which sum may be released in accordance with strict procedures agreed by the parties. The funds were deposited with Metbank for the purpose of part C payment for shares in Jaggers. This court has accepted that Jaggers went into final liquidation and can no longer sell its shares as agreed by the parties. Once the possibility that the sale will go through falls away, in my view only the purchaser (Borlscade) and Muderede can validly instruct Metbank what to do with the escrow monies. The money reverts back to Borlscade D and Muderede, two of the judgment debtors, who borrowed it from Ecobank.

In the absence of written instructions to Metbank on how or when to release the money from Borlscade, the purchaser and Muderede, then the escrow monies can validly be released in accordance with an order of a competent court such as this one. According to clause 6 of the escrow agreement the E parties agreed that a court of competent jurisdiction could instruct Metbank, as the escrow agent, to release the escrow monies. Metbank did not deny that the escrow monies came from the loan given to two of the judgment debtors by Ecobank. Metbank did not deny that the escrow monies ought to have been held by Gill, Godlonton & Gerrans. No explanation was given as to how or why the funds were deposited with Metbank, contrary to the agreement F between the parties. Neither Bolscade nor Cecil Rhanniel Muderede saw fit to explain what had transpired. The court is left with unchallenged submissions by Ecobank that the motive for depositing the funds with Metbank was to cause prejudice to Ecobank.

In my view the balance of equities demands that this court makes an order G that the escrow monies USD2 500 000, together with interest which has accrued thereon from the date of deposit to date, be transmitted to Ecobank by Metbank, in terms of clause 6 of the escrow agreement. It is just and equitable that Ecobank recovers the money which it loaned and advanced to Borlscade and Muderede, and which all the parties accept is currently deposited in an escrow account with Metbank. It is hereby ordered as follows: H

Chigumba J

A **Order**

1. The application for condonation and extension of time within which to file opposing papers in case no. HC11039/12, ref case no. 7831/12 be and is hereby granted, with costs.
2. The claimant's claim in case no. HC7831/12, ref case no. 10435/11B, be and is hereby dismissed.
3. The B costs of suit, on an ordinary scale, shall be paid by the respondent.

Kantor & Immerman, claimant's legal practitioners

C *Atherstone & Cook*, judgment debtor's legal practitioners

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Document 13 of 79

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2013/Volume 2/CFI HOLDINGS LTD v NYAHORA 2013 (2) ZLR 94 (H)

CFI HOLDINGS LTD v NYAHORA 2013 (2) ZLR 94 (H)

Citation	2013 (2) ZLR 94 (H)
Case No	Judgment No. HH- 231-13
Court	High Court, Harare
Judge	Chigumba J
Heard	9 July 2013; *CAV*
Judgment	24 July 2013
Counsel	*L Uriri*, for the applicant *C Venturas*, for the respondent
Case Type	Opposed application
Annotations	No case annotations to date

Flynote

Employment – *Labour Court – jurisdiction – exclusive jurisdiction in labour matters – no jurisdiction to provide common law remedies – vindicatory action arising out of labour dispute – High Court having jurisdiction*

Headnote

Pursuant to disciplinary proceedings brought against him by his employer, D the applicant company, the respondent was found guilty of the various charges of misconduct and dismissed from his employment. He noted an appeal to the Labour Court against his dismissal. He refused to return a motor vehicle that had been allocated to him. The vehicle was owned by the company. The company's vehicle policy stated that the E vehicle user would be given the first option to purchase the vehicle at disposal time and that the purchase price would be set by the executive committee, reviewed as necessary. The applicant brought a vindicatory action against him.

The respondent argued (a) that the matter was a labour dispute which fell under the exclusive jurisdiction of the Labour Court; and (b) that he had a claim F of right to the motor vehicle emanating from the applicant's company car scheme and that this claim of right had not been extinguished by the termination of his contract of employment, because his appeal against that termination was still pending before the Labour Court.

Held, that in terms of s 89(1)(a), as read with s 89(6), of the Labour Act G [*Chapter 28:01*], the Labour Court enjoys exclusive jurisdiction, at first instance, in relation to all matters that may be classified as purely labour disputes, such as suspension from employment and termination of employments contracts. However, this was an application for vindication of the applicant's property. The *actio rei vindicatio* cannot be termed to be a purely labour remedy which falls under the exclusive purview of H

A the Labour Act. The Labour Court, being a creature of statute, may only do that which it is expressly authorized to do. The High Court, having inherent jurisdiction, may do anything except that which it is expressly prohibited from doing. There is no exclusive provision of the Act which expressly authorizes the Labour Court to adjudicate in matters involving the *actio rei vindicatio*, which is a common law remedy. There is nothing B in the Labour Act which expressly ousts the High Court's jurisdiction in regard to matters which have aspects of labour disputes but in which common law remedies are sought.

Held, further, that the clear effect of the vehicle policy was to allow the applicant a discretion as whether or not to offer the vehicle to its employee, at a price to be determined by a committee within the company. This C had not been done at the time that the respondent was suspended, or at the time that he was dismissed, from employment. The respondent thus never acquired a right to purchase the motor vehicle and no claim of right arose. A legitimate expectation does not amount to a claim of right.

Held, further, that the noting of an appeal to the Labour Court did not suspend D the decision to dismiss the respondent.

Cases cited

Chetty v Naidoo 1974 (3) SA 13 (A)

Dhege v Bell Medical Centre 2004 (1) ZLR 352 (H)

DHL International (Pvt) Ltd v Madzikanda 2010 (1) ZLR 201 (H)

E *FBC Ltd v Deshe* HH-285-11

Jolly v Shannon & Annor 1998 (1) ZLR 78 (H)

Kingdom Bank Workers Cttee v Kingdom Bank Financial Hldgs 2012 (1) ZLR 93 (H)

Masudi v Jera HH-67-07

Mvududu v ARDA 2011 (2) ZLR 449 (H)

F *Sagittarian (Pvt) Ltd v Workers Cttee, Sagittarian (Pvt) Ltd* 2006 (1) ZLR 115 (S)

Stanbic Finance Zim Ltd v Chivhungwa 1999 (1) ZLR 262 (H)

Zimasco (Pvt) Ltd v Marikano HH-235-11

Zimbabwe Educational Scientific Social & Cultural Workers' Union v G *Kaharo* HH-222-11

Legislation considered

Labour Act [*Chapter 28:01*], ss 89 and 92E

Case information

L Uriri, for the applicant

H *C Venturas,* for the respondent

Chigumba J

Judgment

Chigumba J: This is an application for confirmation of a provisional order A that was granted by this court on 16 October 2012. The order was granted by consent, on the following terms:

> "TERMS OF FINAL ORDER SOUGHT
>
> That you show cause to this Honourable Court why a final order should not be B made in the following terms:
>
> 1. The respondent be and is hereby ordered to surrender possession of and return to applicant the motor vehicle, namely BMW X5 Registration number AAX 8022, upon service of this order failing which the Deputy Sheriff be and is hereby authorized to take all and any such steps as may be

necessary to recover the said motor vehicle from the respondent or C any person whomsoever is in possession thereof on the authority of the respondent and return it to the applicant.

2. The respondent shall pay the costs of suit on the Law Society of Zimbabwe scale of attorney and client.

INTERIM RELIEF GRANTED

That pending the determination of this matter on the return day, the applicant D be and is hereby granted the following relief:

1. The motor vehicle namely a BMW X5 Registration number AAX 8022 be and is hereby placed under judicial attachment.
2. The respondent be and is hereby ordered to surrender and return the motor vehicle to the Applicant's premises being c/o Victoria Foods (Private) Limited 83 Woolwich Road, Willowvale, Harare where it shall be kept/ E stored by the applicant pending the return day.
3. In the event of the respondent failing to comply with the terms of para 2 of this order, the Deputy Sheriff be and is hereby directed and authorized to take any and all such steps as are necessary to recover the motor vehicle from the respondent or any person whomsoever is in possession thereof on the authority of the respondent and return it to the applicant for purposes of compliance with para 2 of this order. F
4. Both the applicant and the respondent are hereby prohibited/interdicted with immediate effect from driving, using or in any manner dealing with the motor vehicle and/or allowing any other person to do so except for purposes of complying with this provisional order.

SERVICE OF THE PROVISIONAL ORDER

The Provisional Order, together with all supporting documents, shall be served G on the respondent or his legal practitioners and or the Deputy Sheriff."

The facts giving rise to this application are as follows.

On 2 October 2012 the respondent was found guilty, pursuant to disciplinary proceedings brought against him by his employer, the applicant in this matter, of the following charges: H

Chigumba J

A Charge 1

An act, conduct or omission inconsistent with the fulfilment of the express or implied condition of the contract of employment in terms of s 4(a) of SI 15 of 2006.

Or, in the alternative

B Gross incompetence or inefficiency in the performance of his works in terms of s (f) of SI 15 of 2006.

Charge 2

Wilful disobedience to a lawful order in terms of s 4(b) of SI 15 of 2006.

He was sentenced to dismissal from the date of his suspension 3 August C 2012. On the day of his suspension, the respondent had been directed by the applicant to surrender his company vehicle, a BMW X5 Registration number AAX 8022, which is now the subject matter of these proceedings. When he failed to surrender the motor vehicle as directed, the additional charge of wilful disobedience to a lawful order was preferred against him by the applicant.

D On 3 October 2012, when the disciplinary proceedings were concluded, the respondent was asked, in writing, to surrender the motor vehicle to the applicant. He refused to do so. The applicant then filed an urgent chamber application on 10 October 2012 in which he sought the court's assistance to recover the motor vehicle from the respondent. The provisional order was E granted by consent on 16 October 2012.

The issue that now falls for determination by this court, in considering whether to confirm the provisional order or to discharge it, is whether the applicant is entitled to the return of its motor vehicle, pursuant to the termination of the contract of employment, on 3 October 2012. In essence, the relief sought in the terms of the final order constitutes an application for relief in terms of F the common law remedy of *rei vindicatio.*

The applicant contended that the court ought to be guided by the following cases:

The first is *Chetty v Naidoo* 1974 (3) SA 13 (A) at 14 where it is stated:

"It is inherent in the nature of ownership that possession of the *res* should normally be with the owner, and it follows that no other person may withhold it from the G owner unless he is vested with some right enforceable against the owner (e.g. a right of retention or contractual right)."

The applicant also referred the court to *Masudi v Jera* HH-67-07 at pp 2-3 where it was stated:

"Based on the authorities, it appears to me settled at law that the *rei vindicatio*, H being an action *in rem*, is only available to owners of the property in issue,

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which, at the time of the commencement of the action, is in the possession of A the defendant and the defendant fails to prove a right to retain the property as against the owner".

In *Stanbic Finance Zimbabwe Ltd v Chivhungwa* 1999 (1) ZLR 262 (H) Malaba J (as he then was), applied the principle of the *actio rei vindicatio* in respect of a motor vehicle owned by the plaintiff and leased to a buyer B under a suspensive agreement of sale. In that matter, he referred to his decision a year earlier in *Jolly v Shannon & Anor* 1998 (1) ZLR 78 (H) at 88 where he had this to say:

"The principle on which the *actio rei vindicatio* is based is that an owner cannot be deprived of his property against his will and that he is entitled to recover it from any person who retains possession of it without his consent. The plaintiff C in such a case must allege and prove that he is the owner of a clearly identifiable movable or immovable asset and that the defendant was in possession of it at the commencement of the action. Once ownership has been proved its continuation is presumed. The onus is on the defendant to prove a right of retention*: Chetty v Naidoo* 1974 (3) SA 13 (A) at 20A-C; *Makumborenga v Marini* S-130-95 p 2. It follows that the action is based on the factual situation that prevailed at the D time of the commencement of the legal proceedings."

It is common cause that the motor vehicle in question is currently registered in the name of CPG (Pvt) Ltd, t/a Vetco, a wholly-owned subsidiary company of the applicant. The respondent submitted that the applicant is not the actual owner of the vehicle and is precluded from bringing an application for vindication against him. With respect, I cannot accede to that argument. The E respondent cannot eat his cake and still have it. If we follow that argument to its logical conclusion, then the respondent himself would not have a right to retain the vehicle because his contract of employment was with the applicant and not its subsidiary.

It is my view that the respondent accepted the vehicle in terms of the company policy scheme with the applicant, knowing full well that the registered F owner of the vehicle was the applicant's subsidiary company. I find that the applicant has discharged the onus upon it, in an application for the remedy of *rei vindicatio,* to prove that it is the owner of the vehicle in question, the *res*, through its subsidiary company, and that the *res* was in the possession of the respondent without its authority or consent at the time these proceedings G were instituted, on 10 October 2012. The onus now shifts to the respondent, to prove that he has a right to retain the motor vehicle.

The respondent raised two issues in regard to his right to retain the motor vehicle in question. The first was that this court is not clothed with the requisite jurisdiction to resolve the dispute between the parties, which in the respondent's opinion is a labour dispute which falls under the exclusive H

A jurisdiction of the Labour Court. The respondent relied on the provisions of s 89(1)(a) of the Labour Act [*Chapter 28:01*] as authority for this proposition. Section 89(1)(a) provides as follows:

"89 Functions, powers and jurisdiction of Labour Court

(1) The Labour Court shall exercise the following functions –

(a) hearing and determining applications and appeals in terms of this Act or B any other enactment; …"

Section 89(6) provides:

"(6) No court, other than the Labour Court, shall have jurisdiction in the first instance to hear and determine any application, appeal or matter referred to in subsection (1)".

C The respondent contended that s 89(1)(a), as read with s 89(6), ought to be interpreted to mean that the Labour Court has exclusive jurisdiction to determine all matters relating to suspension from employment and termination of employment.

The applicant submitted that this issue has long been settled in a plethora of D decided cases such as *Zimbabwe Educational Scientific Social and Cultural Workers Union v Claud Kaharo* HH-222-11, where this court stated in unequivocal terms that:

> "A *rei vindicatio* action, which is rooted in common law, is certainly not one of those where the Labour Court enjoys jurisdiction … Unless its jurisdiction has been specifically and expressly ousted by the legislature, this court has a concomitant E duty to jealously guard against the erosion of its inherent jurisdiction. I am firmly convinced that this court enjoys its power to hear an action for vindication, because, as I said, this power falls outside the jurisdiction of the Labour Court".

My reading of s 89(1)(a), as read with s 89(6) of the Labour Act, is that the Labour Court enjoys exclusive jurisdiction, at first instance, in relation to all matters that may be classified as purely labour disputes, such as suspension F from employment and termination of employment contracts, as correctly pointed out by Mr *Venturas* for the respondent. The applicant clearly stated in its founding affidavit that it was applying for vindication of its property. The *actio rei vindicatio* cannot be termed to be a purely labour remedy which falls under the exclusive purview of the Labour Act. The Labour Court, being a creature of statute, may only do that which it is expressly G authorized to do. This court, having inherent jurisdiction, may do anything except that which it is expressly prohibited from doing.

There is no exclusivity provision of the Labour Act which expressly authorises the Labour Court to adjudicate in matters involving the *actio rei vindicatio*, which is a common law remedy. There is nothing in the Labour H Act which expressly ousts this court's jurisdiction in regard to matters

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which have aspects of labour disputes but in which common law remedies A are sought. There is nothing in the High Court Act, or any other enactment, which expressly prohibits this court from determining disputes involving the remedy of *actio rei vindicatio*. This court ought to guard against unscrupulous litigants whose clear intention is to subvert the provisions of the Labour Act by attempting to cloak common law remedies that they seek as "labour B remedies". Such attempts are readily discernible and as transparent as the emperor's new clothes. On the other hand, this court ought not to shy away from determining matters that fall within the four corners of its jurisdiction simply because those matters have aspects which may, on the face of them, be classified as labour disputes.

I find that there is nothing, in the papers before me, to persuade me that the C relief sought by the applicant is one which ought to be determined exclusively by the Labour Court. Lastly, it is important to note that, by entering into an order by consent on 16 October 2012 when the provisional order was granted, the respondent consented to the jurisdiction of this court.

The respondent's second submission was that it has a claim of right to the D motor vehicle in question emanating from the applicant's company car scheme, and that this claim of right has not been extinguished by the termination of his contract of employment, because his appeal against that termination is still pending before the Labour Court.

The applicant's company car scheme provides, in clause 5.2 thereof, that: E

> "The vehicle will be replaced on completion of four years of purchase".

In clause 6.2, the scheme stipulates that:

> "The vehicle user will be given the first option to purchase the vehicle on disposal time. Purchase price will be set by the Executive Committee reviewed as necessary". F

Clause 6.3 stipulates that:

> "Should the user leave the company's employ or be dismissed prior to the vehicle completing 4 years, the vehicle shall remain the property of the company".

On the basis of these clauses, the respondent averred that he had a legitimate expectation that the applicant would give him the first option to purchase the G vehicle because in 2011 the four-year stipulated period lapsed, which was prior to his dismissal in August 2012. The respondent further contended that the issue of the validity of the termination of his contract of employment was pending before the Labour Court, and that he was entitled to hold onto the vehicle until that issue was finalized. He submitted that he has noted an appeal against the termination of his contract of employment, which appeal H

Chigumba J

A is pending before the Labour Court, therefore his claim of right as against the applicant was not suspended by the noting of the appeal

As authority for this proposition the respondent relied on *DHL International (Pvt) Ltd v Madzikanda* 2010 (1) ZLR 201 (H) at 206. In my view, that case is distinguishable from the matter under consideration on the facts. I am B persuaded by the applicant's submissions that the respondent never acquired a right to purchase the motor vehicle in question. No offer was made to him by the applicant to purchase the vehicle. There was no determination of the purchase price as provided for by the company policy. As such, no claim of right arises. A legitimate expectation does not amount to a claim of right. See *Dhege v Bell Medical Centre* 2004 (1) ZLR 352 (H) where the court stated:

> C "… 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 a company car could only be exercised after an offer had been made to the employee and not before. The option to offer for sale cars used for employees was a privilege and not a right"

When regard is had to the relevant provisions of the applicant's company D policy scheme, the wording used is not peremptory. The intention clearly was to allow the applicant a discretion as to whether to offer the vehicle to its employee or not, at a price to be determined by a committee within the company. This had not been done at the time that the respondent was suspended or at the time that he was dismissed from employment.

E In *FBC Ltd v Deshe* HH-285-11 at p 1 it is stated:

> "The respondent refuses to hand over the vehicle to the applicant on the basis that he has appealed to the Labour Court against his dismissal. The respondent had also argued that this is a labour dispute and therefore this court has no jurisdiction to entertain the application. (See *Zimasco (Pvt) Ltd v Marikano* S-181-10)".

The court in the above matter made it clear that the respondent in that matter F had no claim of right which was awaiting determination by the Labour Court. *In casu,* I find that the noting of the appeal did not suspend the decision to dismiss the respondent from employment. The provisions of s 92E of the Labour Act are quite clear on that point.

Section 92E (2) provides:

> G **"92E Appeals to the Labour Court generally**
>
> (1) …
>
> (2) An appeal in terms of subsection (1) shall not have the effect of suspending the determination or decision appealed against".

See *Kingdom Bank Workers Committee v Kingdom Bank Financial Holdings* H 2012 (1) ZLR 93 (H) at 98H-99B where it is stated:

Chigumba J

> "I fully agree with Mr *Nkomo* that the provisions of section 92E are unambiguous A and unequivocal in their scope and effect. They apply to every appeal in terms of the Act, including an appeal under s 98(10), and they operate to pre-empt and preclude the suspension of the decision appealed against. The common law presumption against the operation and enforceability of judgments appealed against has been explicitly ousted by section 92E…"

See *Mududu* v ARDA 2011 (2) ZLR 449 (H) and *Sagittarian (Pvt) Ltd v* B *Workers Committee, Sagittarian (Pvt) Ltd* 2006 (1) ZLR 115 (S)

Finally, it is my view that *Zimasco (Pvt) Ltd v Marikano* HH-235-11 at 9 disposes of this matter as follows:

> "Clearly, for the respondent's defence to be sustained, he has to establish a claim of right over the applicant's assets. That he has failed to do. The assets, like the C office which he duly vacated upon termination of employment, were placed in his hands in order for him to perform his duties as an employee of the applicant. Indeed there could have been ancillary benefits flowing from the use of those assets, such as personal use of the vehicle, but that fell away upon termination of employment – notwithstanding the challenge in the courts."

In the circumstances, I find that that the respondent has failed to establish a D clear claim of right and cannot therefore lawfully hold onto the applicant's motor vehicle. The applicant has proved that it owns the motor vehicle and that the motor vehicle was in the possession of the respondent at the time that these proceedings were instituted, and that the respondent has neither a claim of right or a statutory right or any contractual right to hold onto the motor vehicle, despite the noting of an appeal against his dismissal to the E Labour Court.

Accordingly, the application for vindication ought to succeed. The provisional order granted by this court on 16 October 2012 be and is hereby confirmed. The respondent is to pay costs of suit.

Kantor & Immerman, applicant's legal practitioners F

Venturas & Samukange, respondent's legal practitioners G

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Document 14 of 79

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MUTANGA v MUTANGA 2013 (2) ZLR 103 (H)

Citation	2013 (2) ZLR 103 (H)
Case No	Judgment No. HH-247-13
Court	High Court, Harare
Judge	Dube J
Heard	18 July 2013; *CAV*
Judgment	24 July 2013
Counsel	*V Makuku*, for the applicant Mrs *B Mtetwa,* for the respondent
Case Type	Chamber application
Annotations	No case annotations to date

Flynote

Practice and procedure – *parties – "dirty hands" – principle of – spoliation proceedings – self help – party taking law into own hands – possessor in unlawful possession of vehicle – other party may not seize possession of the vehicle otherwise than in accordance with due process of the law –* D *party may not plead in aid "dirty hands" principle in such circumstances*

Property and real rights – *possession – elements – direct and indirect possession – distinction – agent holding property for limited purpose – not a possessor*

Property and real rights – *spoliation order – requirements – who is entitled* E *to – agent of possessor – not entitled to remedy on his own behalf – indirect possessor entitled to remedy – defences – possessor's possession illegal – not a defence – gives no right to spoliator to take possession*

Headnote

For the purpose of a spoliation order (*mandament van spolie*) both a direct and an indirect possessor are entitled to avail themselves of the order, as F long as they can show that they had the intention to derive some benefit from holding the thing. Physical possession of the thing can, therefore, be attained through another person.

In seeking a spoliation order, the applicant relied upon facts which were substantially common cause. The papers disclosed that the parties were married but separated pending a divorce. The applicant had retained G possession of a vehicle which he kept at his house while the respondent, his wife, retained in her possession another vehicle. On the day in question, the applicant had sent his girl friend in his car to the shops to buy groceries. Shortly thereafter, the respondent arrived at the same shops in her vehicle. Upon seeing the applicant's vehicle parked there, H she took possession of it. While some dispute existed as to the precise

manner in which she did so, it was clear that the girl friend was not able A to do anything about it, other than to inform the applicant as to what had happened upon her return to his house. In defending the applicant's claim for a spoliation order in respect of his vehicle, the respondent raised two preliminary points. Firstly, the respondent submitted that as the vehicle was in the possession of the girl friend when she recovered it, it was B the girl friend who should have been the applicant. Secondly, and in any event, the girl friend should not have been driving the vehicle at all because it was subject to a temporary import permit (TIP) which required that it be kept at the respondent's address and not used by a Zimbabwean resident. It was argued that the applicant had also contravened the law by failing to renew the TIP, thereby depriving fiscus of revenue. The C girlfriend's possession was tainted with illegality and could not be peaceful and undisturbed possession. In view of these irregularities, the respondent submitted that applicant's case fell foul of the "dirty hands" principle, depriving him of the right to the relief he sought. On the merits, the respondent submitted that she did not take the law into D her own hands because, so she said, the girl friend had handed her the car keys voluntarily. This allegation was disputed. However, even on the respondent's version of the facts, it could not be said that the taking of the keys was consensual.

Held, that the respondent's first preliminary point failed. An agent who holds E the property for a limited purpose and has no interest in the property which he holds for his principal, or who derives no benefit from holding it, is not entitled to claim the relief of a *mandament van spolie,* which is a remedy available to a possessor; it does not extend to a mere *detentor.* A *detentor* who does not have the intention to hold the thing in question for his own benefit and not for another is indeed merely a *detentor*. F The girl friend had possession of the vehicle at the shops, but only on behalf of the applicant. As such she had mere detention of it. The true possessor was the applicant and he was, therefore, entitled to bring spoliation proceedings.

Held, further, granting the order that the respondent's second preliminary G point also failed. She did not have clean "hands" herself. No matter how unlawful was the applicant's possession of the vehicle, the respondent had no right to take the law into her own hands and to take possession herself. No matter how unlawful a person's possession may be, his possession may not be interfered with except through due process of law. H

Dube J

Cases referred to A

ANZ (Pvt) Ltd v Min of State for Information and Publicity 2004 (1) ZLR 538 (S)

Bennett Pringle (Pty) Ltd v Adelaide Municipality 1977 (1) SA 230 (E)

Botha & Anor v Barrett 1996 (2) ZLR 73 (S)

Davis v Davis 1990 (2) ZLR 136 (H)

B *de Jager v Farah & Nestadt* 1947 (4) SA 28 (W)

de Jager v Harris NO & Anor 1957 (1) SA 171 (SWA)

Diana Farm (Pvt) Ltd v Mudondo 1998 (2) ZLR 410 (H)

Forrester Estate (Pvt) Ltd v Chidavaenzi HH-22-10

Fraind v Nothmann 1991 (3) SA 837 (W)

B *Karori (Pvt) Ltd & Anor v Mujaji* 2007 (1) ZLR 105 (H)

Mars Incorporated v Candy World (Pty) Ltd 1991 (1) SA 567 (A)

Maswaure v Nyamunda 2001 (1) ZLR 405 (S)

Mbuku v Mdinwa 1982 (1) SA 219 (TkS)

Milligan v Milligan 1925 WLD 164

Muller v Muller 1915 TPD 28

D *Nienaber v Stuckey* 1946 AD 1049

Nino Bonino v de Lange 1906 TS 120

R v Binns & Anor 1961 (2) SA 104 (T)

R v Kasamula 1945 TPD 252

S v Neill 1982 (1) ZLR 142 (H)

E *Stocks Housing (Cape) (Pty) Ltd v Chief Executive Dir, Dept Education & Culture Svcs & Ors* 1996 (4) SA 31 (C)

Yeko v Qana 1973 (4) SA 735 (A)

Zimbabwe Bonded Fibreglass (Pvt) Ltd v Peech 1987 (2) ZLR 338 (S)

Case information

V Makuku, for the applicant

F Mrs *B Mtetwa,* for the respondent

Judgment

Dube J: The applicant approached this court on an urgent basis seeking a spoliation order. The parties are married to each other but are separated pending divorce. When the parties separated, the applicant retained property G which includes a Chrysler 300 D registered in Botswana ,which he keeps at his house, and the respondent a Mercedes Benz CLK 320 and other property.

On 13 July 2013 the applicant sent Chiedza Sundayi (hereinafter referred to as Chiedza), his girlfriend, to the Avondale Shopping Centre to buy some groceries. She was in the company of the couple's minor child B. She drove H the Chrysler. Chiedza returned a few minutes later and reported that she

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had been dispossessed of the vehicle by the respondent at the shops. The A applicant has launched this application.

The respondent raised two preliminary points and, after my ruling, I directed that the matter proceed on the merits. The points may be summarised as follows. Counsel for the respondent, Mrs *Mtetwa,* submitted that the court did not have the right applicant before it, as the applicant was not in B physical possession of the vehicle when it was recovered but that of his girlfriend Chiedza. She contended that Chiedza should be the applicant and not Bernard Mutanga, the current applicant. She submitted that the law of spoliation protects physical possession only. Counsel referred the court to *Yeko* v Q*ana* 1973 (4) SA 735 (A) and *Stocks Housing (Cape) (Pty) Ltd v* C *Chief Executive Director, Dept of Education & Culture Services* 1996 (4) SA 231 (C) for that proposition.

The second preliminary point relates to the "dirty hands" principle. Mrs *Mtetwa* submitted that the applicant has dirty hands and should not be heard by the court, in that he allowed Chiedza to drive the car contrary to the Zimbabwe Revenue Authority (ZIMRA) Temporary Import Permit (TIP) D conditions, which are clear that the vehicle should not be used by residents of Zimbabwe and should be kept at the respondent's address. The respondent's counsel claimed that the applicant has also contravened the law by failing to renew the TIP thereby depriving the State and ZIMRA of revenue. She submitted that the possession by Chiedza is tainted with illegality and cannot be peaceful and

undisturbed possession. Counsel urged the court not to condone the illegal actions of the applicant, especially in this case where the illegality concerns the fiscus.

In his response, Mr *Makuku*, who represented the applicant, argued that Chiedza was driving the vehicle with the consent of the applicant, in that the F applicant extended his possession of the vehicle to her. By implication, the applicant was in physical possession of the vehicle as she had the consent of the applicant to drive the vehicle.

On the point concerning the dirty hands principle, Mr *Makuku* submitted that the applicant has not been in unlawful or illegal possession of the vehicle, G as he was given permission to register the vehicle in Zimbabwe in April 2011. He conceded that the applicant has not renewed his TIP since that time but contended that that there was no need to renew the TIP as he had been given permission to register the vehicle in Zimbabwe. He stated that the vehicle had experienced mechanical problems, resulting in the delay in registering the vehicle. H

Dube J

A The first preliminary point concerns the applicant's *locus standi* to institute these proceedings. A party seeking to rely on this remedy must prove the following requirements:

1. that he was in peaceful and undisturbed possession of the property;
2. that he was forcibly by stealth, wrongfully deprived without his consent B or lawful order. See *Botha and Anor v Barrett* 1996 (2) ZLR 73 (S), *Diana Farm (Pvt) Ltd v Mudondo* 1998 (2) ZLR 410 (H), *Forrester Estate (Pvt) Ltd v Chidavaenzi* HH-22-10 for this approach. See also *Nino Bonino v de Lange* 1906 TS 120 and *Nienabar v Stuckey* 1946 AD 1049.

The first preliminary point has a bearing on the merits of the application. C In order to determine this question, the court is required to examine the requirement regarding whether or not the applicant was in peaceful and undisturbed possession of the vehicle at the time of the dispossession. The onus is on the applicant to prove the requirements of the *mandamus*. I find authority for this proposition in *Mars Incorporated v Candy World* 1991 (1) SA 567 (A) D at 575H-D where the court remarked as follows:

> "The general rule is that it is for the party instituting proceedings to allege and prove that he has *locus standi*, the onus of establishing that issue rests upon the applicant…"

The applicant is required to show that he was in possession of the property. The concept of possession is explained in *R v Binns* 1961 (2) SA 104 (T), E where the court explained the concept as follows.

> "Two elements are involved: a physical element (*corpus*) and a mental element (*animus*). The comprehensive and precise delineation of *corpus* is a matter of extreme difficulty, but for present purposes it may be assumed to be physical control by a person over a thing – a conception, the precise limits of which, though difficult to define, is yet largely self-explanatory. The co-existence of F *corpus* and *animus* postulates the presence of this intention in all cases, but it may be qualified according to the circumstances; (a) the intention may be to exercise control for one's own benefit or (b) to exercise control on behalf of another. The owner or thief exercises control for his own behalf; the agent or servant, on behalf of another. Both qualifications may, however, be present at the same time; the lessee and the borrower for use exercise control for their own G benefit and also on behalf of the lessor or lender."

The judge also referred to *R v Kasamula* 1945 TPD 252 for the definition where it was held that the ordinary meaning of "possess" is physical detention or control plus the intention to exercise control for one's own purpose or benefit. In *Yeko v Qana supra,* the court held that a party seeking the remedy H should establish possession and

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Dube J

> "the possession which must be proved is not possession in the juridical sense; A it may be enough if the holding was with the intention of securing some benefit for himself."

In *Maswaure v Nyamunda* 2001 (1) ZLR 405 (S) the court held that the possession envisaged in spoliation matters consists of the physical holding and detention of the property with the intention of holding it as one's own B or for oneself. The applicant must establish that possession was not only physical but that it was accompanied by *animus*, the intention of securing a benefit. See also

Bennett Pringle (Pty) Ltd v Adelaide Municipality 1977 (1) SA 230 (E) at 233 which was quoted with approval by Adam J in *Davis v Davis* 1990 (2) ZLR 136 (H) at 141E-F as follows:

> "In terms of all the authorities cited, the 'possession' in order to be protected by C a spoliation remedy must still consist of the *animus* – the intention of securing some benefit to the possessor, and detention, namely the holding itself … if one has regard to the purpose of the possessory remedy, namely to prevent a person taking the law into their own hands. It is my view that a spoliation order is available to any person who is (a) making physical use of the property to the extent that he derives a benefit from such use; (b) intends by such use to secure the benefit himself; and (c) is deprived of such use and benefit by a third person". D

In Nathan *Interdicts* at 344 the author states that:

> "…The applicant (for a spoliation order) must show that at the time of dispossession he had not merely the intention to hold possession, but also actual physical possession either personally or by a representative.''

In *R v Binns and Anor (supra*) Jansen J concluded that E

> "the *corpus* exists either in direct physical control of the person concerned himself over the thing or through the mediate control through another having control on behalf of the former."

Jansen J also discusses the concept of immediate control and refers to sentiments expressed in *An Essay on Possession in the Common Law* by F Pollock & Wright at p 26 where the writers state that:

> "a movable thing is in the possession of the husband of any woman, or the master of any servant who has the custody of it for him, and from whom he can take it at pleasure. The word 'servant' here includes any person acting as a servant for any particular purpose".

In *The Law of Things and Servitudes* at p 70 C G van der Merwe and M J de G Waal discuss the concept of direct and indirect possession. They conclude that physical control of a thing need not be exercised personally but may be exercised indirectly by a representative or a servant of a possessor. That all that is required to be established is that the possessor should have the intention of deriving some benefit from the object in issue. The authors conclude that both the direct and indirect possessor are entitled to the *mandament van* H

Dube J

A *spolie* as long as they can show that the possessor had the intention to derive some benefit for himself from holding the thing. The authors suggest that the remedy should be extended to all persons exercising conscious control over a thing and suggest that this correlates with the main purposes of the *mandamen*t, which is to discourage selfhelp and disturbance of the peace. The authors find support for this proposition in *Mbuku v Mdinwa* 1982 (1) SA 219 (TkS) B where the concept of vicarious possession was recognized.

The authors go on to suggest that making the *mandament van spolie* available to all persons exercising physical control over a thing with the intention to exclude others from interfering with the object would lead to equitable results. The authors conclude that both the direct and indirect possessors C should in principle be entitled to the *mandament*. Further, the direct possessor should have the first opportunity of instituting the *mandament*. If the direct possessor is unwilling to or unable to institute the *mandament*, the vicarious possessor should be entitled to avail himself of the *mandament.* I agree with the reasoning of the learned authors. The reasoning is fair and accords with real and good notions of justice.

D It is clear therefore that physical possession can be attained through another person. What this court is being called upon to decide is whether the applicant possessed the vehicle through his girlfriend.

The facts of this are quite unique in that they involve a person sent on an errand in a car belonging to the sender and later being dispossessed of the E vehicle. There is a plethora of cases where the courts have accepted that an owner or holder of property may institute spoliation proceedings even though he may not have been in actual physical possession of the property at the time of the dispossession. Most of the cases involve agent and principal relationships. The facts of this case are similar to the case of *Mbuku v Mdinwa supra*.The facts of that case were that the respondent left cattle he F had inherited from his father at his father's kraal where his brother looked after them. One day, when his brother took them to the dipping tank, the applicant drove them away. The court held that, although the brother had the cattle under his physical control, it was for a limited purpose of having them dipped and having them returned to the kraal afterwards and that the cattle did not pass from the respondent's possession into his brother's possession G in the sense in which the

concept of possession is understood in spoliation proceedings. The court further remarked that an agent who holds property on behalf of his principal or who derives no benefit from his holding it is not entitled to the remedy. Hefer CJ stated at 222F as follows.

> "In any event, I am of the view that an agent who has no interest in the property H which he holds for his principal, or who derives no benefit from holding it ,is not

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2013 (2) ZLR p110

Dube J

> entitled to claim the relief of a *amendment van spolie.* One should not forget that A it is a remedy which is available to a possessor; it has never, to my knowledge, been extended, except perhaps inadvertently, to a mere *detentor.* But the *animus possidendi* which is required to transform detention into possession is not the intention required of old for so-called civil possession; it is no more than the intention to hold the thing in question for one's benefit and not for another. And a *detentor* who does not have the intention is indeed merely a *detentor* .I am in B full agreement with the view expressed in *Wille's Principles of SA Law* 7 ed at 196-7 … If the person who has detention of a thing has the intention of holding it not for himself but for another person, he does not have possession, he is a custodian merely and the possessor is the person on his behalf he is holding."

The learned Chief Justice goes on to say that physical control is capable, not only logically but legally too, of being exercised either personally or C through an agent. He relies for this proposition on Grotius *Inleydinge tot de Hollantsche rechtsgeleertheit* 2.2.4 who says:

> ". . . it is well understood that possession and all its consequences may be acquired through an agent".

What I can say, from all these authorities, is that physical control of a thing is capable of being exercised personally or through another person. D The possession envisaged in spoliation proceedings is not mere physical possession. A party wishing to rely on this remedy is required to show that he had, in addition to the physical control of the property, an intention to exercise that control for his own purpose or benefit. A person who has no intention to derive any benefit from the property does not possess the property E but has mere detention of it. The person who has possession is the person on whose behalf he holds the property. He is the possessor and is entitled to bring spoliation proceedings.

The same approach adopted in cases involving agents should, in my view, be applicable here. The rationale in denying an agent the remedy of the *mandament van spolie* is that the agent has no interest in the property he F holds and is a mere *detentor* .He does not hold the property with a view to get a benefit for himself from holding it but for the benefit of another. The deciding factor, as found in *Mbuku supra*, is whether the person holds the property "not for himself but for another person".

In this case, Chiedza was sent on an errand by the applicant, to buy some G groceries from the shops in the vehicle. She drove the vehicle with his authority and consent. It is difficult to say that she borrowed the vehicle, because she did not drive the vehicle for her own benefit. Although Chiedza had custody and exercised physical control over the vehicle at the time it was taken, there is no evidence that she had any personal or beneficial interest in holding the vehicle or that she did have the intention to derive some benefit H

2013 (2) ZLR p111

Dube J

A from the vehicle herself. It seems that her use of the vehicle was temporary and was limited to the purpose for which she was given the car: thus going to the shops to purchase some groceries for the applicant. She would be expected to hand over the vehicle back to him when she returned. Chiedza intended to hold the vehicle not for herself but for the applicant and is a custodian and a mere *detentor*. The possessor is the person on whose behalf B she held the vehicle. It is clear that she exercised control over the vehicle for the benefit of the sender. She drove the vehicle at his pleasure. Possession of the vehicle had not passed over to her and hence she held it on behalf of the applicant. She is not entitled to claim relief under the *mandament*. The remedy is only available to a possessor who holds the property with a view to deriving some benefit from it. The applicant still retained control of C the vehicle and is legally the possessor. He still had the intention to benefit from the vehicle despite giving the vehicle to his girlfriend to drive to the shops. The applicant is an indirect possessor. He has been disturbed in his control of the vehicle and is entitled to institute spoliation proceedings. He has sufficient interest in the vehicle to entitle him to sue for the recovery

of D the vehicle. See *Muller v Muller* 1915 TPD 28 and *de Jager v Harris and the Master* 1957 (1) SA 171 (SWA).

The decision in *Maswaure* deals with classical dispossession and remains authoritative. The facts of this case are distinguishable. If the direct possessor, Chiedza, does not institute proceedings, the real possessor, the applicant will be left with no remedy and an absurdity will occur. That point fails.

E The principle that a court may not grant relief to a litigant with dirty hands in the absence of good cause being shown or until such defiance or contempt has been purged was applied in *ANZ (Pvt) Ltd v Minister of State for Information and Publicity* 2004 (1) ZLR 538 (S), *S v Neill* 1982 (1) ZLR 142 (H), *Mulligan v Mulligan* 1925 WLD 164 and *Fraind v Nothman* 1991 (3) SA 837 (W).

F The objection is basically that the applicant has been driving a Botswana registered vehicle which is on a temporary import permit without renewing it with ZIMRA since April 2011 and that he has been keeping the vehicle in Zimbabwe without authority and in breach of the law. The applicant has also failed to keep the vehicle at the given address and allowed Chiedza to drive the vehicle without authority.

G The application of this principle in spoliation proceedings was considered by Kudya J in *Karori (Pvt) Ltd & Anor v Mujaji* 2007 (1) ZLR 105 (H) where the learned judge remarked as follows:

> "Before a person seeks to establish his rights in a court of law, he must approach the court with clean hands. Where he himself through his own conduct makes it H impossible for the processes of the court (whether criminal or civil) to be given

> effect to, he cannot ask the court to set its machinery in motion to protect his A rights and interests"

On the facts of this case, the applicant brought these proceedings on the premise that the respondent took the law into her own hands when she dispossessed Chiedza of the vehicle. The respondent allegedly took the law into her own hands by taking the vehicle from Chiedza without a lawful B order. It does not appear to me that the respondent has clean hands herself. She cannot ask this court to set its machinery into motion to protect her when she herself is in breach of the law. This point fails.

Having handed down my ruling on the preliminary points, I directed that the application be argued on the merits. Mr *Makuku* submitted that the applicant's girlfriend was wrongfully and unlawfully dispossessed of the vehicle. The C fact that the TIP had expired did not justify the respondent taking the law into her own hands. Mrs *Mtetwa* submitted that the vehicle was taken with the consent of the applicant's girlfriend. She submitted further that the applicant has not been able to show that he was in peaceful and undisturbed possession of the vehicle as the vehicle was not in his possession at the time D of the taking. She submitted further that, whilst Chiedza claimed that she had been pulled out of the vehicle, her supporting affidavit has no explanation of how the doors were opened and how she was pulled out of the vehicle. She fails to explain what happened to the keys and that it is not clear whether they were left in the ignition or she pulled them out. There is no explanation pertaining to the position where the child was seated in the car or how he E got out of the vehicle. Mrs *Mtetwa* argued that the applicant failed to give a full explanation of how the actual dispossession took place. She castigated the applicant for failing to file an answering affidavit dealing with all these points when it was clear from the respondent's opposing affidavit that the respondent refuted Chiedza's version. The first preliminary point disposes of F the requirement that the applicant be in peaceful and undisturbed possession of the property. Surprisingly, Mrs *Mtetwa*, despite my earlier ruling that the applicant was a possessor of the property and was entitled to apply for spoliation, pursued the preliminary point I had dismissed. She contended that the applicant had not established that he was in physical possession of G the vehicle. My ruling stands.

The remaining issue is whether the applicant's girlfriend consented to the taking of the vehicle. The following are the defences which a respondent may raise:

(a) that the applicant was not in peaceful and undisturbed possession of the property at the time of the dispossession; H

Dube J

(b) that A restoration of the property is impossible;

(c) that the respondent acted within the limits of counter spoliation in gaining possession of the property; and

(d) that dispossession was not unlawful and did not constitute spoliation.

It is the last defence that we are concerned with today. The respondent's B defence is that the applicant's girlfriend consented to the taking. The respondent further asserted that she was obliged to take the vehicle as Chiedza was driving the vehicle in contravention of the ZIMRA regulations. She wanted to take her to the police.

The onus is on the applicant to show that his girlfriend did not consent to C the taking. The approach that the court is going to take is the one outlined in *Botha and Anor v Barret* 1996 (2) ZLR 73 (S) at 80 where Gubbay CJ remarked as follows:

> "Consent to the deprivation may be expressly given, as where the possessor is present at the time, is spoken to and gives his permission. Or it may be implied from the conduct of the possessor both before and after the removal of his D property. *In casu*, as I have mentioned, it was for the respondent to satisfy the court on a balance of probabilities that any actions or omissions bearing upon his loss of possession, did not warrant a finding that he had been a consenting party."

Another case on point is *Stocks Housing (Cape) Pvt Ltd supra* where the court, in dealing with the question of consent, remarked as follows,

> E "The cardinal enquiry is whether the person in possession was deprived thereof without his acquiescence and consent. Spoliation may take place in numerous ways. It may be unlawful because it was by force, or by threat of force, or stealth, deceit or theft, but in all cases spoliation is unlawful when the dispossession is without the consent of the person deprived of possession, since consent to the giving up of possession of property, if the consent is genuinely and freely given, F negates the unlawfulness of the possession."

There are a number of disputes concerning the manner in which the car was taken. These are still capable of resolution on the papers before me. I will adopt a robust and common sense approach and resolve them. See *Zimbabwe Bonded Fibreglass (Pvt) Ltd v Peech* 1987 (2) ZLR 338 (S).

The court will examine the manner in which the dispossession took place G in order to determine the lawfulness or otherwise of the taking. Chiedza claims that as she was driving the vehicle, she was suddenly blocked by the respondent who was driving an Audi 3 and she stopped the vehicle. The respondent disembarked from her vehicle, walked towards her and pulled her and the child out of the vehicle. The respondent got into her vehicle H and drove away in it, leaving her and the child behind. The vehicle that the

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respondent had been driving was taken over and driven away by her male A passenger. She remained with the child. The respondent claims that when she approached the applicant, she introduced herself to her and Chiedza immediately bolted from the car. She explained that she required to go with her to the police and Chiedza voluntarily gave her the keys to the car. She denies that she forcibly took the car from her but contends that the vehicle B was surrendered to her by consent. She also claims that she took her son with her. Following the recovery of the vehicle, she made a report to the Southerton Vehicle Theft Section.

The applicant does not allude to any exchange of words between the two. The respondent claims that after the encounter, she introduced herself to C Chiedza and asked her to come to the police with her and she refused. Both mother and son state that Chiedza seemed reluctant to go to the police and do not suggest the words spoken by her. There is nothing from both versions to suggest that the applicant's girlfriend expressly consented to the taking. The remaining issue is whether it can be implied from Chiedza's conduct during and after the taking that she consented to the taking. D

Chiedza's version discloses a movie style dispossession where she was left horror-struck. The act of blocking Chiedza in itself suggests that she was forced to stop. Chiedza's affidavit discloses that the taking occurred within a few seconds of the encounter. Here we do have a girlfriend confronted by the wife of her boyfriend whilst driving a family car. This is not the sort E of situation that a girlfriend in her circumstances desires to find herself in. Chiedza says that she was in utter shame and shock. She does not mention what happened to the keys during the melée. There is no

suggestion that she handed over the keys. She states that both her and the child were pulled out of the vehicle and omits to give finer details of this occurrence. Even when the court considers the respondent's stance alone, I still remain unsatisfied F that the circumstances of the taking amount to consensual taking. Even assuming that she handed over the keys, it cannot be said that the handover was voluntary. The taking was through violence. It is clear that the taking was induced by fear and duress. I am unable to find that the consent, if any was given genuinely and freely. The fact that she made an immediate G report of the dispossession to the boyfriend resulting in the launching of this application supports her assertion that she did not consent to the taking. The court has noted that the applicant did not report the dispossession to the police. The inference to be drawn from the circumstances of the taking is that the respondent forcibly and unlawfully dispossessed Chiedza of the vehicle. There is no reason why the applicant's girlfriend would lie that she H

Dube J

A remained with the child if she didn't. The facts as alleged by the applicant's girlfriend are more probable. I reject the respondent's version.

The defence that the possessor's possession was illegal does not suffice as a defence in spoliation claims. In *de Jager and Ors v Farah and Nestadt* 1947 (4) SA 28 (W), the court held that no matter how unlawful a person's B possession may be, his possession may not be interfered with except through due process of law. This defence does not avail the respondent.

I am left in no doubt that Chiedza did not consent to the taking. The application is granted.

The respondent is ordered to return Chrysler 300D registration number B977 ALA to the applicant within 24 hours of the service of this order. The C vehicle shall be surrendered at No 26 Maasdorp Avenue, Belgravia, Harare. Costs follow the event.

Tizirai Chapwanya and Makuku, applicant's legal practitioners

D *Nyambirai Mtetwa and Partners*, respondent's legal practitioners

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Document 15 of 79

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MNANGAGWA v ALPHA-MEDIA HOLDINGS (PVT) LTD & ANOR 2013 (2) ZLR 116 (H)

Citation	2013 (2) ZLR 116 (H)
Case No	Judgment No. HH-225-13
Court	High Court, Harare
Judge	Mathonsi J
Heard	17 July 2013 *CAV*
Judgment	25 July 2013
Counsel	*E W W Morris*, for the excipients (defendant) *L Uriri*, for the respondent (plaintiff)
Case Type	Exception

Annotations No case annotations to date

Flynote

Delict – *defamation – when material defamatory – test – exception to pleadings – test as to whether matter defamatory – court required to decide only whether reasonable person might or could regard statement as defamatory* D

Legal practitioner – *conduct and ethics – duty to client and court – making outrageous claims for damages (plus petitio) – irresponsibility of such claims*

Headnote

The respondent (plaintiff) brought an action against the excipients (defendants) E for damages for defamation. The sum claimed was one million US dollars. The defendants excepted to the claim, arguing that the declaration disclosed no cause of action, in that the words complained of were not defamatory *per se* and could under no circumstances be damaging to (the) plaintiff's good name and reputation.

Held, that the amount of damages claimed was outrageous. Quite often in F recent years litigants in this country come up with these outlandish claims for damages, even for the slightest of infractions, which are completely divorced from the economic realities of this country and are detached from existing precedence and legal realities of our jurisdiction. It is the kind of habit which legal practitioners must take responsibility G for encouraging, as ultimately it is they who advise litigants and draft the processes filed in court. Legal practitioners engaged by litigants to represent them and to draft court processes on their behalf should take care in drafting such court papers and claims and should apply their minds to the task reposed upon them. After all, they are paid to provide such service and it is the height of irresponsibility to come up with H

A outrageous claims which not only fail to ventilate the relief the litigant seeks but also fail to conform with existing precedents on the subject.

Held, further, that it is a first principle in dealing with exceptions that, if evidence can be led which can disclose a cause of action alleged in the pleading, that particular pleading is not excipiable. A pleading is only excipiable on the basis that no possible evidence led on the pleadings B can disclose a cause of action. Thus, where exception is taken to the plaintiff's declaration in a defamation case, the test of what constitutes defamatory matter is different from that at the trial stage. All the court is called on to decide at this stage is whether a reasonable person of ordinary intelligence, having heard the defendants' words and having C knowledge of the circumstances *might* reasonably understand these words as meaning that the plaintiff had been guilty of illegal or criminal conduct. The test on exception is, therefore, whether a reasonable person of normal intelligence and with knowledge of the circumstances *could* or *might* regard the statement as defamatory, whereas at the trial stage the test is whether a reasonable person *would* regard it as defamatory. The D contents of the article in question have on the mind of the ordinary reader of the publication and what would be the overall impression gained by him? Or, put another way, in the contest of the article as a whole; are the words used reasonably capable of conveying to the reasonable reader the E defamatory meanings ascribed to them by the plaintiff in his declaration?

Cases referred to

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

McKelvey v Cowan NO 1980 ZLR 235 (G); 1980 (4) SA 525 (Z)

F *Zvobgo v Mutjuwadi & Ors* 1985 (1) ZLR 333 (H); 1985 (3) SA 1055 (ZH)

Case information

E W W Morris, for the excipients (defendant)

L Uriri, for the respondent (plaintiff)

Judgment

Mathonsi J: The defendants (who are the excipients in this matter) have G excepted to the plaintiff's (who is the respondent) declaration and I have to decide whether that exception has merit or not.

The plaintiff is a government Minister, being the Minister of Defence, and a senior member of a political party known as the Zimbabwe African National Union Patriotic Front (Zanu PF) which is one of the ruling parties in the H current government of national unity. The defendants are the owner of a

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publication which is said to enjoy wide circulation in Zimbabwe, namely A the *Zimbabwe Independent*, and its editor.

In the *Zimbabwe Independent* edition of 11 May 2012, an article was published in the front page under the title "Mnangagwa Ready to Rule". The article reads in pertinent part thus:

> "Defence Minister Emmerson Mnangagwa (pictured) has for the first time openly B declared his interest in taking over from President Robert Mugabe as the leader of Zanu PF and the country, in remarks showing the succession battle in the party is intensifying.
>
> Mnangagwa told the *Zimbabwe Independent* last Friday at Heroes Acre during the burial of Zanu PF politburo member Edson Ncube he was ready to govern if given an opportunity. This virtually confirmed he is positioning himself to C succeed Mugabe, remarks which could anger senior Zanu PF officials and fuel factionalism and internal power struggles ahead of the next elections.
>
> 'I am ready to rule if selected to do so', Mnangagwa said. 'Zanu PF is about observing the will of the people and I will respect the people's wishes if they choose me'. D
>
> …
>
> In remarks which show succession is now hotly contested, Zanu PF secretary for administration Didymus Mutasa this week poured cold water on Mnangangwa's ambitions, saying he would not waste his time commenting on individuals' dreams. 'I do not want to be drawn into baseless arguments by commenting on individuals' wishes; said Mutasa. 'I will comment on that issue when the time comes, that is when the people – here I mean Zanu PF – have chosen him as E the leader of the party'.
>
> Mutasa, who is number five in the hierarchy, recently said Mnangagwa, who is not in the top 10, was far down the pecking order to succeed Mugabe compared to Mujuru and others.
>
> …
>
> Mnangagwa has been battling the Mujuru faction for years in a sustained turf F war to succeed Mugabe. The Zanu PF fight for power has escalated as evidence mounts that Mugabe is struggling with old age complications and ill health. Factionalism and infighting recently flared up in Zanu PF forcing Mugabe last Friday to slam faction leaders and greed, saying they were destroying his party.
>
> Mnangangwa has been fighting to take over from Mugabe for a long time. He first tried to position himself as heir apparent by vying for the vice-presidency G in the run up to the 2004 congress but was ruthlessly crushed by Mugabe and the Mujuru faction. His camp was also trounced during the 2009 congress, but is now gaining ground . . .
>
> Zanu PF spokesperson Rugare Gumbo also appeared to dismiss Mnangagwa's ambitions saying his party had laid-down procedures to be followed on succession. 'In Zanu PF, we have a hierarchy and this is adhered to whenever there is need H

> A for promotion' said Gumbo. 'Whilst people may harbour presidential ambitions, it is unfortunate (for Mnangagwa) that we follow this hierarchy'.
>
> …
>
> The Zanu PF Youth league said factional leaders causing chaos in the party should be confronted and dealt with head on. 'These are pretenders (factional leaders) and we don't work with pretenders but the person elected at the congress. We B deal with reality – that is the person in power' national deputy youth secretary for external affairs Tongai Kasukuwere said. 'If people are named for fanning divisions, they must be disciplined. We don't want to work with people who cause confusion'".

The plaintiff took issue with the article and instituted summons action against the defendants, seeking defamation damages of US$1 million. In para(s) 2.6 C to 2.9 of his declaration he made the following averments:

> "2.6 The article specifically alleges that (the) plaintiff, is a leader of a 'faction' fighting and involved in a power struggle with other government officials to succeed the President of Zimbabwe.
>
> 2.7. The article is false in that the plaintiff never made the remarks attributed to him in the article nor did he speak to the Zimbabwe Independent or anybody D else as alleged.
>
> 2.8. The article is defamatory *per se* of (the) plaintiff to whom it refers, in both his personal as well as his professional capacities.
>
> 2.9. As a result of the defamation, (the) plaintiff has been damaged in his good name and reputation and suffered damages in the amount of USD1 000 000".

E "Allow me a minute", as Alan Paton would say, while I make the point that I share the indignation of Mr *Morris* who appeared on behalf of the defendants about the outrageous amount of damages being claimed. Quite often in recent years, litigants in this country have taken to coming up with these outlandish claims for damages, even for the slightest of infractions, which are completely divorced from the economic realities of this country and are detached from F existing precedents and legal realities of our jurisdiction. It is the kind of habit which legal practitioners must take responsibility for encouraging, as ultimately it is they who advise litigants and draft the processes filed in court. Legal practitioners engaged by litigants to represent them in this court and to draft court processes on their behalf should take care in drafting such G court papers and claims, and should apply their minds to the task reposed upon them. After all they are paid to provide such service and it is the height of irresponsibility to come up with outrageous claims which not only fail to ventilate the relief the litigant seeks but also to conform with existing precedents on the subject. Legal practitioners should be taken seriously by the courts for it is serious business that we transact in these courts and not H local drama, nor is it the television series *Carson's Law* or *LA Law*.

Mathonsi J

But then, I digress. The quantum of damages is not the subject of the present A inquiry and drifting away from the field of discourse will not resolve the present dispute between the parties. The quantum of damages will obviously feature prominently in the event of the matter going to trial. My immediate concern is to determine the propriety of the exception that has been taken.

The defendants have excepted as follows: B

> "The defendants hereby note an exception to (the) plaintiff's declaration as disclosing no cause of action in that the words complained of are not defamatory *per se* and can under no circumstances be damaging to (the) plaintiff's good name and reputation.
>
> Wherefore (the) defendants pray that (the) plaintiff's claim be struck down with costs on the scale of legal practitioner and client". C

Where exception is taken in a defamation suit, the law is as was set out by J M Burchell in *The Law of Defamation in South Africa* at pp 102-3 where the learned author said;

> "Where exception is taken to the plaintiff's declaration, the test of what constitutes defamatory matter is different from that at the trial stage. D
>
> Tindall JA said in *Basner v Trigger* 1945 AD 229 & 32 (this case involved an innuendo, but the test on exception is the same). 'In other words all the court is called on to decide at this stage is whether a reasonable person of ordinary intelligence, having heard the defendants' words and having knowledge of the circumstances … *might* reasonably understand these words as meaning that the plaintiff had been guilty of illegal or criminal conduct…' The test on E exception is, therefore, whether a reasonable person of normal intelligence and with knowledge of the circumstances *could* or *might* regard the statement as defamatory, whereas at the trial stage the test is whether a reasonable person *would* regard it as defamatory".

The above passage in Burchell was adopted in our jurisdiction by Sandura JP (as he then was) in *Zvobgo v Mutjuwadi & Ors* 1985 (1) ZLR 333 (H) F at 335-336; 1985 (3) SA 1055 (ZH) at 1058F-G where the learned judge pronounced:

> "I must now deal with the fourth defendant's exception to the plaintiff's declaration. The fourth defendant excepts to the plaintiff's declaration on the ground that it is bad in law because it discloses no cause of action in that the words relied G upon are not reasonably capable of conveying a defamatory meaning.

I ought to make it quite clear right from the outset that I do not have to determine at this stage whether or not the article in question is in fact defamatory. What I must decide is whether the words complained of are reasonably capable of conveying to the average reader the defamatory meaning assigned to them by the plaintiff. This is made quite clearly by Burchell in his new book, *The Law of Defamation in South Africa* at 102-3". H

2013 (2) ZLR p121

Mathonsi J

A In *Auridiam Zimbabwe (Pvt) Ltd v Modus Publications (Pvt) Ltd* 1993 (2) ZLR 359 (H) at 368C-D, Robinson J added the following:-

"The test is undoubtedly an objective one. See *Botha en'n Ander v Marais* 1974 (1) SA 44 (A) at 48E and *Demmers* on appeal *supra* at 842A-B. In *Visse*'s cases *supra* at 447, Murray J went on to say:

'The test to be applied by the court in determining whether these words B are reasonably capable of the alleged defamatory meaning is the effect on the mind of the ordinary reader, an average reasonable person of ordinary intelligence – *Basner v Trigger* 1945 AD at p 32 – who reads the article with ordinary care, but not as 'an astute lawyer or a super critical reader would read the passage' – *per* Wessels JA in *Johnson v Rand Daily Mails* 1928 AD at p 204."

C The learned judge went on at 371F-G to say:-

"Accordingly, putting aside, as I am told I must do, my training and my logical, critical and analytical habits of mind as a lawyer and stepping into the shoes of the ordinary reader of the *Financial Gazette*, the question which I must answer is – what immediate impact would the contents of the article in question have on the mind of such a reader and what would be the overall impression gained by D him? Or put another way, in the context of the article as a whole; are the words used reasonably capable of conveying to the reasonable reader the defamatory meanings ascribed to them by the plaintiff in para 5 of his declaration?"

Beadle AJ (as he had then become) made the point in *McKelvey v Cowan NO* 1980 ZLR 235 (G); 1980 (4) SA 525 (Z) at 526D that:

"It is a first principle in dealing with matters of exception that, if evidence can be E led which can disclose a cause of action alleged in the pleading, that particular pleading is not excipiable. A pleading is only excipiable on the basis that no possible evidence led on the pleadings can disclose a cause of action. That is the manner in which I approach this case".

Mr *Morris* for the defendant submitted that the article complained of does not in fact specifically allege that the plaintiff is a faction leader although the F implication is there. In this view, in most organisations including political ones, there is vying for leadership and nothing turns on that. He submitted that there is nothing in the article to suggest that the plaintiff is fanning division or creating dissent but that he is just one of a number of people interested in standing for the office of president once the incumbent steps down. Mr *Morris* further submitted that the fact that the article attributes to G the plaintiff the words that he will abide by the decision of the people and respect their wishes shows considerably greater nobility of mind than some of those quoted who believe that a presidential candidate must be selected following a party hierarchy of succession.

Mr *Uriri* for the plaintiff pointed to passages in the article which, in his view H would be understood by the ordinary reader to mean that the respondent is

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2013 (2) ZLR p122

Mathonsi J

of a diminished reputation and character. According to Mr *Uriri*, the crux A of the matter lies in para 2.8 of the declaration which avers that the article complained of is defamatory *per se*. For that reason, the article must be examined in its entirety to determine whether it would convey the message complained of. I agree.

I am mindful of the fact that I am not being called upon at this point in B time to determine whether the article *is* defamatory. That is the province of the trial court. What I have to determine at this stage is whether the article is reasonably capable of conveying to the average reader the defamatory meaning assigned to it by the plaintiff. In doing so, I must, as, as suggested by Robinson J in *Auridiam Zimbabwe (Pvt) Ltd supra*, put aside my training and my logical critical and analytical habits of mind as a lawyer and step C into the shoes of the ordinary reader of the *Zimbabwe Independent* in order to answer that question.

The article states that the respondent is "positioning himself to succeed Mugabe, remarks which could anger senior Zanu PF officials and fuel factionalism and internal power struggles". It also states that Zanu PF has D laid down succession procedures which it follows whenever there is a need for promotion. The ambitions of the plaintiff, who is not even in the top 10 of that hierarchy, to succeed the President are therefore misplaced and at variance with the procedures of that party. It is the kind of ambition which could fuel factionalism and internal struggles which have already flared up resulting in President Mugabe slamming faction leaders for greed and E destroying his party. Indeed, even the youth wing of Zanu PF has taken a stand against faction leaders for fanning divisions insisting that they should be disciplined.

To the extent that the declaration makes the averment that the entire article is defamatory *per se* and that one has to therefore look at it in its entirety, F one cannot avoid the conclusion that in the context of the article as a whole, the words used are reasonably capable of conveying to the reasonable reader of the *Zimbabwe Independent* the defamatory meaning ascribed to them by the plaintiff. Generally, factionalism is presented as a sticking problem for Zanu PF and faction leaders as not only undisciplined but also as destroying the party. I do not agree with Mr *Morris* that the article does not allege that G the plaintiff is a faction leader. In fact, that argument is made half-heartedly because counsel conceded at the same time that the implication is there. It is also important to point out that the plaintiff avers in his declaration that he never gave an interview to the *Zimbabwe Independent* and that everything attributed to him in the article is false. That is an issue to be canvassed by evidence and if evidence can be led to that effect, clearly a cause of action H

Mathonsi J

A exists. The declaration is therefore not excipiable: *McKelvey v Cowan NO supra*.

I am therefore unable to uphold the exception. I however take the view expressed by Beadle AJ in *McKelvey supra* that the law does not discourage parties from taking exceptions when exceptions may result in the reduction of costs and shortening of proceedings. This is a case in which the defendants B were entitled to except, albeit unsuccessfully. For that reason, the costs should be in the cause.

In the result, it is ordered that:

1. The exception is hereby dismissed.
2. The C costs shall be in the cause.

Dube, Manikai & Hwacha, plaintiff's legal practitioners

D *Atherstone & Cook*, defendants' legal practitioners

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Document 16 of 79

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2013/Volume 2/MUPAZVIRIWO v KUBETA 2013 (2) ZLR 124 (H)

MUPAZVIRIWO v KUBETA 2013 (2) ZLR 124 (H)

Citation	2013 (2) ZLR 124 (H)
Case No	Judgment No. HH-227-13
Court	High Court, Harare
Judge	Makoni J & Mawadza J

Heard 27 June 2013; *CAV*

Judgment 25 July 2013

Counsel *F M Katsande*, for the appellant
Ms *P Kashiri*, for the respondent

Case Type Civil appeal

Annotations No case annotations to date

Flynote

Contract – *breach of promise of marriage – essential elements – damages – contumelia associated with breach – not a separate cause of action – contumelia may aggravate damages*

Family law – *husband and wife – breach of promise of marriage – essential* D *elements – damages – contumelia associated with breach – not a separate cause of action – contumelia may aggravate damages*

Headnote

The essential elements for a breach of promise to marry are (a) that the defendant made a promise to marry the plaintiff; (b) that the plaintiff E accepted the promise and communicated his or her acceptance of promise to the defendant: and (c) that the defendant had broken his or her promise without just cause.

While it might be very useful corroborating evidence for the plaintiff to show that there was an engagement witnessed by a number of people and that love tokens were exchanged between the parties in order to F prove that a promise to marry was made by the defendant, such issues are not essential elements of the breach of promise to marry.

With regard to damages, a claim for breach of promise to marry is not a separate cause of action from one for *contumelia* when one deals with the same action for breach of promise to marry. The action for breach G of promise to marry is a composite one, combining both the contractual and delictual elements. In practice, these two elements must be clearly separated in the pleadings and in the assessment of damages, but this does not mean that these are two separate causes of action. The cause of action remains the breach of promise to marry. While damages may be aggravated by contumelious or injurious conduct by or on the behalf H

A of the defendant, such *contumelia* does not constitute a separate cause of action.

Cases referred to

Guggenheim v Rosenbaum (2) 1961 (4) SA 21 (W)

Mazarire v Magoronga 1992 (1) ZLR 282 (S)

Case information

B *F M Katsande*, for the appellant

Ms *P Kashiri*, for the respondent

Judgment

Mawadze J: This is an appeal against the entire judgment of the Bindura C magistrates court delivered on 28 March 2012.

The appellant appeals against the entire judgment in which the court a quo granted an absolution from the instance.

The respondent also filed a cross appeal in which he seeks to have the appeal dismissed on the basis that the court *a quo* did not have the jurisdiction to D deal with the matter.

The appellant's grounds of appeal against the entire judgment are couched as follows:

"1. The learned magistrate misconceived the prerequisites of breach of promise which are:

'(a) that E the defendant made a promise to marry the plaintiff.

(b) that the plaintiff accepted the promise to marry and communicated his/her acceptance to the defendant and

(c) that the defendant breached the promise to marry without just cause.'

Mazarire v Magoronga 1992 (1) ZLR 282 (S) at 255 F-G.

1. Contrary to the established principle of law on the subject the learned magistrate F found that the promise to marry had to be published and or witnessed by third parties. In that extent the learned magistrate went remiss, misdirected himself and erred in law.
2. The learned magistrate erred and misdirected himself in law when he found that a claim of *contumelia* is vitiated by the plaintiff's consent to licentious behaviour with the defendant who jilted her.
3. The G learned magistrate ought to have found that the plaintiff's participation in the defendant's advances was a result of the latter's wiles and solicitations which is what aggravated his moral blameworthiness when he unjustifiably repudiated the amorous relationship and promise to marry.
4. The learned magistrate ought to have found that the deception and glib talk is the basis upon which the claim for *contumelia* was premised and not the H consent to the lewd practice.

Mawadze J

Wherefore the appellant prays that the judgment by the learned provincial A magistrate be set aside on appeal and the following substituted therefor:

"There will be judgment for the plaintiff in terms of the summons.

5. The respondent shall bear the costs of this appeal."

On the other hand, the respondent's grounds of the cross appeal are as follows:

"Grounds of Appeal B

1. The learned magistrate erred by entertaining a matter in which the claim exceeded the monetary jurisdiction of the court.

Wherefore the respondent prays that:

(a) The court *a quo*'s decision to dismiss the point *in limine* raised by the respondent be and is hereby set aside.

(b) The plaintiff's claim is hereby dismissed. C

(c) The plaintiff shall pay the costs of this appeal."

In his submission to the court Mr *Katsande* for the appellant took the point that the cross appeal was filed out of time in terms of the rules of the magistrates court and therefore should be regarded as a nullity.

The notice of appeal was issued out at both the High Court and Bindura D magistrate's court on 29 March 2012. The cross appeal was filed on 23 April 2012. The question which arises therefore is whether the cross appeal was filed in accordance with the rules.

Order 31 r 2(3) of the Magistrates Court (Civil) Rules 1980 (SI 290 of 1980) provides as follows: E

"2 Method of noting appeal or cross appeal

(3) A cross appeal shall be noted by the delivery of the notice within seven days after the delivery of the notice of appeal."

Mr *Katsande* for the appellant submitted that the notice of appeal was issued out on 29 March 2012 and served on the respondent on 2 April 2012. The F respondent only filed the cross of appeal on 23 April 2012 well after the prescribed seven days. The provisions of Order 31 r 2(3) are mandatory. The notice of the cross appeal by the respondent fails to meet the requirements of the rules and is therefore a nullity.

Although the respondent's cross appeal is a nullity, this court is still seized with the material issue as to whether the court *a quo* had jurisdiction to G entertain the appellant's claim.

The appellant's claim as per the prayer in the particulars of claim is couched as follows;

"Wherefore the plaintiff prays for judgment as follows:

(a) US$2000 damages for breach of promise to marry H

2013 (2) ZLR p127

Mawadze J

(b) US$1000 A for *contumelia*

(c) Costs of suit."

At the time the claim was brought before the court *a quo* by the appellant the monetary jurisdiction of the magistrates court was fixed at US$2000. Mr *Katsande*'s submissions were for to the effect that the claim by the appellant B was well within the monetary jurisdiction of the court *a quo* as appellant is entitled at law to claim damages for breach of promise to marry separately from damages for *contumelia*. The logic of this argument would be that a claim for breach of promise to marry is a separate cause of action from one for *contumelia* when one deals with the same action for breach of promise to marry. This is incorrect. The action for breach of promise to marry is a C composite one, combining both the contractual and delictual elements. See *Guggenheim v Rosenbaum (2)* 1961 (4) SA 21 (W). In practice, these two elements must be clearly separated in the pleadings and in the assessment of damages. However, this does not mean that these are two separate causes of action. The cause of action remains the breach of promise to marry. In the D same vein, while delictual damages maybe aggravated by contumelious or injurious conduct by or on the behalf of the defendant, such *contumelia* does not constitute a separate cause of action. While it is correct for the appellant to specify the nature of damages claimed and the quantum thereof, such a cause of action should remain within the jurisdiction of the magistrate court. *In casu* the court *a quo* could only have competently dealt with a claim for E a breach of promise to marry inclusive of both contractual and delictual damages which is within its monetary jurisdiction of US$2000.

The law on what constitutes breach of promise to marry is clear. See *Mazarire v Magoronga* 1992 (1) ZLR 282 (S) at 255E-H. The essential elements for a breach of promise to marry can be summarised as follows:

(i) that F the defendant made a promise to marry the plaintiff

(ii) that the plaintiff accepted the promise and communicated his or her acceptance of promise to the defendant and

(iii) that the defendant had broken his or her promise without just cause.

G It is correct that the magistrate, with all due respect, misdirected himself on the law of breach of promise to marry. It is illustrative to refer to the relevant part of the magistrate's judgment in which he said:

> "The law on breach of promise to marry is clear. For a breach of promise to marry claim to be [sustained] one would be called upon to establish the existence of a promise made through an engagement party which would be witnessed by a H number of people in the exchange of some love tokens before other relatives.

2013 (2) ZLR p128

Mawadze J

> Now in this particular case such did not happen. What we has is word of mouth A maybe between the parties such promise was never witnessed" (*sic*).

While it might be very useful corroborating evidence for the plaintiff to show that there was an engagement witnessed by a number of people and that love tokens were exchanged between the parties in order to prove that a promise to marry was made by the defendant, such issues are not essential elements B of the breach of promise to marry. To that extent it is therefore clear that the magistrate misdirected himself and erred in law.

Having made that finding the question still to be answered is whether on the evidence on record the magistrate was correct to grant an absolution from the instance. Put differently, the question is whether the appellant in the court *a quo* made a case of breach of promise to marry. At this stage it is useful to C deal with the brief facts of the matter.

[The learned judge then reviewed the evidence led in the court *a quo*, and concluded:]

The critical question to be answered is as follows: did the respondent make a promise to marry the appellant from the evidence briefly discussed? D

The evidence on record does not show at all that the appellant in the court *a quo* managed to prove on a balance of probability that she was in love with the respondent let alone that a promise to marry her was made. This conclusion is inevitable for a number reasons.

Other than the appellant's word that she fell in love with the defendant, which E is strongly disputed by the defendant, there is no other evidence to show that such a love relationship existed between the two. While the appellant's love life may not be a bar to her having a relationship with the respondent, the circumstances of the case make it highly unlikely that the respondent fell in love with her. The respondent was a friend to her "husband", a fact which should have been known at this school which is a very small community. F The respondent, who is a bachelor, knew that the appellant had been married twice, had a child and was much older than him. While the appellant in her evidence gave the impression that this love relationship was an open book for everyone in the locality including her friends which she mentioned by name, none of those witnesses were called. The need to do so was very clear G in view of the respondent's stance. In fact the respondent challenged the appellant to name a single fellow teacher at the school who was aware of the alleged love relationship. The appellant was unable to take up this challenge.

The appellant's own evidence is uninspiring and does not seem to suggest that the respondent made a promise to marry her. A few examples of her evidence in brief is illustrative. H

Mawadze J

A The following exchange took place between the appellant and her legal practitioner:

" Q. Did courtship continue?

A. Yes

Q. What other developments took place?

A. He B made continuous visits to me making indications that he was interested in me. I posed a question to him whether he was interested in marrying me or he was not.

Q. What was his response?

A. He indicated he intended to marry me and not play with me

Q. Was this at the beginning, middle or end of courtship?

A. It C was in the middle of the courtship.

Q. What then happened?

A. It then happened that I approached my Pastor then and highlighted it to him and the Pastor eventually approached the defendant and had a talk with him.

Q. And what was the result?

A. After D that the Pastor came and told me that the defendant had indicated that he still loved me although he was not yet prepared to marry me but was going to do so when he ever get ready.

Q. Did he ever get ready?

A. I never saw the readiness."

E According to the appellant the respondent advised the pastor that he was not ready to marry her. This is the response which caused the appellant's legal practitioner to write a letter of demand to the respondent.

In her evidence the appellant said the respondent told her that he was unwilling to be introduced to the appellant's uncles or relatives for fear that such a F move would be misconstrued for a serious relationship. It is surprising that the appellant, who is not a young, naive and excitable girl, would then take such a relationship seriously, even assuming it existed.

Under cross examination by the respondent the appellant conceded to the following:

(i) that G she never had sexual intercourse with the defendant.

(ii) that neither the appellant nor the respondent introduced the other to their respective relatives.

(iii) that they did not enter into any engagement.

(iv) that the appellant is unable to mention any teacher at Nzvimbo school H who was aware of their love relationship.

Mawadze J

(v) that she never went to any place with the respondent or attended any A occasion together.

All these factors taken cumulatively tend to show that there was no love relationship between the parties. It would be really bizarre to find otherwise.

The letter written by the appellant's legal practitioners to the respondent is not proof that a love relationship existed between the parties, let alone that B the respondent made a promise to marry the appellant. All the letter contains is what the appellant herself told her legal practitioner. The letter is therefore is of no probative value to the point in issue.

All in all the appellant's case is a hopeless one. The court *a quo* would have acted properly even if the appellant's claim had been dismissed. However, the C court *a quo* granted an absolution from the instance. There is no misdirection in that regard. The appellant did not make a case at all for the claim made. The appeal lacks merit and cannot succeed. The appellant should bear the burden of the costs.

Accordingly for the above reasons the following order is granted: D

1. The appeal be and is hereby dismissed.
2. The appellant shall pay the costs.

MAKONI J concurred.

F M Katsande & Partners, appellant's legal practitioners E

Tondhlanga & Associates, respondent's legal practitioners

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Document 17 of 79

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2013/Volume 2/AL SHAMS GLOBAL BVI LTD v EQUITY PROPERTIES (PVT) LTD 2013 (2) ZLR 131 (H)

AL SHAMS GLOBAL BVI LTD v EQUITY PROPERTIES (PVT) LTD 2013 (2) ZLR 131 (H)

Citation	2013 (2) ZLR 131 (H)
Case No	Judgment No. HH- 37-13
Court	High Court, Harare
Judge	Zhou J
Heard	13 February 2013; *CAV*
Judgment	29 July 2013
Counsel	*T Mpofu,* for the plaintiff *A P de Bourbon SC,* for the defendant
Case Type	Unopposed matter
Annotations	No case annotations to date

Flynote

Practice and procedure – *provisional sentence – claim opposed – set-down of opposed matter – should not be set down on unopposed roll where plaintiff becomes aware, before hearing date given in summons, that* D *claim is opposed*

Headnote

A summons for provisional sentence is issued where a plaintiff is the holder of a valid acknowledgment in writing of a debt or a liquid document. The summons may be in one or the other of two forms, Form No. 4 or Form E No.5. It must call upon the defendant to satisfy the plaintiff's claim, or in default to appear before the court at the hour and on the day and at the place stated in the summons to show why he has not done so, and to acknowledge or deny the signature to the said liquid document or the validity of the claim. Rule 25(1) of the High Court Rules provides that the defendant *may* file a notice of opposition and supporting affidavit F prior to the date stated in the summons; the provision is not couched in peremptory terms. It therefore means that the defendant has a choice as to whether or not to file a notice of opposition and opposing affidavit. Rule 25(2) provides that Order 32 shall apply, *mutatis mutandis*, to the service of a notice of opposition and the filing and service of answering or further affidavits which may be filed by the parties subsequent to the G filing of the opposing affidavit. Where a notice of opposition is filed, this does not mean that the matter will wait to be placed on the opposed roll, although the filing of further affidavits after the opposing affidavit are to be in terms of the provisions of Order 32.

It has previously been held that the practice of the High Court is to determine H provisional sentence matters on the date appearing on the face of the

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summons. Issues of convenience to the court, which is essentially sitting A as an unopposed court, can effectively be overcome by the presiding judge standing the matter down to the end of the roll for counsel to make their submissions to court. However, r 223(1)(a) provides for the setting down of uncontested cases for provisional sentence on the roll for unopposed matters. There is no provision in the rules for contested B cases for provisional sentence to be set down on the same roll. The setting down of contested cases for provisional sentence on the "unopposed" roll is, therefore, not in accordance with the provisions of the Rules. It is not always apparent that the matter is to be opposed, because Forms No. 4 and 5 make no provision for the *dies induciae* within which the defendant must file a notice of opposition and opposing affidavits, C other than that it should be before the date of the hearing inserted in the summons. The three courses of action available to the defendant are (a) to satisfy the claim; or (b) to file opposing affidavits; or (c) to appear in court on the date stated in the summons to admit or deny the claim. Where a defendant chooses to appear in court on the date of the hearing to deny liability, it is only then that the court becomes aware D that the matter is contested. But if the plaintiff becomes aware before the date of hearing that the matter is opposed, he should not set it down on the unopposed roll.

Cases cited

Mavindidze & Anor v Mukonoweshuro 2010 (1) ZLR 191 (H) E

Sibanda v Mushapaidze 2010 (1) ZLR 216 (H)

Zimbank v Interfin Merchant Bank of Zimbabwe Ltd 2005 (1) ZLR 114 (H)

Legislation considered

High Court Rules 1971 (RGN 1047 of 1971), rr 25 and 223 F

Case information

T Mpofu, for the plaintiff

A P de Bourbon SC, for the defendant

Judgment

Zhou J: There are two matters in respect of which the applicant instituted G proceedings for provisional sentence against the defendant. In the first matter, Case No. HC 13730/12, the summons for provisional sentence was issued on 28 November 2012. The second summons, in case no. HC 13977/12, was issued on 5 December 2012.

In case no. HC13730/12 the plaintiff's claim for provisional sentence in a sum of US$200 000 is founded upon a banker's acceptance number LN12/0112 H

Zhou J

A executed by the defendant in favour of Interfin Banking Corporation Ltd. According to the summons "the plaintiff purchased, paid for and took delivery of the banker's acceptance from Interfin Banking Corporation Ltd on 12 April 2012, but it was dishonoured by that bank when it was presented for payment. In HC 13977/12 the claim is for US$300 000. The defendant filed opposing papers in both cases. The plaintiff filed answering affidavits in the B two cases. The respondent filed heads of argument in case no. HC 13977/12. The two cases were set down on the unopposed roll on 19 December 2012. The result sheet for case no. 13730/12 shows that the matter was removed from the roll while that for HC13977/12 states that the matter was postponed *sine die*. The matters were again set down for hearing on 30 January 2013. C The result sheets show that the two matters were struck off the roll. In both records the learned judge commented that the two matters were opposed and should be referred to the opposed roll, as arguable defences were raised in the opposing papers.

Somehow the matters still found their way to the unopposed roll on 13 February 2013. Both Mr *Mpofu* for the plaintiff and Mr *de Bourbon* for the D defendant made submissions on the merits. Of late there are many contested cases for provisional sentence which are set down on the unopposed roll.

Order 4 of the High Court Rules 1971 deals with claims for provisional sentence. A summons for provisional sentence is issued where a plaintiff is the holder of a valid acknowledgment in writing of a debt or a liquid E document. The summons may be in one or other of two forms – Form No. 4 and Form No. 5. The rules prescribe the contents of a summons for provisional sentence. Among other things, the summons must "call upon the defendant to satisfy the plaintiff's claim or, in default, to appear before the court at the hour and on the day and at the place stated in the summons to show why he has not done so, and to acknowledge or deny the signature to the said liquid F document or the validity of the said claim". Rule 22 provides, *inter alia*, that the "provisions of rules 10, 11, 14, 15, 16, 17, 18 and 19 shall be observed in a summons for provisional sentence". Rule 25(1) provides that a defendant cited in a provisional summons *may* file a notice of opposition and supporting affidavit prior to the date stated in the summons. I have highlighted the word "may", as it shows that the provision is not couched in peremptory terms. G It therefore means that the defendant has an election as regards whether or not to file a notice of opposition and an opposing affidavit. Subrule (2) of r 25 provides that Order 32 shall apply, *mutatis mutandis*, to the service of a notice of opposition and the filing and service of an answering or further affidavit which may be filed by the parties subsequent to the filing of the H opposing affidavit.

Zhou J

The issue of the fate of an opposed provisional sentence has previously A arisen in this court. In *Zimbank v Interfin Merchant Bank of Zimbabwe Ltd* 2005 (1) ZLR 114 (H) at 116F-117A Makarau J (as she then was) stated the following:

> "The position as to what happens when opposition to provisional sentence is manifested in the form of opposing affidavits or the defendant appearing on the B floor of the court has thus become blurred through the disuse of the procedure. It is therefore, in my view, necessary to recall that the procedure of provisional sentence allows a creditor armed with a liquid document to obtain payment of the debt without having to wait for the final determination of the dispute between the parties. Whilst a speedy remedy, provisional sentence is an extra-ordinary remedy based on the presumption of indebtedness created by the liquid document. It is a brisk and robust remedy granted by the court in appropriate C cases, on the date of the hearing endorsed on the face of the summons, after the court has satisfied itself that the defendant has no probability of success in the principal case. Although opposed, the matter cannot wait to be determined on the opposed roll in accordance with the provisions of Order 32 of the High Court Rules,

1971, although the filing of further affidavits after the opposing affidavit are to be in terms of the provisions of Order 32. D

The above is my view in answer to the second argument raised by Mrs *Zindi* that the matter be referred to the opposed roll. It has always been the practice of this court to determine provisional sentence matters on the date appearing on the face of the summons. Issues of convenience to the court, which is essentially sitting as an unopposed court, can effectively be overcome by the presiding judge standing the matter down to the end of the roll for counsel to make their submissions to court. I have not been able to conceive of any interpretation of E the rules of this court that would tend to suggest that this is not the proper way of proceeding. I have further failed to conceive of any possible reason why the practice of this court should be changed to refer contested provisional sentences to the opposed roll as that course will effectively rob the 'quick' remedy of its efficacy and thereby weaken the whole machinery of provisional sentence."

It seems to me, however, that the rules do have provision as regards the setting F down of cases for provisional sentence, at least in relation to the unopposed roll. Order 32 r 223(1)(a) provides for the setting down of uncontested cases for provisional sentence on the roll for unopposed matters. There is no provision in the rules for contested cases for provisional sentence to be set down on the same roll. The setting down of contested cases for provisional G sentence on the "unopposed" roll is, therefore, not in accordance with the provisions of the Rules. I am mindful of the fact that the issue of the stage at which the court (and, indeed, the plaintiff) becomes aware that a matter for provisional sentence is opposed presents difficulties. That is so because Forms No. 4 and 5 make no provision for the *dies induciae* within which the defendant must file a notice of opposition and opposing affidavits, other than H

Zhou J

A that it should be before the date of the hearing inserted in the summons. Yet in the same forms the defendant is warned: "If you do not take the action described in the previous paragraph, a provisional sentence may be given against you." The three courses of action available to the defendant are to satisfy the claim or to file opposing affidavits or to appear in court on the date stated in the summons to admit or deny the claim. Where a defendant B chooses to appear in court on the date of the hearing to deny liability, then the court only becomes aware that the matter is contested on that date.

In the two cases before me opposing papers were filed prior to the date of the hearing. Thus, the plaintiff knew then that in the two matters provisional sentence was being contested. The matters should not, therefore, have been C set down on the unopposed roll. Contested cases for provisional sentence have previously been heard as opposed applications as shown by some judgments of this court. See *Mavindidze & Anor v Mukonoweshuro* 2010 (1) ZLR 191 (H); *Sibanda v Mushapaidze* 2010 (1) ZLR 216 (H). The attention of litigants is therefore directed to the provisions of the Rules regarding the setting down of contested cases for provisional sentence.

D In the instant cases I heard argument on the merits, albeit the plaintiff had not filed heads of argument, principally because the matter was set down on the unopposed roll. In opposition to the claim for provisional sentence the defendant contends that the plaintiff is not the holder of the instruments upon which the claims are founded. The plaintiff seems to believe that it became E the holder of the bankers' acceptances by the mere fact of having paid for and taken delivery of the instruments. That is not necessarily so. Delivery of the instrument without more merely makes the plaintiff a possessor of the instrument. Since the banker's acceptances *in casu* were not bearer instruments, the plaintiff did not necessarily become the holder thereof by merely taking physical delivery of them without further evidence that the F instruments were negotiated in its favour. *Ex facie* the instruments, Interfin Banking Corporation is the holder. In the premises, this to me is not an appropriate case for provisional sentence to be granted.

In the result, it is ordered that:

1. Provisional sentence be and is hereby refused.
2. The G case is hereby ordered to stand over for trial and the summons shall stand as the summons in an ordinary action.
3. The defendant shall enter appearance to defend within five days of the date of this judgment.
4. The H costs shall be costs in the cause.

Zhou J

Atherstone & Cook, plaintiff's legal practitioners A

Gill Godlonton & Gerrans, defendant's legal practitioners

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Document 18 of 79

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2013/Volume 2/MOYO v MKOBA & ORS 2013 (2) ZLR 137 (S)

MOYO v MKOBA & ORS 2013 (2) ZLR 137 (S)

Citation	2013 (2) ZLR 137 (S)
Case No	Judgment No. S-35-13
Court	Supreme Court, Bulawayo
Judge	Malaba DCJ, Gowora JA and Cheda AJA
Heard	30 July 2012; *CAV*
Judgment	7 August 2013
Counsel	*T Mpofu,* for the appellant *H Moyo,* for the first respondent
Case Type	Civil application
Annotations	No case annotations to date

Flynote

Constitutional law – *Constitution of Zimbabwe 1980 – s 31K – executive functions of President – President acting on own deliberate judgment – exclusion of power of court to investigate – appointment of chief by President – incorrect information as to customary succession given to President – procedural impropriety resulting in an irrational decision* D *– power of court to review such decision*

Customary law – *chief – appointment of by President – customary principles of succession – President required to give "due consideration" to such principles – need for recommendation to President to be based on such principles – recommendation not based on those principles – President* E *not able to give due consideration to those principles – appointment made without due consideration to customary principles of succession void*

Words and phrases – *"due consideration" – Traditional Leaders Act [Chapter 29:17] – s 3 (2) – must relate to something which has been established as a fact*

Headnote

F "Due consideration" means "proper consideration". For the President to give "due consideration" to the matters specified in s 3(2) of the Traditional Leaders Act [*Chapter 29:17*] before he can act on his deliberate judgment to appoint a chief, he must have relevant facts which have a bearing on the matters set out therein. There cannot be "due consideration" of G something which has not been established as a fact.

In a dispute over who should be appointed as substantive chief, the evidence established that following the death of the previous chief, a dispute had arisen between the appellant and the first respondent, supported by their respective family members. Two meetings involving officials from the H local district administration were held in an attempt to resolve the dispute.

No agreement was reached, however, because the parties in dispute A failed to agree on what were the customary principles of succession. At the end of the second meeting, the matter was put to the vote and the first respondent won on the basis that he was the oldest surviving grandson of the late chief. This did not resolve the dispute and in due course the matter was referred to the fourth respondent, the Minister of B Local Government. He, in turn, recommended to the President, the fifth respondent, that the first respondent be appointed as chief as being in accordance with the customary principles of succession of the clan. It was clear, however, that this was not so, although it was convenient for the administration. The appellant sought an order from the High Court precluding the President from appointing the first respondent as chief. C The High Court dismissed the application. On appeal to the Supreme Court, the appellant argued that the Presidential discretion in appointing a chief in terms of ss 3(1) and (2) of the Traditional Leaders Act could be impeached where it was based upon incorrect, irrelevant or improper considerations. The first respondent relied upon s 31K of the Constitution D of Zimbabwe 1980 and argued, *inter alia*, that the President's discretion in the appointment of a chief is unfettered; the exercise of his powers is not impeachable in any circumstances; and the appointment of a chief is an exercise of Presidential power which cannot be reviewed by the courts.

Held, that in terms of s 3(2) of the Traditional Leaders Act, the President, in E appointing a chief, is required to give due consideration to the prevailing customary principles of succession, if any, applicable to the community over which the chief is to preside. An inquiry is required to be carried out by officials of the Ministry of Local Government to establish those principles. If there is a dispute, the court ought to inquire into the question of whether those investigations produced the information on the matters F to which the President is required to give due consideration. The President is required to act on his own deliberate judgment *after* he has information relating to the prevailing customary principles of succession applicable to the community, to which he must give due consideration. Whether the information placed before the President relates to the matters to G which he is required to give due consideration is a justiciable question. An appointment of a chief not preceded by a demonstrable compliance by the President with the obligation to give due consideration to the prevailing customary principles of succession to the chieftainship would be null and void. The Minister's recommendation forms the basis of the President's decision, as it should be based on information relating to H

A matters to which he is required to give due consideration before acting on his own deliberate judgment.

Held, that whether the information as to the customary principles of succession of the clan and placed before the President related to matters which he was required to consider in terms of s 3(2) of the Traditional Leaders Act was a justiciable question. It was not, therefore, one of the matters B contemplated by s 31K of the Constitution which is not justiciable. Such matters are acts of States which a court has no power to investigate.

Held, further, that the effect of the recommendation of the Minister to the President, having been based on an incorrect principle of customary succession, meant that the President did not have the correct facts C upon which he was required to give consideration before making his appointment as to the substantive chief. It was not what the Act required to be put before him. Where the law requires that a particular thing be done in a particular way and something else is done, there is not only a procedural impropriety but the resultant decision is irrational and can be the subject of judicial review.

D *Held,* further, allowing the appeal with costs, that the Minister must make a recommendation to the President for the removal of the first respondent from the chieftainship and that there be a further investigation as to the prevailing customary principles of succession to the chieftainship for consideration by the President.

Editor's note: decision of Ndou J in *Moyo v Mkoba & Ors* 2012 (1) ZLR 143 (H) reversed.

Cases referred to

Chagaresango v Chagaresango & Ors 2000 (1) ZLR 99 (S)

Chipfuvamiti v Nyajina & Anor 1992 (2) ZLR 148 (H)

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

Dhlamini & Ors v Carter NO & Anor (1) 1968 (1) RLR 136 (A); 1968 (2) SA 445 (RA)

Mosome v Makapan NO & Anor 1986 (2) SA 44 (B)

PF ZAPU v Minister of Justice, Legal & Parliamentary Affairs 1985 (1) ZLR 305 (S)

Rushwaya v Min of Local Govt 1987 (1) ZLR 15 (S)

G *Ruzame v Paradzai & Anor* 1991 (1) ZLR 273 (S)

Legislation considered

Constitution of Zimbabwe 1980, s 31K

H Traditional Leaders Act [*Chapter 29:17*], ss 3(1) and (2)

Malaba DCJ

Case information

T Mpofu, for the appellant A

H Moyo, for the first respondent

Judgment

Malaba DCJ: This is an appeal against the judgment of the High Court given on 19 January 2012. The High Court discharged a provisional order under HCB 1396/09. It also dismissed an application for review under case B No. HCB 1410/09.

The provisional order which had been granted on 10 September 2009 reads:

> "TERMS OF FINAL ORDER SOUGHT
>
> 1. That the installation ceremony of the first respondent as substantive Chief Bunina set for 18 September 2009 be and is hereby stayed and/or postponed pending the hearing of an application for review of the decision to appoint C the first respondent as Chief Bunina of Lower Gweru.
> 2. That the applicant shall forthwith file and serve his review application upon the respondents who shall have the right to oppose same in terms of the rules of court.
> 3. That the costs of this application shall be borne by the respondents' only if they oppose it. D
>
> INTERIM RELIEF GRANTED
>
> 4. That the installation ceremony of the first respondent as substantive Chief Bunina be and is hereby stayed and/or postponed pending the determination of the review application filed of record."

The order sought in the review application under case No. HCB 1410/09 reads: E

> "IT IS ORDERED:
>
> 1. That the decision to appoint the first respondent as substantive Chief Bunina be and is hereby set aside.
> 2. That the matter be and is hereby remitted to the office of the second respondent who shall reconvene a selection meeting of all interested parties which shall select a candidate for appointment as Chief Bunina in accordance with the F customary principles of succession of the Bunina clan.
> 3. That the costs of this application shall be borne by the Respondents only if they oppose."

The court *a quo* discharged the provisional order on the return day and dismissed the application for review of the actions of the officials of the G Local Government, Rural and Urban Development, which formed the basis of the decision by the fifth respondent to appoint the first respondent as substantive Chief Bunina.

The relief sought on appeal is an order setting aside the court *a quo's* judgment and substituting in its place an order confirming the interim order; and granting the application for review and setting

the decision of the fifth H

2013 (2) ZLR p141

Malaba DCJ

A respondent aside. The granting of the relief relating to the interim order is no longer possible because the first respondent was installed as substantive Chief Bunina of Lower Gweru on 18 September 2009. He had been appointed on 7 May 2007.

The appellant is the eldest son of Jackson Moyo, the last Chief Bunina of B Lower Gweru, who died in June 2003. The late Jackson Moyo had taken over the chieftainship from his late father Mantiya. After the death of Jackson Moyo the appellant was appointed acting Chief Bunina of Lower Gweru in May 2004 until the expiry of his term in May 2006. The first respondent's father was Mkoba. He was one of the sons of Chief Bunina born of a younger wife. The other direct descendants of Chief Bunina are Mpabanga, Dick C Ndudzo and Lugwalo. Mpabanga and Mkoba were brothers born of the same mother. They were brothers in one house.

The process of choosing a substantive Chief Bunina started in 2005. The appellant alleged in the answering affidavit in the application to the court *a quo* that the dispute over the chieftainship succession arose because the D first respondent objected to his succession to the chieftainship following his father's death. On 19 August 2005 a meeting of all the members of the Bunina family was convened. In attendance were Mr Mukwaira the Deputy Secretary in the fourth respondent's ministry, the Provincial Administrator, the District Administrator for Gweru and the District Administrator for Kwekwe.

The meeting, which had been called to discuss and resolve the question of E who should succeed the late Jackson Moyo as substantive Chief Bunina, was not conclusive. The question which remained unresolved was whether the prevailing customary principles of succession to the chieftainship applicable to the community over which the substantive Chief Bunina would preside were based on patrilineal or collateral succession. The question was not who F amongst the Bunina family members was to be elected Chief Bunina.

The meeting was reconvened on 20 October 2005. The Mantiya family, Mpabanga family, Mkoba family, and Lugwalo family all being direct descendants of Chief Bunina were present. A total of twenty two people represented the families. It is alleged that at the meeting Mr Mukwaira said that G since the Bunina clan was Rozvi by origin they should choose the substantive chief using the collateral customary principles of succession. He went on to direct the members of the families present to elect the person they wanted to become the substantive Chief Bunina. Members of Mkoba, Mpabanga and Lugwalo families voted for the first respondent. Members of Mpabanga and Mkoba families, being descendants of brothers, should have been counted H as one house if an election was an appropriate method of succeeding to the

2013 (2) ZLR p142

Malaba DCJ

chieftainship. The first respondent was then recommended to the President A for appointment as substantive Chief Bunina. The appellant challenged the decision alleging that he was the rightful heir to the Bunina chieftainship.

The second and third respondents' reports to the fourth respondent confirm that the Bunina customary principles of succession to the chieftainship are patrilineal. A report made by one R Dzingirai of the office of the Provincial B Administrator, Midlands, to the Governor of the Midlands Province on 27 October 2005 is to this effect:

> "Records in the file indicate that the Ndebele custom is the preferred mode of succession. An undated family tree supports this contention (find attached). Correspondences in the Chieftainship file suggest that Mantiya was the rightful heir as he is the first born by the senior wife Mavu. C
>
> However due to his youth he was unable to take up his post, therefore Mpabanga was appointed as regent Chief. Mpabanga only ruled for two years at which time Mkoba was nominated to the same position. When Mantiya was of age, he was unable to regain his chieftainship on the basis that Mkoba was unwilling to relinquish the chieftainship.
>
> Reference is made to the District Commissioner's notes dated 12 June 1972 Ref: D Per/4/Mkoba/Bunina Page 3 which states that Mkoba was '. . . a tough, violent, relentless, self centred despot . . . who brooked no opposition, dealt physically violently with anyone who offended or opposed him'. It is argued by the then District Commissioner that Mantiya adhered to the trusty adage that 'better a living coward than a dead

Hero'. In his writings the District Commissioner even went further to note, 'By appointing Mantiya, we re-affirm the principle E repeatedly averred to by the tribal elders, that their custom of succession is patrilineal not collateral. His son Jackson will follow him.'

With the above observations, in mind it would be pertinent to point out that the same sentiments emerged at the following selection meeting, the purpose of which was to appoint a substantive chief after the death of Mantiya. At a meeting held on 19 May 1989, which was chaired by the Acting District Administrator F for Gweru Mr Rushwaya, members present 'unanimously agreed to follow the Ndebele custom of Chief begets a chief hence Mavu, first wife of Bunina, had borne a chief in Mantiya'. One would assume that the same adage was adopted upon Jackson's death, with Golden Moyo, his son acting.

At all these previous meetings, what is consistent is the clan's agreement that the selection system is Ndebele and that Mantiya is the rightful heir of the G chieftainship. The two meetings held in August and October 2005 respectively acknowledge that the people of Bunina are of the Rozvi origin, but the mode of succession has always been aligned more to the Ndebele patrilineal system than the Rozvi."

What is clear from the report, which was written seven days after the meeting of 20 August, is that the decision of Mr Mukwaira was challenged as not H

Malaba DCJ

A having been based on the prevailing customary principles of succession to the Bunina clan chieftainship as reflected by the official records.

In another report by Mr Mupeta (who was the Acting District Administrator for Gweru) to the Provincial Administrator, dated 28 October 2005, it was confirmed that the Bunina system of succession to chieftainship was B endemically Ndebele, although they were Rozvi. It was only after Mr Mukwaira interfered with the debate and advised that in his opinion if they were Rozvi they should follow the house to house system of succession to chieftainship that the first respondent emerged as a contender to succeed Jackson Moyo as Chief Bunina.

The report records that before meeting members of the Bunina family on C 19 August 2005 the officials held a caucus meeting of their own. The report shows that the officials agreed that the patrilineal succession was the prevailing customary principle to be applied. The agreement was not implemented because the first respondent claimed that the family had chosen their own chief. The meeting was then adjourned to 20 October 2005. The report states D that at the meeting of 20 October members of the Bunina family indicated that although they were Rozvi by origin they had followed patrilineal customary principles of succession to their chieftainship. It was then that Mr Mukwaira said if they are Rozvi by origin they should follow the house to house system of succession to chieftainship.

E Following complaints by the appellant and other members of his family to the fourth respondent through the office of third respondent, another meeting of members of the Bunina families was held on 21 June 2006. Although the purpose of the meeting was for the members of the Bunina families to agree on the customary principles of succession, no such agreement was reached or sought to be encouraged by the officials present. At the end of the meeting F the families were asked to vote for those they wanted to be Chief Bunina. Those who voted for the first respondent did so because he was the oldest surviving grandson of Chief Bunina.

The report states:

"Chief Sogwala and Chief Malisa from the same area who also are Rozvi by G origin were at the meeting. They expressed dismay at the development. They encouraged the Bunina families not to change their tradition in order to impose a candidate. They urged the parties not to waive family tradition to facilitate the ascension of an ineligible candidate. The record of the meeting of 21 June 2006 shows that the first respondent was not chosen because he belonged to the house which according to the collateral principle was entitled to succeed H to the chieftainship."

Malaba DCJ

In the memorandum dated 28 August 2006 to the fourth respondent, the A Provincial Administrator refers to the election of the first respondent as Chief Bunina on 21 June 2006 and then states that:

"… Though there was no succession among the family members what sufficed was that Stephen Mkoba, was chosen by the majority of the houses. The decision to appoint Stephen Mkoba from the families,

though non-procedural and non-congruent with either the bi-lateral or collateral system was welcome by this B office in the best interests of the Chieftainship. . .”

The report on the meeting of 21 June 2006 had stated that:

> “Records dating back to 1985 showed deliberations made by the respective families which clearly showed that they were following a Ndebele custom and the Mantiyas were the rightful heirs to the chieftainship (minutes of 4 November 1985). The Mpabanga family asserted that the system of succession was from C father to son. Even Stephen Mkoba said that it was from father to son. This was a selection meeting after the death of Mantiya.”

The court *a quo* found that:

> “The first respondent’s claim to the chieftainship does not seem to be based on a recognisable Ndebele system of succession, custom or tradition of the clan D but merely on some kind of election or poll conducted by Local Government officials.”

The court *a quo* went on to say:

> “In the exercise of his powers the President appointed the first respondent the substantive Chief Bunina on 7 May 2007. This appointment is in accordance with the Rozvi principles of succession. The President in his wisdom and discretion E did not follow the Ndebele system of succession. It is this appointment really that resulted in these two matters.
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> …
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> It is trite that although chiefs are envisaged as hereditary holders of office it is only official recognition by the President that carries with it the title of Chief. In practice the President frequently appoints the person holding traditional title to F the chieftainship, but he is not obliged to do so. Section 3(2) of the Act obviously implies that the President ‘should give due consideration to the customary principles of succession if any applicable to the community over which the Chief is to preside’, as investigated by Ministry of Local Government officials in particular the 2nd respondent. But, once the investigation has been made, the President is free to act as he thinks best in the interests of good governance of G the community.”

The question is whether the recommendation of the fourth respondent to the President, to appoint the first respondent as Chief Bunina, was in accordance with the customary principles of succession of the Bunina clan. The first respondent does not find anything amiss in the fact that he was chosen by means of a poll, as candidate for appointment as Chief Bunina. What is very H

Malaba DCJ

A clear from the letter of 28 August 2006 is that the recommended appointment of the first respondent as Chief Bunina was not in accordance with any prevailing customary principles of succession to the chieftainship. It was for the convenience of the administration.

Section 3 of the Traditional Leaders Act [*Chapter 29:17*] (“the Act”) provides B that:

> “(1) Subject to subsection (2), the President shall appoint chiefs to preside over communities inhabiting Communal Land and resettlement areas.
>
> (2) In appointing a chief in terms of subsection (1), the President –
>
> (a) shall give due consideration to –
>
> (i) the prevailing customary principles of succession, if any, applicable C to the community over which the chief is to preside; and
>
> (ii) the administrative needs of the communities in the area concerned in the interests of good governance.”

The appellant contends that the court *a quo* misdirected itself in concluding that the President’s discretion in the appointment of a chief is unfettered. D The court *a quo* said:

> “… section 3 of the Act provides the President with unfettered discretion in the appointment of a Chief . . . this exercise of executive powers by the President cannot be reviewed.”

The appellant takes issue with the holding by the court *a quo* that s 3(2) of the Act only requires that there be an investigation into the prevailing customary E principles of succession applicable to the community over which the chief is to preside. The court held that the investigation has no bearing on how the President should exercise his powers. The appellant argues that the exercise of discretion in appointing a chief by the President, is impeachable where it is based on incorrect, irrelevant or improper considerations.

F The first respondent argued that:

1. the President has no obligation to necessarily appoint as chief a person holding traditional title to the chieftainship.
2. His discretion in the appointment of a chief is unfettered.
3. The exercise of his powers is not impeachable in any circumstances.
4. The G appointment of a chief is an exercise of Presidential powers which cannot be reviewed by the courts.
5. He is not obliged to follow the recommendations of the second respondent in terms of the Act.

The Constitution of Zimbabwe provides for the extent to which the President's H executive powers are justiciable. Section 31K provides:

2013 (2) ZLR p146

Malaba DCJ

"Extent to which exercise of President's functions justiciable A

(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, 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 B of the act; or

(c) the nature of any advice or recommendation tendered to the President; or

(d) the manner in which the President has exercised his discretion.

(2) Where the President is required or permitted by this Constitution or any other law to act on the advice or recommendation of or after consultation with C any person or authority, a court shall not, in any case, inquire into either of the following questions or matters –

(a) the nature of any advice or recommendation tendered to the President; or

(b) the manner in which the President has exercised his discretion."

Only the President has the power to appoint a chief. It is correct to say that chiefs are Government officials who hold office during pleasure and D contingent upon good behaviour. The appointment of chiefs has since 1927 been controlled by statute. In deciding to appoint a particular person as the chief to preside over a community, the President acts on his own deliberate judgment. In other words, he is not obliged to appoint that person. In those matters in respect of which the President is empowered to act in his own E discretion, the manner in which he exercises that discretion is not subject to judicial review unless he has exercised his discretion outside the law, that is, where the President has in the exercise of his discretion, made an error of law. See *Chipfuvamiti v Nyajina & Anor* 1992 (2) ZLR 148 (H).

The court *a quo* accepted that in terms of s 3(2) of the Act an inquiry is required to be carried out on the prevailing customary principles of succession F applicable to the community over which the person to be appointed chief is to preside. The court went on to find that once the recommendation was made, the President was free to act as he thought fit. The court cannot inquire into the question whether recommendation was made to the President to appoint the first respondent as Chief Bunina and whether he acted on such advice. G

Having accepted that s 3(2) of the Act required that an inquiry be conducted by the officials of the Ministry of Local Government, Rural and Urban Development to ascertain the prevailing customary principles of succession applicable to the community the court ought to have inquired into the question whether those investigations produced the information on the matters to which the President is required to give due consideration. H

2013 (2) ZLR p147

Malaba DCJ

A The President is required to act on his own deliberate judgment after he has information relating to the prevailing customary principles of succession applicable to the community to which he must give due consideration. Whether the information placed before the President relates to the matters to which, he is required to give due consideration is a justiciable question. This means that this is not one of those matters contemplated by s 31K of B the Constitution which are not justiciable.

The validity of the exercise of the power to appoint a chief is made to be subject to due consideration having been given to the prevailing customary principles of succession to the chieftainship applicable to the community over which the chief is to preside. An appointment of a chief not preceded by a demonstrable compliance by the President with the obligation to give C due consideration to the prevailing customary principles of succession to the chieftainship would be null and void.

In *Rushwaya v Minister of Local Government* 1987 (1) ZLR 15 (S) it was held at 18H that:

> "Notwithstanding s 66(3) of the Constitution, the High Court can review advice D given to the President by the responsible Minister in relation to the appointment of a chief in terms of the Chiefs and Headmen Act, 1982. The grounds on which such advice can be reviewed are illegality, irrationality and procedural impropriety."

Section 66(3) of the Constitution is now s 31K, which spells out the scope or limit of the executive function the exercise of which is not justiciable. E It is accepted that the Minister's recommendation forms the basis of the President's decision as it should be based on information relating to matters to which he is required to give due consideration before acting on his own deliberate judgment.

In *PF ZAPU v Minister of Justice, Legal & Parliamentary Affairs* 1985 (1) ZLR 305 (S) F it is stated in the headnote that:

> "The exercise of an executive prerogative is not necessarily an act the question of the validity of which is beyond jurisdiction of the court. The term act of State should only be applied to those acts in respect of which the courts' jurisdiction is ousted. All other executive acts, whether within the prerogative or not, are subject to review on the usual grounds."

G At p 313G-H Dumbutshena CJ stated the general principle in these words:

> "In my view an act of State is an act of the executive in those areas of executive prerogative which oust the jurisdiction of the courts. But such executive prerogatives are now very few and far between because whenever the exercise of executive prerogative affects the private rights, interests and legitimate expectations of the subjects or citizens the jurisdiction of the courts is not H ousted. The private rights, interests and legitimate expectations of the citizens

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Malaba DCJ

> subject to judicial review acts of the executive which would otherwise oust the A jurisdiction of the courts."

The Act governs the appointment of a person to a particular chieftainship and the recognition and establishment or abolition of any particular chieftainship. Under the statute the functions are vested in the President. In exercising these powers the President has an absolute discretion, unfettered by any statutory B shackles other than the duty to give due consideration to the customary principles of succession if any, applicable to the community over which such chief is to preside. It is only the President who can determine who shall be appointed as chief. The court has no power to investigate, determine or even recommend to the President who should be appointed as the chief in the area.

The same principle of law by which the President is vested with absolute C discretion in the exercise of the powers of appointing chiefs was recognised in *Ruzane v Paradzai & Anor* 1991 (1) ZLR 273 (S) where at 280H-281A Manyarara JA observed that "the clear meaning of the provision is that the President is required to give due consideration to the customary principles of succession", not to follow them in making his choice. D

In *Chagaresango v Chagaresango & Ors* 2000 (1) ZLR 99 (S) it is stated in the headnote:

> "… While ordinarily it is not competent for a court to investigate how the President has exercised his discretion, it may investigate whether the relevant Minister and his officials, in formulating their advice to the President, acted on sound principle. Where it was shown that the appointment of a chief deviated from the ordinary E customs and traditions of the clan in question, and that the Minister had not given due consideration to the customary principles of succession before making his recommendation to the President, the court can make the declaration to the effect that the customary principles of succession to the particular chieftainship were not given due consideration."

See also *Rushwaya's* case *supra* at pp 154-160 and 18F-19B. F

> In *CCSU v Minister of the Civil Service* [1984] 3 All ER 935 (HL) Lord Diplock, at 950j-951d, put and described the three grounds of judicial review as follows:
>
> "The first ground I would call 'illegality', the second 'irrationality' and the third 'procedural impropriety'.

By 'illegality' as a ground for judicial review I mean that the decision-maker G must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.

By 'irrationality' I mean what can by now be succinctly referred to as 'Wednesbury unreasonableness' (see *Associated Provincial Picture Houses Ltd v Wednesbury* H

2013 (2) ZLR p149

Malaba DCJ

A *Corp* [1947] 2 All ER 680, [1948] 1 KB 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system.

B I have described the third head as 'procedural impropriety' rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice."

C It is clear that what is reviewable is not the executive act of the President. The court cannot inquire into the fact that the President decided in the exercise of his discretion to appoint the first respondent instead of any one else as Chief Bunina. The court cannot inquire into what information was taken into account by the President in making his decision and whether the D decision was justifiable on the information.

The court *a quo* failed to appreciate the effect of the position taken by the officials in the fourth respondent's ministry that although the recommendation to appoint the first respondent as Chief Bunina was "non-procedural and non-congruent" with either the patrilineal or collateral customary principles of E succession, it was considered to be in the best interests of the chieftainship.

The recommendation was not based on a finding, as implied by the court *a quo*, that the customary principle of collateral succession was found to be the prevailing customary principle of succession to the chieftainship applicable to the community over which Chief Bunina presided. The learned judge misdirected himself when he held that the appointment of the first F respondent as Chief Bunina was in accordance with the Rozvi customary principles of succession.

The effect of the finding of the fact of the recommendation made to the President not having been based on any prevailing customary principle of succession is that the President did not have before him facts on the G prevailing customary principles of succession to which he was required to give due consideration before making the appointment of first respondent as substantive Chief Bunina.

The method of choosing the person to be appointed substantive Chief Bunina was the one by which members of some of the houses of the descendants H of Chief Bunina voted for their preferred candidate. The elective method

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2013 (2) ZLR p150

Malaba DCJ

of choosing a person to become a chief is not necessarily consistent with A customary principles of succession to chieftainship.

The court *a quo* said that the fourth respondent acted in terms of the proviso to s 3(2)(b) of the Act, which reads:

"Provided that, if the appropriate persons concerned fail to nominate a candidate for appointment as chief within two years after the office of chief became vacant, B the Minister, in consultation with the appropriate persons, shall nominate a person for appointment as chief."

There is nothing in the record of proceedings to support the submission that the fourth respondent acted in terms of the proviso. Section 3(2)(b) of the Act only comes into effect where there has been failure to nominate a candidate in accordance with the prevailing customary principles of C succession applicable to the community over which the chief is to preside. The circumstances envisaged under the proviso as the precondition for its application did not arise in this case.

The recommendation to the President was contrary to the evidence that the prevailing customary principles of succession to the chieftainship were D patrilineal. The officials of the Ministry of Local Government, Rural and Urban Development did not base their recommendation on the evidence. They decided that because the clan was Rozvi by origin they had to apply the collateral principles of succession to the chieftainship. That decision was contrary to the evidence to the effect that succession to the chieftainship after the death of the original Chief Bunina was based on the patrilineal principles E of succession because there were no brothers who would have contested the right to succeed him in terms of the collateral principles of succession. The development was important to consider because it is according to the customary principle of collateral succession that a son should not succeed his father as chief.

The problem with this case is that whilst the first respondent claimed that F the collateral principles of succession were applicable, he was not himself appointed in terms of those principles. He was chosen on the basis of a vote by members of the other three families. He must have known that on the house to house customary principles of succession he had no claim to the chieftainship. The Mkoba house would have had its turn if the primacy of G rotational succession was observed. The houses that would have been entitled to succeed to the chieftainship were those of the descendants of Lugwalo, Dick Ndudzo and Mpabanga. Those who voted for him did so out of deference because he was the oldest of the surviving descendant grandsons of Chief Bunina. No evidence was led of the fact that it was a customary principle of succession to the chieftainship that the oldest surviving descendant of H

Malaba DCJ

A Chief Bunina has a right to succeed to the chieftainship even if his house is not next in the line of succession.

The appointment was not supported by the community over which the chief was to preside. The evidence showed that whilst the Bunina family may have migrated from Matojeni Area and were Rozvi by origin they settled in an B area inhabited by a community which is predominantly Ndebele. Over many years they practised the customary principles of succession to the patrilineal chieftainship in line with the customs of the community over which they presided. If that practice had changed, the officials of the Ministry of Local Government, Rural and Urban Development should have gathered sufficient evidence of the fact of that change from the community. Instead of gathering C the evidence, they imposed their own views on which customary principles of succession should be applied.

A thorough investigation of the matter was of paramount importance because the last substantive Chief Bunina had succeeded to the chieftainship on the basis of the patrilineal principles of succession. The evidence on record D shows that the first respondent approved in 1985 of Jackson succeeding to the chieftainship following the death of his father Mantiya on the basis of the customary principles of patrilineal succession. He must have accepted that Mkoba had held the office as a regent Chief Bunina because Mantiya was a minor. The act by the President was initiated by a recommendation not based on facts or findings arrived at by a process prescribed by law. The court *a* E *quo* did not address this question of compliance by the officials concerned with the due process. Where the law requires that a particular thing be done in a particular way and something else is done there is not only a procedural impropriety the resultant decision is irrational.

The President was made to act on what the officials decided was the customary F principles of succession to the Bunina clan chieftainship without reference to evidence, including the official records. He was made to appoint a person as a chief who was not chosen by his own people in terms of the very customary principles of succession the officials had sought to impose on the community. The first respondent was elected by members of the Bunina family who were at the meeting of 26 June 2006 because he was the oldest surviving grandson G of the Chief Bununa. He was not chosen because he was the eldest son in the house which was entitled to succeed to the chieftainship according to the customary principles of collateral succession.

The President did not act on the basis of what was considered by the community to be the prevailing customary principle of succession as required by law. In H other words, what was placed before the President to enable him to exercise

Malaba DCJ

his own judgment in reaching the decision to appoint the chief was not what A the statute required to be placed before him. The power vested in the President did not extend to taking into account unlawful matters. It is a question of the limit of the power as opposed to the manner of its exercise. See *Dhlamini v Carter* 1968 (1) RLR 136 (A); 1968 (2) SA 445 (RA) at 453D-F.

For the President to give due consideration to the matters specified in s B 3(2) of the Act before he can act on his deliberate judgment to appoint a chief he must have relevant facts which have a bearing on those matters: *Mosome v Makapan NO & Anor* 1986 (2) SA 44 (B). "Due" consideration means "proper" consideration. By making the validity of the exercise by the President of the power to appoint a chief depended upon compliance with the requirements of subs (2) of s 3, the Act underlines the importance of C having to give the due consideration to the prevailing customary principles of succession in the appointment of a chief.

The memorandum of 28 August 2006 and the finding of the court *a quo* show that the question as to the prevailing customary principles of succession to the Bunina chieftainship remains unresolved. The question was not thoroughly D and objectively investigated by the officials of the fourth respondent's Ministry. The prevailing customary principles of succession applicable to the community over which the chief was to preside had to be established before the President exercised his powers under s 3(1) of the Act. The other matters the President is enjoined by s 3(2)(ii) of the Act to take into account can only be considered where there is "due consideration" of the prevailing E customary principles of succession to a chieftainship. There cannot be "due consideration" of something which has not been established as a fact.

Accordingly, the appeal is allowed with costs. The costs are to be paid by the first and fourth respondents jointly and severally, the one paying the other to be absolved.

The judgment of the court *a quo* is set aside and the following is substituted F instead that:

(1) It is hereby declared that the customary principles of succession to the Bunina chieftainship were not ascertained and given due consideration in the appointment of the first respondent as Chief Bunina of Lower G Gweru.

(2) The fourth respondent, forthwith make a recommendation to the President for the removal of the first respondent from the chieftainship of the Bunina clan.

(3) The second, third and fourth respondents cause a meeting of all interested parties to investigate and deliberate on the prevailing customary principles H

Malaba DCJ

A of succession to the Bunina chieftainship for due consideration by the President in the appointment of a substantive Chief Bunina.

(4) The respondents are to pay the costs of the application; jointly and severally, the one paying the others to be absolved.

B GOWORA JA and CHEDA AJA concurred.

Coghlan & Welsh, appellant's legal practitioners

Joel Pincus & Wolhuter, first respondent's legal practitioners

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Document 19 of 79

Source:
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S v JOHN 2013 (2) ZLR 154 (H)

Citation	2013 (2) ZLR 154 (H)
Case No	Judgment No. HH-242-13
Court	High Court, Harare
Judge	Mafusire J
Heard	1 August 2013; *CAV*
Judgment	7 August 2013
Counsel	*T Magwaliba,* for the applicant *J Uladi,* for the respondents
Case Type	Urgent chamber application
Annotations	No case annotations to date

Flynote

Criminal procedure – *review – incomplete proceedings – when a superior court may interfere – refusal to grant discharge at end of State case – no evidence linking accused with offence – accused being put on his defence to "clear" his name – superior court entitled to interfere*

Headnote

The applicant was charged with fraud, the allegation being that he had D misrepresented that he was the new owner or director of a certain company, the original owners and directors of which had emigrated. He was alleged to have fraudulently drawn up certain company documents and filed them with the Registrar of Companies. At the close of the E State case the applicant applied for a discharge. The application was based on the alleged glaring defects in the charge and the evidence led. The application was refused and some weeks later the applicant filed an application for review, challenging the magistrate's decision to put him on his defence. Shortly after that, the applicant applied for a stay of the trial pending the determination of the review application. That F application was also refused, the magistrate ruling that he would not stop the proceedings unless an order to that effect was obtained from the High Court. The applicant then filed an urgent chamber application, seeking a stay of the trial proceedings in the magistrates court, pending the determination of the application for review. G

The applicant showed that none of the State witnesses incriminated him in any way. In particular, the witness from the Registrar of Companies, who was alleged to have been prejudiced, had actually exonerated him. The only evidence that seemed to have influenced the magistrate in his decision was the hearsay evidence of the investigating officer who apparently was under pressure from a disgruntled former employee of H

A the company. The magistrate, in ordering that the applicant be put on his defence, said that he did so for the applicant to "clear" his name. The respondents argued that superior courts normally refrain from interfering in uncompleted proceedings and that there was no danger of an irreparable harm or of a miscarriage of justice. The trial should be allowed to proceed without interference. If, at the end of it, the applicant B were aggrieved by the outcome, he could always appeal.

Held, that generally, the superior courts do not encourage the bringing of unterminated proceedings for review, but there may be circumstances which may justify the reviewing of unterminated proceedings. An application of this nature could only succeed if the application for review C has prospects of success. A superior court will normally intervene only in exceptional circumstances

of proven gross irregularity vitiating the proceedings and giving rise to a miscarriage of justice which cannot be redressed by any other means or where the interlocutory decision is so clearly wrong as to seriously prejudice the rights of the litigant.

Held, further, that a court must acquit at the close of the State case where D (a) there is no evidence to prove an essential element of the offence; (b) there is no evidence on which a reasonable court, acting carefully, might properly convict; or (c) where the prosecution evidence is so manifestly unreliable that no reasonable court could safely act on it. The question whether at the close of the State case there is, or there is no, evidence that the accused committed the offence charged is one of fact. E It is a misdirection where the trier of facts sees facts that are completely absent or fails to see facts that are patently conspicuous. The magistrate, despite glaring deficiencies in the State evidence, nonetheless failed to consider that there was no evidence linking the accused to the crime. There was thus every likelihood that the review court might find that F that there was a misdirection so gross as to warrant interference with the trial before it was completed. The review court might also find that the directive by the magistrate that the applicant be put on his defence to "clear" his name was irregular and amounted to a shifting of the onus to the applicant to prove his innocence.

G *Held*, further, that in weighing the balance of convenience between the need for a judicial officer to manage his court by, for instance, insisting on the continuation of a scheduled hearing in the interests of justice and the efficient administration of justice, against fairness and the delivery of quality justice, the balance favoured the postponement of the trial to H allow the review application to be heard.

2013 (2) ZLR p156

Mafusire J

Cases referred to A

A-G v Makamba 2004 (2) ZLR 63 (S)

A-G v Makamba 2005 (2) ZLR 54 (S)

Ismail & Ors v Additional Magistrate, Wynberg & Anor 1963 (1) SA 1 (A)

Matapo & Ors v Bhila NO & Anor 2010 (1) ZLR 321 (H)

S v Kachipare 1998 (2) ZLR 271 (S)

S v Kuruneri HH-59-07 B

S v Tsvangirai & Ors 2003 (2) ZLR 88 (H)

Legislation considered

Criminal Procedure and Evidence Act [*Chapter 9:07*], s 198(3) C

Case information

T Magwaliba, for the applicant

J Uladi, for the respondents

Judgment

Mafusire J: This is an urgent chamber application. The applicant seeks a provisional order for a stay of the criminal trial against him in the D magistrate's court pending the determination of his application for review which is pending in this court.

The applicant was charged with fraud as defined in s 136 of the Criminal Law (Codification and Reform) Act, [*Chapter 9:23*]. It was alleged that he had unlawfully misrepresented that he was the new owner or director of a E certain company, the original owners and directors of which had emigrated. The applicant was alleged to have fraudulently drawn up certain company documents and filed them with the registrar of companies. prejudice was said to have been caused to the good reputation and good administration of the registrar of companies.

At the close of the State case the applicant applied for a discharge in terms F of s 198(3) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] (the CP & E Act). The application, which was

based on alleged glaring defects in the charge and the evidence led, was refused. That was on 22 May 2013. On 9 July 2013 the applicant filed the application for review, challenging the magistrate's decision to put him on his defence. On 16 July G 2013 the trial magistrate, who in these proceedings is cited as the second respondent, filed an opposing affidavit. He simply stated that the application was opposed in its entirety and that the review application could not stop the continuation of the trial. Reference was made to the Supreme Court case of *Attorney-General v Makamba* 2004 (2) ZLR 63 (S), a judgment of Ziyambi JA, a copy of which the magistrate apparently intended to attach. However, H

Mafusire J

A he inadvertently attached the judgment by Cheda JA in the other Supreme Court case of *Attorney-General v Makamba* S-41-04.

On 18 July 2013 the applicant applied to the magistrate for a stay of the trial pending the determination of the review application. That application was also refused. The magistrate ruled that he would not stop the proceedings B unless an order to that effect was obtained from this court. He directed that the trial would continue on 14 August 2013. On 24 July 2013 the applicant filed this urgent chamber application. The interim relief sought was that the trial proceedings in the magistrate's court be stayed pending the determination of the application for review. I heard the application on 1 August 2013. Both parties were agreed that the matter was urgent. After argument I reserved C judgment.

In his application the applicant has made an analysis of the evidence given against him up to the close of the state case. He has concluded that none of the State witnesses incriminated him in any way. In particular, the witness from the registrar of companies had actually exonerated him. The fraud D allegation is predicated on the alleged prejudice to the registrar of companies. The applicant says that the only evidence that seemed to have influenced the magistrate in his decision was the hearsay evidence of the investigating officer who apparently was under pressure from a disgruntled former employee of the "stolen" company.

The applicant expressed concern that the magistrate's conduct would E inevitably lead to a miscarriage of justice in that, in his ruling dismissing the application for discharge at the close of the State case, he had put the applicant on his defence to "clear" his name. This, according to the applicant, was an irregular reversal of the onus of proof. It was now the applicant who was to prove his innocence. This was a clear violation of the presumption of F innocence. Given the inadequate evidence led by the state up to the time of the closure of its case, the magistrate's decision to put the accused person on his defence was so outrageous in its defiance of logic that no sensible person having applied his mind would have arrived at it. It was unprocedural for a court to facilitate the state to bolster its case by the defence evidence. That, in summary, is the applicant's argument for the review application.

G The urgent application was meant to stop the resumption of the criminal trial on 14 August 2013. It was contended that the review application would be rendered academic if the trial went ahead. At the hearing the second respondent opposed the application on the basis that superior courts normally refrain from interfering in uncompleted proceedings. It was submitted that H there was no danger of irreparable harm or of a miscarriage of justice. The

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Mafusire J

trial should be allowed to proceed without interference. If at the end of it the A applicant is aggrieved by the outcome he can always appeal. To allow such an application would open the flood gates. Any accused person unhappy with the exercise of discretion by a magistrate in dismissing an application for discharge at the close of the State case would always rush to this court. That would seriously interfere with the smooth administration of justice. B

Strong reliance was placed by the respondents on the Supreme Court decision by Ziyambi JA in the *Makamba* case aforesaid. However, I find that that judgment dealt with a different issue. Other than the remark by the Supreme Court that the High Court had found justification "… for the unusual course of interfering in an uncompleted trial…", I do not think the case is relevant. It dealt with the position where a judge, in exercising review powers in C terms of the High Court Act [*Chapter 7:06*],

would need the concurrence of another judge before he or she could set aside or alter the proceedings of an inferior court or tribunal.

The classical position is that generally a superior court does not encourage the bringing of uncompleted proceedings for review. In *Matapo & Ors v Bhila* D *NO & Anor* 2010 (1) ZLR 321 (H), this court, *per* Uchena J, said at 325C-D:

> "Generally this court does not encourage the bringing of unterminated proceedings for review. *There are, however, circumstances which may justify the reviewing of unterminated proceedings*. This means this court will not lightly stay proceedings pending review. *An application of this nature can only succeed if the application for review has prospects of success*" (emphasis added). E

Thus it is *not* the position that no review or interference is competent at all unless the proceedings in the inferior court have been completed. In the *Matapo* case above, for instance, this court interfered in the middle of the trial in the magistrate's court where it was satisfied that the magistrate's refusal to recuse himself would render his proceedings a nullity, as the accused person's grounds for seeking recusal had merit. The learned judge went on to state: F

> "The probability of the proceedings being a nullity justifies the stopping of the proceedings pending a determination of their validity by the reviewing court. It would be prejudicial to the accused, and a waste of time and resources, for the trial court to carry on with a trial which is likely to be declared a nullity.

In *Attorney-General v Makamba* 2005 (2) ZLR 54 (S) Malaba JA, as he G then was, stated at 64B-D:

> "The general rule is that a superior court should intervene in uncompleted proceedings of the lower courts only in exceptional circumstances of proven gross irregularity vitiating the proceedings and giving rise to a miscarriage of justice which cannot be redressed by any other means *or where the interlocutory decision is clearly wrong as to seriously prejudice the rights of the litigant*" (emphasis added) H

2013 (2) ZLR p159

Mafusire J

A In exercising review powers, superior courts restrain themselves from unnecessarily interfering with the exercise of judicial discretion bf the inferior courts or tribunals. Unless the exercise of discretion by the inferior court or tribunal was injudicious or so grossly wrong as to amount to a miscarriage of justice, the superior court will let the decision pass even though it might itself have come to a different decision.

B It is not every wrong decision by the inferior court that warrants interference. In the *Makamba* case above Malaba JA, at p 64D-E, quoted with approval the remarks of Steyn CJ in *Ismail & Ors v Additional Magistrate, Wynberg & Anor* 1963 (1) SA 1 (A):

> "It is not every failure of justice which would amount to a gross irregularity C justifying intervention before completion … A superior court should be slow to intervene in unterminated proceedings in a court below and should generally speaking confine the exercise of its powers to 'rare cases where grave injustice must otherwise result or where justice might not by other means be obtained"

In this application Mr *Uladi* submitted that the applicant was not without a remedy. He could appeal any adverse decision against him. He could always D choose to exercise his constitutional right to remain silent and thereby obviate the danger of self-incrimination. However, Mr *Magwaliba* for the applicant urged that the applicant's situation should be deemed as one of those exceptional cases contemplated by the law and that for the applicant to exercise the right to silence would hardly be satisfactory since in terms E of s 199 of the CP & E Act, such conduct could invite an adverse inference against him.

Naturally I do not, at this stage, have to decide the review application or consider the applicant's prospects of success in much greater detail. But I must of necessity consider the merits of that application and assess the F prospects of success before I can be able to pass judgment in this application.

Section 198(3) of the CP & E Act, which governs discharges at the close of the State case, reads:

> **"198 Conduct of trial**
>
> (1) …
>
> (2) … G
>
> (3) If at the close of the case for the prosecution *the court considers* that there is no evidence that the accused committed the offence charged in the indictment, summons or charge, or any other offence of which he might be convicted thereon, it *shall* return a verdict of not guilty" (emphasis added).

Thus a court has no discretion. It was noted by the Supreme Court in *S v* H *Kachipare* 1998 (2) ZLR 271 (S) that, unlike its precursor, namely s 188 (3)

Mafusire J

of [*Chapter 59*], which used "may" as opposed to "shall", in the current s A 198(3) a court must acquit at the close of the State case where:

(i) there is no evidence to prove an essential element of the offence;

(ii) there is no evidence on which a reasonable court, acting carefully, might properly convict,

(iii) the evidence on behalf of the State is so manifestly unreliable that no B reasonable court could safely act on it.

It was also noted in that judgment at 276G-H, that unlike in South Africa, in this country there is no longer any controversy as to whether a court may properly refrain from exercising its discretion in favour of the accused, if at the close of the case for the prosecution it has reason to suppose that the C inadequate evidence adduced by the state might be supplemented by defence evidence. See also *S v Kuruneri* HH-59-07 and *S v Tsvangirai & Ors* 2003 (2) ZLR 88 (H).

Section 198(3) opens with the words: "If at the close of the case for the prosecution *the court considers that …*" In my view, there should be no D difficulty for the review court where the magistrate does in fact consider that there is no evidence adduced by the State at the close of its case but goes on to refuse the discharge application, opting to hear the defence evidence. That decision would be contrary to the law. The difficulty arises, in my view, where the magistrate, despite glaring deficiencies in the State evidence, nonetheless fails *to consider that* there is no evidence linking the accused to the crime. E

Plainly, the question whether at the close of the State case there is, or there is no evidence that the accused committed the offence charged is one of fact. It is a misdirection where the trier of facts sees facts that are completely absent or fails to see facts that are so patently conspicuous.

I have briefly considered the application for review that is pending in this F court, and in particular the record of proceedings in the magistrate's court. I have also considered the magistrate's judgment dismissing the application for discharge. I think that there is every likelihood that the review court might find that that there was a serious misdirection so gross as to warrant interference with the trial even before it is completed. To begin with, it is G curious that the charge is about the prejudice said to have been suffered, not by the original owners of the company in question, not by the other company with which a tribute agreement was entered into and consummated, but by the Registrar of Companies whose reputation and good administration was said to have been tarnished. Nobody else but the State, through the police and the disgruntled former employee, seemed to complain. H

Mafusire J

A As pointed out before, the witness from the Registrar of Companies had nothing against the applicant. None of the rest of the witnesses, except perhaps the investigating officer and the former employee, had anything against the applicant. The investigating officer testified on his investigations and on the witnesses that he had assembled. He had no independent knowledge of the B fraud himself. All the witnesses that he had assembled, other than the former employee, said nothing incriminatory against the applicant. Even that former employee merely alleged that he once worked for the company in question and that *he was informed* that it had not been sold. That is hardly evidence of fraud against the applicant. At the hearing of the urgent chamber application C Mr *Uladi* for the respondents submitted that the second respondent must have considered that the evidence of the witness from the firm of chartered accountants that used to audit the books of the "stolen" company had been relevant to the charge and that therefore the accused had to be put on his defence. However, all that the witness from the firm of chartered accountants D said was that she had not seen any company resolutions in which the applicant had been appointed a director of the company. In my view, even if that evidence was relevant, it was of no value to the offence charged.

The review court might find that the directive by the second respondent that the applicant be put on his defence to "clear" his name was irregular. It may E have amounted to a shifting of the onus to the applicant to prove his innocence when there was probably no shred of evidence of the

commission of the offence at the close of the state case. In reality, the applicant was probably being asked to clear his name against mere suspicions by the investigating officer and those urging him on.

F The review court might find that there was a failure by the second respondent to see that at the close of the state case there was in reality no evidence of the commission of the offence with which the applicant was charged and therefore that there was a gross misdirection.

The review court might find that all the criteria for discharge at the close of G the state case as set out in the *Kachipare* case and others were in fact satisfied. It is necessary to weigh the balance of convenience between the need for a judicial officer to manage his or her court by, for instance, insisting on the continuation of a scheduled hearing in the interests of justice and the efficient administration of justice, against fairness and the delivery of quality justice. H In *Matapo* above at 329-330 Uchena J stated as follows:

Mafusire J

> "I entirely agree with Harms JA's comments [1] on the judicial officers' responsibilities A in the management of cases that come before them for trial or preparation for trial. I would only add that this equally applies to magistrates who in fact preside over more cases than judges. The need for firm control of proceedings is called for, as a supine approach will result in avoidable backlogs. The need for efficient court management by judicial officers must, however, give in to the delivery of quality justice, which must be seen to be done. In short, a judicial officer must B be firm and fair, allowing genuine applications for postponement, and turning down those made for dilatory purposes."

I am satisfied that the application for review has strong merit. The balance of convenience favours the postponement of the trial to allow the review application to be heard. I am of the view that the magistrate's dismissal of the discharge application was not about an injudicious exercise of discretion C because such discretion is not available. It was about his failure to consider that there was no evidence led by the State when it closed its case linking the accused to the offence. The magistrate seems to have seen something which in reality was non-existent. He failed to see that such evidence as was led either exonerated the accused or was harmless to him. That failure, in my view, was so gross as to warrant interference. The applicant is entitled D to an opportunity to present his application for review for real relief rather than for academic purposes. If I do not grant the interim relief the review application will just become one for academic purposes. At any rate the matter will be ventilated and canvassed more fully on the return day. In the meantime I grant the interim order sought as follows:

Pending the determination of this matter on the return day, the trial proceedings E in the magistrates court under CRB R874/12 are hereby stayed.

Mahuni & Mutatu applicant's legal practitioners

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

1 In *Take & Save Trading CC & Ors v Standard Bank of South Africa Ltd* 2004 (4) SA 1 (SCA) at 4 -5

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Document 20 of 79

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2013/Volume 2/MASANGO v FARMERS' COMMODITY STOCK EXCHANGE (PVT) LTD & RELATED CASES 2013 (2) ZLR 163 (H)

MASANGO v FARMERS' COMMODITY STOCK EXCHANGE (PVT) LTD & RELATED CASES 2013 (2) ZLR 163 (H)

Citation	2013 (2) ZLR 163 (H)
Case No	Judgment No. HH-248-13
Court	High Court, Harare
Judge	Mafusire J
Heard	6 June 2013; 7 June 2013; 19 June 2013; 20 June 2013; 21 June 2013; *CAV*
Judgment	12 August 2013
Counsel	*C W Gumiro*, for the plaintiff in case 1 *G C Manyurureni*, for the plaintiffs in the remaining cases *R J Gumbo*, for the defendant in case 1, and for the second defendant in the remaining cases
Case Type	Civil trial
Annotations	No case annotations to date

Flynote

Employment – *employee – who is – distinction between employee, agent and independent contractor – test of control and supervision as showing* D *whether person is an agent or independent contractor*

Headnote

An employee, an agent and an independent contractor all render service to another person for remuneration, but there are differences. An accurate test for distinguishing the agent from the independent contractor is that the agent has authority to bind his principal in contract, whereas E the independent contractor has no such power. The degree of control, supervision and freedom also helps in determining whether a particular contractual relationship is one of master and servant or one of an independent contractor and principal. "Control" is a wide concept. It includes, *inter alia*, the right of an employer to decide what work is to F be done by the employee, the manner in which it is to be done by him, the means to be employed by him in doing it, the time when and the place where it is to be done by him. Supervision implies the right of the employer to inspect and direct the work being done by the employee.

The difference between an agent and an independent contractor is that an G agent is bound to act in the matter of the agency subject to the directions and control of the principal, whereas an independent contractor merely undertakes to perform certain specified work, or produce a certain specified result, the manner and means of performance or production being left to his discretion, except as far as they are specified by the contract. The contract between master and servant is one of letting and H hiring of services (*locatio conductio operarum*), whereas the contract

between a principal and a contractor is the letting and hiring of some A definite piece of work (*locatio conductio operis*).

The fact that the employer provides a motor vehicle or an office or a telephone, or that restrictions are placed upon the work the person does for the employer, does not necessarily make the person an agent. B

Cases referred to

Colonial Mutual Life Assurance Soc Ltd v Macdonald 1931 AD 412

Dennis Edwards & Co v Lloyd 1919 TPD 291

Mkize v Martens 1914 AD 382

Smit v Workmen's Compensation Commr 1978 (1) SA 339 (C)

Smit v Workmen's Compensation Commr 1979 (1) SA 51 (A) C

Southampton Assurance Co of Zimbabwe v Mutuma & Anor 1990 (1) ZLR 12 (H)

van der Byl's Est v Swanepoel 1927 AD 141

Legislation considered

Labour Act [*Chapter 28:01*], s 2 (definition of "employee" and D "employer")

Case information

C W Gumiro, for the plaintiff in case 1

G C Manyurureni, for the plaintiffs in the remaining cases

R J Gumbo, for the defendant in case 1, and for the second defendant in the E remaining cases

Judgment

Mafusire J: In September 2010 some 11 farmers from the Glendale farming area of Zimbabwe sued, on separate summonses, a company called Farmers' Commodity Stock Exchange (Pvt) Ltd, in the one case, and one Peter Kenneth jointly with that company in the other cases. The claims were F for payment of various sums of money. The farmers claimed they had sold maize grain to Farmers' Commodity Stock Exchange (Pvt) Ltd (hereafter referred to as FCSE) through Peter Kenneth. They alleged that Peter Kenneth was an employee or agent of FCSE. The plaintiff in case no 1, Tonderai Abel Masango (hereafter referred to as the first plaintiff), alleged that he had sold and delivered soya beans as well. G

Upon application by FCSE, all the 11 cases were consolidated to be heard by a single judge.

The background to the claims was common cause. FCSE was in the business of buying maize from various parts of the country. In the Glendale area they were buying the maize through Peter Kenneth. Peter Kenneth was renting H

A premises from the local authority. He used those premises as a collection depot. The bagged grain would be collected from the different farms by trucks contracted by FCSE or Peter Kenneth. At Peter Kenneth's depot were large containers for FCSE. The grain would be stored in those containers before dispatch to the various customers in and around Harare. Peter Kenneth dealt directly with the farmers. He sourced the grain and paid the farmers. His B terms of payment were said to be cash within seven days of delivery. FCSE was supplying the cash. Peter Kenneth moved around with a Mazda van emblazoned with FCSE's name and logo.

Problems soon arose. Peter Kenneth did not pay for all the grain delivered. The farmers complained. Peter Kenneth became evasive. The farmers reported C the matter to the police. Initially more than 50 farmers were involved. Both Peter Kenneth and certain representatives of FCSE were arrested. Peter Kenneth took rat poison in a suicide attempt. He was rushed to hospital just in time. He survived. FCSE's representatives Mark Oliver Hutchings (Mark Hutchings) and Jonathan Paul Kennedy (J P Kennedy) were detained D in custody for several weeks before being released on bail.

The charge against Peter Kenneth, FCSE, Mark Hutchings and J P Kennedy was fraud as defined in s 136(a) and (b), as read with s 277, of the Criminal Law (Codification and Reform) Act [*Chapter 9:13*]. Evidently s 277 was invoked to attach personal liability on Mark Hutchings and J P Kennedy. E They were said to be the directors of FCSE.

The particulars of the charge were that from July to August 2009 the accused persons deceived the farmers by purporting to be buying their maize at $300 dollars per tonne but that they did not pay them. Initially Peter Kenneth was a State witness. Subsequently he was jointly charged and tried together with FCSE and its representatives aforesaid Mark Hutchings and J P Kennedy. F FCSE and its

representatives were acquitted. Peter Kenneth was convicted and sentenced to 13 years' imprisonment. Although he was in default at the time of the trial in this matter, he was said to be out on bail pending appeal. It was also common cause that, even after that conviction, Peter Kenneth had again been subsequently convicted of a similar offence in which the victims G were two of the farmers, Davidzo Ethel Shirihuru and Felix Mazivarimwe. For the latter fraud he was sentenced to five years' imprisonment. But again he was said to be out on bail pending appeal.

The farmers were disgruntled by the outcome of the criminal proceedings. Eleven of them decided to bring civil proceedings before this court. But, of H the initial 11, only six actually turned up at the trial. The six are those listed

in cases 1 to 6 above. The other five, listed in cases 7 to 11 above, were in A default. Their claims were dismissed with costs.

Peter Kenneth was a co-defendant in cases 2 to 11. However, he neither filed any papers nor appeared at the trial.

The farmers' cases before this court were all based on the allegation that Peter Kenneth was an "employee" of FCSE whose duty had been to procure grain B on behalf of that company. They all claimed that they had contracted with FCSE through Peter Kenneth; that they had delivered their grains to FCSE through Peter Kenneth; that they had been paid for part of the deliveries by FCSE through Peter Kenneth and that they looked to FCSE for the remainder of their money.

On the other hand, FCSE denied that Peter Kenneth had been their employee C at the time or any other, but that he was someone the company had contracted as an independent agent to procure maize for it in the Glendale-Mvurwi area. He had been on a commission. He was being paid cash in advance for the procurement of the maize. He was to buy the maize at $150 per tonne and had no authority to buy at any price higher. FCSE had stationed its containers at D his depot to facilitate collection. It had also released to him one of its motor vehicles at his special instance and request to ease up travel difficulties as the area he covered was vast. However, the arrangement was a credit sale. He would pay for the car from his commissions. FCSE also claimed that Peter Kenneth was an agent of several other grain merchants, among them E his own company by the name of Glen Grain (Pvt) Ltd and an individual by the name of Wayne Moss. FCSE stated that it had no control over Peter Kenneth's dealings. The company was only interested in collecting grain from him for the cash disbursed to him in advance.

Except for the plaintiff in case no 4, Trust Chinyama (hereafter referred to as the fourth plaintiff), all the other plaintiffs gave their evidence in Shona. F It soon became apparent, especially as the plaintiff in case no 2, Webster Nyamayedenga Bepura (the second plaintiff) was testifying, that the Shona language comes short on terms like "employee", "employer", "agent" and "independent contractor". In the Shona language the terms "employee", "agent" and "independent contractor" seem to mean the same thing, namely, G one doing a job or a piece of work for another for money. With regards to the term "employer", almost all the plaintiffs used the colloquial expression "*varungu vake*" meaning "his employers". Therefore when the plaintiffs referred to Mark Hutchings and J P Kennedy as "*varungu vake*" in relation to Peter Kenneth, it was clearly not in reference to their skin colour, for "*varungu*" is Shona for "white persons", but to them as his employers. On H

A the other hand, the plaintiffs were clearly not ascribing any technical meaning to the word "employer", but simply the sense that it was those employers that would pay Peter Kenneth who in turn would pay them.

The crisp issue before me was whether Peter Kenneth was an employee and/or agent of, and/or for FCSE, or an independent contractor.

B It is settled law that a principal is liable for the delicts of his agent where the agent is a servant but not where the agent is a contractor, subcontractor or the servant of a contractor or subcontractor: see *Mkize v Martens* 1914 AD 382; *Dennis Edwards & Co v Lloyd* 1919 TPD 291; *Estate van der Byl v Swanepoel* 1927 AD 141; *Colonial Mutual Life Assurance Society Ltd v*

Macdonald 1931 AD 412; *Smit v Workmen's Compensation Commissioner* C 1979 (1) SA 51 (A); *Southampton Assurance Co of Zimbabwe Ltd v Mutuma & Anor* 1990 (1) ZLR 12 (H).

De Villiers CJ, in *Colonial Mutual Life Assurance Society* above, explained that there can be no satisfactory reason that can be advanced for holding a third party liable for the delictual acts of another when he neither committed D such delicts nor authorised them. Earlier cases had sought to explain the rationale of the rule by saying "the reason why a principal shall answer for his deputy is, because as he, the principal has power to put him in, so he has power to put him out without showing any cause" [1]. Other reasons advanced were that, where a person commits a delict, it is only just that he be held E liable for his own wrong, but however where he gets another to do the deed, it is equitable that he should be held equally liable. Yet other reasons were that the principal is liable because of his own negligence in selecting such an agent for the work or for his failure to exercise proper control of the servant.

However, to the learned Chief Justice it was plainly a question of expediency. F At p 430 he put it as follows:

> "Experience teaches that the person who does the damage is in almost all cases not in a position to pay. The question then resolves itself into one between the principal and the innocent third party, and the law has decided (at least where the relation of master and servant exists between the principal and his agent) that of these two the person who takes the benefit of the activities of the agent should bear the loss …"

G Therefore, in a case like the present, the task is to determine whether the contractual relationship was one of master and servant or that of an independent contractor and a principal. Every case depends on its own set H of circumstances.

2013 (2) ZLR p168

Mafusire J

Section 2 of the Labour Act [*Chapter 28:01*] defines an "employee" and an A "employer" as follows:

> "'employee' means any person who performs work or services for another person for remuneration or reward on such terms and conditions as agreed upon by the parties or as provided for in this Act, and includes a person performing work or services for another person –
>
> (a) in circumstances where, even the person performing the work or services B supplies his own tools or works under flexible conditions of service, the hirer provides the substantial investment in or assumes the substantial risk of the undertaking; or
>
> (b) in any other circumstances that more closely resemble the relationship between an employee and employer than that between an independent contractor and hirer of services. " C
>
> "'employer' means any person whatsoever who employs or provides work for another person and remunerates or expressly or tacitly undertakes to remunerate him, and includes –
>
> (a) – (e)" [not relevant].

The definitions in the Labour Act are unhelpful in determining whether Peter D Kenneth was, at the relevant time, an employee or agent of FCSE or an independent contractor. However, the reference in that Act to "… that more closely resemble the relationship between an independent contractor and hirer of services …" plainly shows that the Legislature was alive to the fact that there is a distinction between an employee or agent and an independent contractor. One must therefore look to the common law as expressed through E the cases to determine whether at the relevant time Peter Kenneth was an employee or agent of FCSE or an independent contractor.

An employee, an agent and an independent contractor all render service to another for remuneration. Yet there are differences. In *Colonial Mutual Life Assurance Society* above at 441, Wessels JA stated:

> "There are many cases in which one person renders service to another under a F contract between them. In some cases the agent's occupation is not an independent one, he is not free to render the service or withhold it, he is bound to time and place. In other cases, the agent has an independent occupation, and in carrying out this occupation he renders service to others. This does not mean he does other work besides the service of his principal. The service he does to his principal may be …. his only occupation, but it is essential to determine whether in G carrying out this occupation he was a free agent to do what he pleased and how he pleased, or whether his method of doing his own work was prescribed for him."

The learned judge of appeal quoted *Fraser on Master and Servant* 3 ed p 289 to determine the difference between an agent and an independent contractor. It has to be ascertained whether one renders his service in the course of an H

Mafusire J

A independent occupation representing the will of the employer only as to the result of the work and not as to the means by which it is accomplished.

Roos JA, in the same case at p 426, admits that in many cases the question as to whether a person is a servant is a very difficult one because a contract may have some of the features of an agency agreement and yet be a service contract or *vice versa*.

B De Villiers CJ, also in the same case at p 436, quotes the example given in *Salmond Law of Torts* 6 ed p 96 of a coachman and a cabman to illustrate the difference between an agent and an independent contractor:

> "Thus, my coachman is my servant; and if by negligent driving he runs over someone in the street, I am responsible. But the cabman whom I engage for a C particular journey is not my servant; he is not under my orders; he has made a contract with me, not that he will obey my directions, but that he will drive me to a certain place; if an accident happens by his negligence he is responsible, and not I. So I am responsible for the domestic servants in my house, but I am not responsible for a skilled artisan whom I engage to do a certain job in my house – for example, to paint it, or to mend a window."

D There have been several parameters or tests that have been developed to determine whether a particular contractual relationship is one of master and servant or one of principal and independent contractor. Jonathan M Silke *The Law of Agency in South Africa* 3 ed at p 26 states:

> "An accurate test for distinguishing the agent from the independent contractor is that the agent has authority to bind his principal in contract whereas the E independent contractor has no such power."

In *Dennis Edwards supra* at 298 and the judgment of the lower court in *Smit v Workmen's Compensation* 1978 (1) SA 339 (C) at 345G-H it was noted that the provision in a contract of remuneration by commission, although not by itself decisive or conclusive, is a strong indication against a relationship F of master and servant.

The degree of control, supervision and freedom helps in determining whether a particular contractual relationship is one of master and servant or one of an independent contractor and principal. On "control" Joubert JA, in the appeal judgment in v *Workmen's Compensation Commissioner supra* at 60-61, said:

> G "Control is a wide concept. It includes inter alia the right of an employer to decide what work is to be done by the employee, the manner in which it is to be done by him, the means to be employed by him in doing it, the time when and the place where it is to be done by him. Supervision implies the right of the employer to inspect and direct the work being done by the employee."

The degree of control and supervision test was succinctly enunciated in H *Colonial Mutual Life Assurance Society supra*, especially in the judgment

Mafusire J

of de Villiers CJ. Quoting *Bowstead on Agency* 4 ed p 3 the learned Chief A Justice said at p 433:

> "*Bowstead on Agency* … is equally clear: 'The difference,' he says, 'between an agent and an independent contractor is, that an agent is bound to act in the matter of the agency subject to the directions and control of the principal, whereas an independent contractor merely undertakes to perform certain specified work, or produce a certain specified result, the manner and means of performance or B production being left to his discretion, except as far as they are specified by the contract.' This is a distinction which in our law cannot be ignored for the contract between master and servant is one of letting and hiring of services (*locatio conductio operarum*) whereas the contract between the principal and a contractor is the letting and hiring of some definite piece of work (*locatio conductio operis*). In the former case the relation between the two contracting C parties is much more intimate than in the latter, the servant becoming subordinate to the master, whereas in the latter case the contractor remains on a footing of equality with the employer. The crucial difference between these two cases lies in the fact that where a master engages a servant to work for him the master is entitled under the contract to supervise and control the work of the servant. He is entitled at any time to order the servant to desist, and if the matter is sufficiently serious may even dismiss him for disobedience." D

In summary, the employer has the right to supervise and control the work of the employee. The employer has the right to prescribe to the employee not only what work has to be done, but also the

manner of doing it. In the absence of these features the contractual relationship cannot be one of employer and employee. E

In the present case none of the plaintiffs ever dealt directly with FCSE. They claimed Peter Kenneth told them that he worked for the company. They took his word for it. But even on this score "employee" could have meant anything. The plaintiffs placed great reliance on the fact that Peter Kenneth was driving the company's vehicle and that the company's containers were stationed at his depot. F

In *Colonial Mutual Life Assurance Society supra* a life insurance agent who devoted himself exclusively to the business of the life assurance company and was being remunerated on a commission basis had, among other things, the use of a car sold to him by that company on hire purchase. After examining the details of the contract, the court held that the agent was an independent G contractor and not an employee of the company. On the issue of the car Roos JA stated at p 428:

> "The agreement about the motor car does not order Britain to use the car. He may use any means he likes and in addition he may use the motor car in any way which he chooses but only for the business of the society. This cannot affect the nature of his position or the relationship between him and the society." H

Mafusire J

A It was a similar situation in *Smit's* case. The appellant was an insurance agent. He was prohibited from acting directly or indirectly for any other insurance company although he was not required to work full time and he could do other work. He was given the use of the company vehicle, albeit up to a certain mileage per month. He had the use of a company office and access to telephone facilities of the company. He was held to be an independent B contractor. In its judgment that was upheld on appeal the lower court, on the issue of the motor vehicle, had this to say at 345D-E:

> "In regard to the use of a company car, etc. as a neutral factor under the circumstances of the present case, the appellant was not obliged to use the company's car and office facilities and the availability of these did not in any way fetter his freedom of movement."

C In the present case the situation of Peter Kenneth and FCSE was far removed from the master and servant relationship. There was absolutely nothing advanced by the plaintiffs to establish that kind of contractual situation. Most plaintiffs produced purported delivery notes or some invoices as proof of delivery of the grain. However, those had all been issued by either Peter D Kenneth himself or his clerk, one Muyambo. That is hardly evidence of an employer and employee relationship.

The first plaintiff's evidence of Peter Kenneth as being an employee of FCSE was that through an advert in the press that his son had come across and in which FCSE was said to be buying grain, he had obtained J P Kennedy's telephone number. He had subsequently telephoned Kennedy and had told E him that he had grain to sell. Upon enquiry from Kennedy he had disclosed the whereabouts of his farm as being in the Glendale area, whereupon Kennedy had referred him to Peter Kenneth as their "employee" in that area. Thus unlike all the other plaintiffs, the first plaintiff claimed to have become aware of Peter Kenneth only through Kennedy.

F The second plaintiff's evidence on the point was that, upon becoming aware that Peter Kenneth was buying maize, he had gone to his depot and had asked him in what capacity he was buying. Peter Kenneth had allegedly told him that he was buying in his capacity as FCSE. As proof Peter Kenneth had allegedly pointed to the Mazda vehicle parked nearby which had been inscribed with the name and logo of FCSE. The second plaintiff said he had G become satisfied and had required no further proof.

The third plaintiff's evidence was that he had learnt through a third party that some white persons who were Peter Kenneth's employers were buying maize. He had sought directions and had eventually arrived at Peter Kenneth's place where he had seen lots of people, delivery trucks, scotch carts and large H quantities of maize grain. Upon enquiry Peter Kenneth had told him he was

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Mafusire J

buying the grain at $300 per tonne and that payment would be made within A seven days of delivery. He had established that Peter Kenneth's employers would bring the cash.

The fourth plaintiff's evidence was that Peter Kenneth, whilst driving a truck inscribed with defendant's name, had led some delivery trucks to his farm for the collection of the grain. He had been informed that the maize would B be delivered to a company called Blue Ribbon Foods. They had agreed on a price of $300 per tonne which would be paid within seven days of delivery. However, after the lapse of more than seven days without any payment being made he had driven to Peter Kenneth's place. There he had seen Kennedy bringing cash to Peter Kenneth after which he had been paid in part.

In cross-examination the fourth plaintiff said that when they as farmers C had collectively started making enquiries directly with FCSE after Peter Kenneth had failed to pay them, Kennedy had admitted that Peter Kenneth had indeed been "their man". The fourth plaintiff admitted that at no stage had Kennedy claimed that Peter Kenneth was their employee. However, he said by Kennedy referring to Peter Kenneth as "their man" he had deduced D that to mean he was their employee.

The fifth plaintiff's evidence was that she had come to know of Peter Kenneth's connection with FCSE when she had started making follow-ups on her money after her maize had already been collected. She had seen Kennedy and Mark Hutchings bringing some money to Peter Kenneth who E had referred to them as "my bosses".

The sixth plaintiff's evidence was that she had sold and delivered her grain to Peter Kenneth who had claimed he had some "*mabhunhu*" from FCSE that he worked with. "*Mabhunhu*" is Shona slang for whites.

The sixth plaintiff was the only party to call a witness. His name was Mr Vincent Schults. He was quite advanced in age and he admitted to some F memory lapses. However, the gist of his evidence was that he was a trucker who had been contracted and had been paid by FCSE to collect maize grain from sixth plaintiff's farm. Beyond this his testimony became incoherent.

FCSE gave evidence through Mark Hutchings. He was quite emphatic. Peter Kenneth was no more than an agent that they had contracted to source maize G for them at $150 per tonne. They had no control over him. Where and how he got the maize was up to him. He was left entirely to his own designs. He used his own stationery. He employed his own labour. He worked at his own time and from his own premises. He, and not they, dealt with the farmers at all times. He was not on a salary, but a commission. To facilitate storage they had stationed their containers at his depot. They had sold him one of H

A their trucks to ease up his travel woes. They would transfer ownership of the vehicle to him upon full payment of the purchase price. They were not the only company Peter Kenneth sourced maize for. He not only procured for others but also for himself through his own company. Mark Hutchings produced several documents, among them, the grain procurement arrangement with Peter Kenneth and on the sale of the car to him.

B Mark Hutchings said they would never know what was sourced from which farmer and on what terms. Only after Peter Kenneth had taken poison did FCSE get to know that the plaintiffs had allegedly been promised $300 per tonne. However that price would make no sense to FCSE. For its own forward contracts with its customers the sale price was $268 per tonne. Therefore C they would not buy for more and sell for less.

Mark Hutchings further said that FCSE had got to know Peter Kenneth in about May of 2009. He had been procuring soya beans for them. They had got to trust him. Their relationship had grown to such an extent that not only had they extended the grain procurement deal to cover maize but also that D they would pay him large sums of money in advance for the procurement of the maize. Only afterwards, after some detailed reconciliation, did it transpire that there was a huge discrepancy between the money that they had disbursed to Peter Kenneth and the actual grain that he had delivered. FCSE had also reported him to the police.

I find that there is no evidence that Peter Kenneth was an employee of FCSE. E Even the best evidence of some of the plaintiffs – such as the first plaintiff's claim that Kennedy had told him that Peter Kenneth was their employee; or that of the fourth plaintiff that Kennedy had told him that Peter Kenneth was "their man"; or that of several other plaintiffs that Peter Kenneth drove a motor vehicle emblazoned with FCSE's name and logo – all falls woefully F short of what is required to establish a master and servant relationship. What the parties call each other in such a contractual

relationship, or what they perceive their relationship to be, is not decisive and may actually be irrelevant. The court looks at the totality of the evidence and all the circumstances to determine the true nature of the relationship.

G In *Colonial Mutual Life Assurance Society*, for example, it was the company itself that had made available a car to the agent. It was the company itself that had facilitated the insurance cover for that vehicle. And it was the company itself that had completed the proposal form for that cover. One of the questions on the proposal form was "Do you use your car in connection with your *employer's* business?" The answer was "Yes." In the course of H his judgment Roos JA commented at 421:

2013 (2) ZLR p174

Mafusire J

> "t is a curious answer for the employer himself to give, but presumably the meaning A is that the person using the car will use it about the business of the society."

That did not stop the court from holding that the agent was an independent contractor.

The point is, even accepting the first plaintiff's claim *in casu* that Kennedy had told him that Peter Kenneth was "their employee", this takes the plaintiffs' B cases no further. Apart from the fact that it is highly unlikely that Kennedy would have been using "employee" in its more technical sense, the nature of the relationship between Peter Kenneth and FCSE, as disclosed by the totality of the evidence, was completely nowhere near that of master and servant. Peter Kenneth was plainly an independent contractor.

In the result the plaintiffs' claims are hereby dismissed with costs. Judgment C is hereby entered for the defendant in case no 1 above and is also entered for the second defendant in the rest of the cases.

Ngarava Moyo & Chikono, legal practitioners for plaintiff in case 1

Manyurureni & Co, legal practitioners for plaintiffs in cases 2 to 11 D

Gumbo & Associates, legal practitioners for defendant in case 1 and for the second defendant in cases 2 to 11 E

1 At p 431, quoting Holt CJ in *Lane v Cotton* (1701) 12 Mod. 488, 489

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Document 21 of 79

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Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2013/Volume 2/GODZA v SIBANDA & ANOR 2013 (2) ZLR 175 (H)

GODZA v SIBANDA & ANOR 2013 (2) ZLR 175 (H)

2013 (2) ZLR p175

Citation	2013 (2) ZLR 175 (H)
Case No	Judgment No. HH- 254-13
Court	High Court, Harare
Judge	Uchena J
Heard	25 June 2013; *CAV*
Judgment	15 August 2013

Counsel *J Mutiza,* for the applicant
B Diza, for the first respondent

Case Type Opposed application

Annotations No case annotations to date

Flynote

Practice and procedure – *order of court – by consent – variation of – need for parties to apply to court for variation – not competent for parties to novate court order*

Headnote

D Novation is an agreement between a creditor and a debtor in relation to an existing obligation, whereby the old debt between them is extinguished and a new obligation is created in the place of the old one. The parties to such an agreement are the creditor and the debtor. However, where the old agreement has been incorporated into a court order the parties cannot E novate it. A court order has the same effect as a court's judgment, even if it was granted by consent. The parties must apply for an amendment to, or variation of, the court order if they want to depart from its terms.

Cases cited

F *Commercial Farmers Union v Mhuriro & Ors* 2000 (2) ZLR 405 (S)

Commissioner of Police v Commercial Farmers Union 2000 (1) ZLR 503 (H)

Case information

J Mutiza, for the applicant

G *B Diza,* for the first respondent

Judgment

Uchena J: The applicant and the first respondent lived together in an unregistered customary law union. They agree that they had a tacit universal partnership which has broken down, leading to their having to share the assets they had acquired during the universal partnership. They initially H disputed over the sharing of their assets but eventually resolved the dispute

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Uchena J

by entering into a deed of settlement. The deed of settlement records the A parties' agreement on the existence of the universal partnership. It provides for the custody and maintenance of their minor children and the distribution of their movable and immovable property.

The dispute which I have to resolve is on their immovable property for which their deed of settlement had provided for as follows; B

> "5. Immovable Property
>
> A. No 21 Smit Crescent, Eastlea, Harare
>
> (i) It is agreed that the immovable property known as No. 21 Smit Crescent, Eastlea, Harare, be shared in such a way that the defendant gets 60% with the plaintiff getting 40%.
>
> (ii) The immovable property in question shall be valued and sold on open market C by Kennan Properties with the proceeds being shared in percentages provided for in paragraph (i) above.
>
> (iii) That valuation fees and any other related costs shall be shared in proportions of each party's entitlement.
>
> B. Stand No 222 Helensvale Township, Harare.

(i) The parties to this settlement agree that the property known as Stand No. D 222 Helensvale Township (undeveloped stand) of Lot D. E Helensvale be shared in such a way that each party gets 50%.

(ii) That the immovable property in question shall be valued and sold by Kennan Properties on open market with the net proceeds being shared equally between the parties. E

(iii) That valuation fees and other related costs shall be shared equally between the parties."

The deed of settlement was incorporated on 16 November 2010 into a court order granted by Guvava J. The court order reads as follows:

"It is ordered that:

1. The dissolution of the universal partnership of the parties be and is hereby F confirmed.
2. The Deed of Settlement signed by the parties be and is hereby incorporated into this order.
3. Each party bears his/her costs".

It is common cause that the parties have not strictly complied with the court's G order. They sold the Helensvale property through Robert Root, instead of Kennan Properties. They further agreed that the applicant's share in the Helensvale property be retained by the respondent as part payment of the buying out of her share in the Eastlea property. They initially agreed on a purchase price of US$85 000 for the Eastlea property. That agreement failed, but the parties entered into written communication on a further agreement H

Uchena J

A in which the applicant was to buy out the respondent's share of the Eastlea property, which he was to buy at the price of US110 000 . The correspondence between the parties indicates that an agreement had been entered into.

Mr *Mutizwa* for the applicant submitted that the parties had novated their deed of settlement. Mr *Diza* for the respondent argued that the agreement B for the sale of the Eastlea property to the applicant had not been concluded because the parties' minds had not met on the purchase price of the Helensvale property whose sale was linked to the sale of the Eastlea property. He referred to an agreement of sale of the Helensavale property for US$55 000, which is on pp 56 to 62 of the record, and another agreement of the sale of the same property on pp 82 to 87 at a price of US$65 000 . An examination of the two C agreements reveals that the agreement for US$55 000 was not signed by both parties and their witnesses. That agreement was therefore superceded by the latter agreement for the sale of the same property for US$ 65 000, which was signed by both parties. Mr *Diza* later conceded that a binding agreement had been entered into for the applicant to buy the Eastlea property D for US$110 000. He however relied on the parties being bound by the court order which incorporated their deed of settlement. He argued that while the parties can novate their agreement, they cannot novate a court order, as that is alien to our law. This argument, while sound at law, is not being honestly made as the respondent participated in departing from the terms of the court's order in respect of the Helensvale property. His argument can only be sound E in the sense that parties cannot ask a court to enforce their departure from the terms of a court order without first seeking the variation or amendment of that court order. Mr *Mutizwa* persisted with his submission that a court order can be novated. He submitted that parties frequently depart from the terms of court orders they have obtained. He, however, told the court that he F could not find any authorities for his argument in spite of a spirited research.

Novation is an agreement between a creditor and a debtor to an existing obligation whereby the old debt between them is extinguished and a new obligation is created in the place of the old one. The parties to such an agreement are the creditor and the debtor. It does not include a court. Therefore, where the old agreement has been incorporated into a court order G the parties can not novate it.

Herbstein and van Winsen *The Civil Practice Of The Superior Courts In South Africa* 3 ed at p 464, commenting on the effect of a court's judgment, said:

"As long as it stands unaltered or unrescinded it is the conclusive proof as against the parties of findings of facts directly in issue in the case actually decided by H the court."

Uchena J

A court order has the same effect as a court's judgment, even if it was granted A by consent. The parties must apply for its amendment or variation if they want to depart from its terms. The court hearing the subsequent dispute is bound by the terms of the court order. It cannot grant a court order which conflicts with its previous order. In *Commissioner of Police v Commercial Farmers Union* 2000 (1) ZLR 503 (H) at 519F-G Chinhengo J said;

> "It is indeed true that 'all orders of this court, whether correctly or incorrectly B granted, have to be obeyed until they are properly set aside' (*Culverwell v Beira* 1992 (4) SA 490 (W) at 494), but the same cannot be said where the person affected by an order of court goes back to that court, timeously in the circumstances, to explain himself and his perceived inability to comply with the order issued against him. He is in a sense purging his contempt, as it were. This I find to be the situation *in casu* in respect of the applicant's conduct relative C to paras 6, 7 and 8 of the consent order. The application filed by the applicant cannot in my view be construed as a willful intention to disregard the order of the court. I would not find that the applicant is in contempt of the consent order in respect to his inaction relative to paras 6, 7 and 8 of the order."

In *Commercial Farmers Union v Mhuriro & Ors* 2000 (2) ZLR 405 (S) at 408E Gubbay CJ, commenting on the force and effect of a court order, said: D

> "The fact that an order of the Supreme Court was made by consent does not alter the situation. It remains an order of the Supreme Court and may only be varied, set aside or in any way interfered with by the Supreme Court."

These cases confirm that Guvava J's order remains in force even though it was granted by consent. I am therefore satisfied that the applicant's application E to enforce what it calls a novation of the parties' deed of settlement which was incorporated into a court order, cannot be granted because its terms conflict with the terms of a standing court order.

The applicant's application is therefore dismissed with costs.

Chihambakwe, Mutizwa & Partners, applicant's legal practitioners F

Mtetwa & Nyambirai, first respondent's legal practitioners G

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Document 22 of 79

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DHLOMO-BHALA v LOWVELD RHINO TRUST 2013 (2) ZLR 179 (H)

Citation	2013 (2) ZLR 179 (H)
Case No	Judgment No. HH-263-13
Court	High Court, Harare
Judge	Mafusire J
Heard	3 July 2013; *CAV*
Judgment	26 August 2013
Counsel	*T Marume*, for the applicant *T Magwaliba*, for the respondent
Case Type	Civil application
Annotations	Link to case annotations

Flynote

Court – *High Court – reference in statute to High Court – does not necessarily exclude jurisdiction exercised in chambers – application to High Court for registration of arbitral award – may be made to a judge in chambers*

D **Employment** – *arbitral award – registration with High Court for enforcement purposes – application – documents that must be submitted with application – not necessary to submit duly authenticated original of award – substantial compliance with requirement to submit award sufficient*

Employment – *arbitral award – registration with High Court for enforcement purposes – application – may be made to a judge in chambers*

E **Employment** – *Labour Court – appeal to – from decision of arbitrator – not a special appeal – such an appeal one in terms of Labour Act and subject to same procedures as any other appeal*

Headnote

The applicant, an employee of the respondent, had been dismissed from her F employment. The matter had been referred for compulsory arbitration. The arbitrator had made an award in favour of the applicant, in terms of which the respondent was to pay a sum of money in lieu of outstanding salaries and other employment benefits. The respondent noted an appeal to the Labour Court in terms of s 98(10) of the Labour Act [*Chapter 28:01*]. It also, in terms of s 92E of the Act, applied to the Labour G Court on an urgent basis for a stay of the operation of the arbitral award pending the determination of its appeal. At the time of the hearing of the present application both the appeal and the urgent application for stay were still pending. The applicant made a chamber application for registration of the award with the High Court in terms of s 98(14) of H the Act. The application was opposed.

Firstly, the respondent submitted that the reference in s 98(14) of the Labour A Act to the "High Court" meant that the application for registration of the arbitral award could not be made by way of a chamber application. "High Court", it submitted, meant the open court and not a judge sitting in chambers. Similarly, the reference to the High Court in art 35 of the Schedule to the Arbitration Act [*Chapter 7:15*] also meant the open B court and not a judge in chambers. The second objection was that by reason of the appeal to the Labour Court the arbitral award had been suspended and that therefore there was nothing yet to register. This objection was based on the common law rule that an appeal suspends the judgment appealed against. It was also argued that, because the heading to s 92E of the Labour Act is "Appeals to the Labour Court generally", C the section was concerned with *general* appeals to the Labour Court and that therefore there must also be *special* appeals to that court. It was submitted that an appeal from the decision of an arbitrator was a special appeal, not covered by s 92E(2), and that noting the appeal had the effect of suspending the decision appealed against in terms of the D common law rule.

The third ground of objection was that in an application for the registration of an arbitral award in terms of s 98 of the Act it is not just a copy of the award that must be submitted for registration but one which is certified. The document relied on the by applicant was a copy.

The fourth ground of objection was that the documents tendered by the E applicant for the registration of the arbitral award were inadequate, in that in terms of article 35 a party seeking the registration of an arbitral award for enforcement purposes is required to submit not only the duly authenticated original of the award or a duly certified copy thereof, but also the original arbitration agreement. It was argued that the applicant F ought to have attached the reference to arbitration form in lieu of the arbitration agreement or, alternatively, her statement of claim before the arbitrator together with the respondent's statement of defence.

Held, that there is no rigid rule that the word "court" excludes jurisdiction exercised in chambers. Regard must be had to the context and to the ordinary practice, which the legislature must be assumed to know. There G was no justification for limiting the import of "High Court" in the two provisions above to an open court. The legislature did not make such limitation. Neither Act defined "High Court". However, the Interpretation Act [*Chapter 1:01*], in s 3, defines "High Court"

as "the High Court of Zimbabwe referred to in subsection (1) of section 81 of the Constitution" (now s 170 of the 2013 Constitution). Neither the Constitution nor the H

A Acts were concerned with the *form* of proceedings in the High Court. The two Acts merely specified the *forum* to which registration applications for the registration of arbitral awards should be referred. There was nothing to suggest that the legislature meant to ascribe to that term the more technical meaning of "court" as spelt out in the High Court Rules, which distinguish between the "court" and "a judge".

B *Held*, further, that court applications and chamber applications are governed by Order 32 of the Rules. The one essential difference between a court application and a chamber application is that a court application is determined in an open court and a chamber application in the judge's chambers; but otherwise they are similar: both are made in writing and C supported by affidavits; both are determined by a judge sitting alone; in both, the resultant order is an order of the High Court, having the same force and effect; and in a court application notice to all interested parties has to be given, although the same applies to some chamber applications.

Held, further, that in terms of r 226(2) certain matters cannot be brought by way of chamber applications unless they fall within one or more of D the exceptions specified therein. One of those is that the relief sought is procedural. An application to register an arbitral award as an order of court for the purposes of enforcement is clearly an application seeking a procedural relief. The court is not being asked to determine the merits of the arbitration anew.

E *Held*, further, that in the light of the clear wording of s 92E(2) of the Labour Act [*Chapter 28:02*], it was not open to a litigant to argue that the effect of noting an appeal against a determination or decision of an arbitrator to the Labour Court suspends its operation in accordance with the common law. Section 92E is an omnibus provision regarding all appeals made in terms of the Labour Act and must necessarily cover such appeals from an F arbitrator. The common law rule is not applicable in these circumstances.

Held, further, that with regard to the form in which the arbitral award was presented, where a party has substantially complied with the requirements of the law and where there is no discernible prejudice to the other party it would make justice turn on its head to deny relief. Here, while the impeached document may have lacked care and precision G in its preparation, it substantially complied with the requirements for certification. It sufficiently identified the arbitral award in question by, among other things, the case reference number, the names of the parties, the name of the arbitrator and the quantum involved. Furthermore, in the papers placed before the court by both parties, there were annexed H the copies of the documents in the proceedings pending in the Labour

Court. These documents included several copies of the arbitral award. A By its own documents the respondent confirmed that the award sought to be registered was the award which was now the subject matter of the dispute.

Held, further, that as regards the argument that a party seeking the registration of an arbitral award for enforcement purposes is required to submit not B only the duly authenticated original of the award or a duly certified copy thereof, but also the original arbitration agreement, s 5 of the Arbitration Act provides that where an enactment requires any matter to be determined by an arbitrator or by arbitration in accordance with any law relating to arbitration, such requirement shall be deemed to be an arbitration agreement for the purposes of the Act. However, in terms C of s 98 of the Labour Act and s 5 of the Arbitration Act, the application of the Arbitration Act to labour arbitrations is made subservient to the Labour Act. The Labour Act does not require the submission of the arbitration agreement in an application for the registration of an arbitral award for enforcement purposes. Compulsory arbitrations under s 98 of D the Labour Act are by operation of the law. Where conciliation has failed to resolve the employment dispute, it is a statutory requirement that the dispute be referred for compulsory arbitration. It is the Labour Court or the labour officer that refers the dispute for compulsory arbitration, appoints the arbitrator and fixes the terms of reference for the arbitrator. It is not a matter governed exclusively by the private agreement of the E parties as in most commercial arbitrations. Accordingly, the failure by the applicant to annex the reference to arbitration form (or the

statement of claim and of defence as the substitutes for the arbitration agreement) did not form a legitimate ground for opposing the application for the registration of the arbitral award. F

Cases referred to

Re Bathe (1892) 1 Ch 463

Baudi v Kenmark Builders (Pvt) Ltd HH-4-12

Blue Ranges Estates (Pvt) Ltd v Muduviri & Anor 2009 (1) ZLR 368 (S)

DHL Intl Ltd v Madzikanda 2010 (1) ZLR 201 (H) G

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

Friend v Wallman [1946] KB 493

Mandikonza & Anor v Cutnal Trading (Pvt) Ltd & Ors 2004 (2) ZLR 340 (H)

Mvududu v ARDA 2011 (2) ZLR 449 (H)

Ndlovu v Higher Learning Centre HB-86-10 H

Mafusire J

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

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

Sagittarian (Pvt) Ltd v Workers' Cttee, Sagittarian (Pvt) Ltd 2006 (1) ZLR 115 (S)

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

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

Legislation considered

Arbitration Act [*Chapter 7:15*], s 5; First Schedule, art 35

Constitution of Zimbabwe 1980, s 81

Constitution of Zimbabwe 2013, s 170

C High Court Rules 1971 (RGN 1047 of 1971), rr 3, 226(3) & 241

Interpretation Act [*Chapter 1:01*], ss 3 (definition of "High Court"), 7

Labour Act [*Chapter 28:01*], ss 92E, 98(2), (10) & (14)

Case information

T Marume, for the applicant

D *T Magwaliba*, for the respondent

Judgment

Mafusire J: This is an application for the registration of an arbitral award. It is opposed. The facts are fairly common cause. The applicant was a former employee of the respondent. The respondent had terminated her contract of employment. She had considered the termination unlawful and had referred E her case to a labour officer for conciliation in terms of s 93 of the Labour Act [*Chapter 28:02*] ("the Labour Act" or "the Act").

Conciliation not having resolved it, the matter had been referred for compulsory arbitration. The arbitrator had made an award in favour of the applicant. In terms of that award the respondent was to pay a sum of money in lieu of F outstanding salaries and other employment benefits.

It was this award that the applicant sought to have registered with this court for enforcement purposes. But the respondent had appealed the arbitral award to the Labour Court in terms of s 98(10) of the Act. It had also, in terms of s 92E of the Act, applied to that court on an urgent basis for a stay of the operation of the arbitral award pending the determination of its appeal. At G the

time of the hearing of the application *in casu* both the appeal and the urgent application for stay had been pending.

This application is in terms of s 98(14) of the Act. Subsection (14) has to be read together with subs (13). The two read as follows:

> "(13) At the conclusion of the arbitration the arbitrator shall submit sufficient H certified copies of his arbitral award to each of the parties affected by it.

Mafusire J

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

The application has been made through the chamber book but on notice to the respondent. The respondent has opposed it to the hilt. Three sets of B affidavits and three sets of heads of argument have been filed. I heard it in an open court as an opposed application.

The respondent's major grounds of opposition were essentially taken *in limine*. On the first ground it objected to the form of the application. It was contended that "High Court" in s 98(14) of the Labour Act means the open C court and not a judge sitting in chambers. The respondent also made the point that art 35 of the UNCITRAL Model Law of 1985, which our legislature has domesticated as the First Schedule to the Arbitration Act [*Chapter 7:15*] also refers to "the High Court and "not a judge in chambers.

Article 35 reads:

> "(1) An arbitral award, irrespective of the country in which it was made, shall D 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."

Relying on the English cases of Re *Bathe* (1892) 1 Ch 463 and *Friend v Wallman* [1946] KB 493, the respondent argued that a reference to "court" was a reference to a judge sitting in an open court. In its heads of argument E the respondent quoted a section of the judgment in *Friend's* case (which was delivered by Somervell LJ) at p 499 as follows:

> "In recent years, the expression 'the court or a judge' has been frequently used, and in this expression, the 'court' means a judge or judges in open court, and 'a judge' means a judge sitting in chambers."

However, not only did the respondent quote the section of the judgment F inaccurately and out of context, but also the quotation was so selective as to be misleading. This is so because that portion of the judgment went further as follows:

> "We are, however, clear, both on authority and in principle, *that there is no rigid rule which compels us to construe the word 'court' as excluding jurisdiction* G *exercised in chambers*. Regard must be had to the context and to the ordinary practice which the legislature must be assumed to know. In the first place interlocutory applications are normally made in chambers …" (emphasis added).

Furthermore, earlier on in the judgment at 498 the court had stated as follows:

> "The word 'court' can clearly in ordinary language bear a different meaning according to the context. *Considering the matter apart from authority, it is* H

Mafusire J

> A *obvious, for example, that the words 'an application to the "court"' may, in certain contexts, clearly mean an application in chambers*. In other contexts it might as clearly mean an application to the judge at the trial or otherwise than in open court" (emphasis added).

The High Court Rules define "court" in r 3 as meaning the High Court. "Court application" is defined as an application to the court in terms of r 226. Rule B 226 is the one governing court applications. Its essential features are that the application has to be in writing to court and on notice to all interested parties. "Judge" is defined as a judge of the court sitting otherwise than in an open court.

On the premise that s 98(14) of the Labour Act and art 35 of the Arbitration C Act refer to the High Court, the respondent submitted that there was no room for importing a reference to a judge sitting in chambers in an application for the registration of an arbitral award. It submitted that *in casu*, the

registration application having been made to a judge in chambers, it meant that the applicant had adopted the wrong procedure. The respondent therefore called D for the dismissal of the application on that basis.

I note in passing that, in terms of s 98(2) of the Labour Act, the Arbitration Act applies to disputes referred to compulsory arbitration, but subject to that section.

However, notwithstanding that the relevant provisions of both the Labour Act E and the Arbitration Act refer to the "High Court", I am not persuaded that such a reference excludes a judge in chambers. There is no justification for limiting the import of "High Court" in the two provisions above to an open court. The legislature did not make such limitation. Neither the Labour Act nor the Arbitration Act defines "High Court". However, the Interpretation F Act [*Chapter 1:01*] does so in s 3.Therein "High Court" is defined as:

> "… the High Court of Zimbabwe referred to in subs (1) of s 81 of the Constitution."

Section 81 of the old Constitution was duplicated in the preamble to the High Court Act [*Chapter 7:02*]. It was provided therein that there would be a High Court which would be a superior court of record with jurisdiction and powers as might be conferred upon it by the Constitution or an Act of G Parliament. It would consist of the Chief Justice, the Judge President of the High Court and such other judges of the High Court as might be appointed from time to time.

Section 81 of the old Constitution is now s 170 in the new 2013 Constitution. It provides that the High Court is a superior court of record and consists H of the Chief Justice, Deputy Chief Justice, the Judge President of the High

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Court and such other judges of the High Court as may be appointed from A time to time.

Thus, like the two Acts above, the Constitution is not concerned with the *form* of proceedings in the High Court. The two Acts merely specify the *forum* to which registration applications for the registration of arbitral awards should be referred. There is nothing to suggest that when the legislature referred B to the High Court in s 98(14) of the Labour Act it was referring to anything other than the High Court as defined in the Constitution. There is nothing to suggest that the legislature meant to ascribe to that term the more technical meaning of "court" as spelt out in the Rules.

The Rules themselves, in my view, do make it clear that their reference to "court" is a reference to the more technical meaning of that term, not the C ordinary common law meaning as defined in the Constitution. I say so because r 3, the definition section, is prefaced with the words "In these rules". In other words, in terms of the Rules, whatever the term "High Court" might mean elsewhere or however it might be defined there, for their purposes "High Court" means a "court" which is different from a "judge".

I have already stated that the Labour Act and the Arbitration Act direct the D forum to which applications for the registration of arbitral awards should be made and that the rules of court would then govern the procedure. Court applications and chamber applications are governed by Order 32 of the Rules. The one essential difference between a court application and a chamber application is that a court application is determined in an open court and E a chamber application in the judge's chambers. Both are made in writing and supported by affidavits. Both are determined by a judge sitting alone. In both, the resultant order is an order of the High Court. An order from an open court and an order obtained in chambers have the same force and effect. In a court application, notice to all interested parties has to be given. F But so is the case with some chamber applications.

In terms of r 226(2) certain matters cannot be brought by way of chamber applications unless they fall within one or more of the exceptions specified therein. One of those exceptions is that the relief sought is procedural. An application to register an arbitral award as an order of this court for the purposes of enforcement is clearly an application seeking a procedural G relief. The court is not being asked to determine the merits of the arbitration anew. Mathonsi J stated as follows in *Ndlovu v Higher Learning Centre* HB-86-10 at p 2:

> "The respondent cannot seek to challenge an arbitral award in opposing papers filed in an application for registration of the award. In an application of this nature, this court does not inquire into the merits or otherwise of an arbitral H

A award. This is the province of the Labour Court upon an application or appeal being made to that court."

In terms of the proviso to r 241, a chamber application can be served on all interested parties, with appropriate modifications to the form. As noted already, the applicant served her application on the respondent who filed opposing papers. This resulted in the matter turning into a full-fledged B opposed application. I see nothing that the applicant has offended. I therefore overrule the respondent's first objection.

The next objection taken by the respondent was that by reason of its appeal to the Labour Court the arbitral award had been suspended and that therefore there was nothing yet to register. This objection was based on the common C law rule that an appeal suspends the judgment appealed against.

I was quite surprised that not only could the respondent still found an objection on that basis, especially in the face of the unequivocal provisions of s 92E of the Labour Act and the judgment of Patel J (as he then was) in *Baudi v Kenmark Builders (Pvt) Ltd* HH-4-12, but also that it could persist with it.

D Section 92E reads as follows:

> **"92E Appeals to the Labour Court *generally***
>
> (1) An appeal in terms of this Act may address the merits of the determination or decision appealed against.
>
> (2) An appeal in terms of subsection (1) shall not have the effect of suspending E the determination or decisions appealed against.
>
> (3) Pending the determination of an appeal the Labour Court may make such interim determination in the matter as the justice of the case requires" (emphasis added).

Section 98(10) provides for an appeal to the Labour Court from a decision of the arbitrator. It reads:

> "(10) An F appeal on a question of law shall lie to the Labour Court from any decision of an arbitrator appointed in terms of this section."

Thus an appeal to the Labour Court from a decision of an arbitrator is an appeal "… in terms of this Act…" within the meaning of s 92E(1) of the Act. Such an appeal "… shall not have the effect of suspending the determination G or decision appealed against" within the meaning of s 92E(2).

In *Baudi's* case above Patel J held as follows at pp 2 and 4:

> "It is not in dispute that an appeal to the Labour Court against the decisions of an arbitrator under s 98(10) of the Labour Act [*Chapter 28:01*] does not suspend the decision appealed against. This is expressly provided by s 92E (2) of the Act in relation to every appeal to the Labour Court in terms of the Act. Nevertheless, H s 92E(3) empowers the Labour Court to make any interim determination it may

> deem fit, viz. for the stay or suspension of an award, pending the determination A of an appeal …
>
> As I have already stated, s 92E(2) of the Labour Act expressly provides that an appeal against an award in terms of s 98(10) shall not operate to suspend the award. Section 92E(3) enables the Labour Court to suspend or stay an award upon application by the aggrieved party. Where no such application is made or where it is dismissed, subss (14) and (15) of s 98 entitle the successful party to B apply for the registration and enforcement of the award. Parliament has obviously applied its mind to the delays inherent in the appeal process and considered the policy implications of the general common law rule which automatically suspends a decision that is appealed against. It has consciously and deliberately decided that arbitral awards in the realm of labour relations should be enforced, despite any pending appeal and notwithstanding any inconvenience that such C enforcement might entail…."

In the light of such clear provisions of the Act and such a clear pronouncement by this court, in this matter what possibly could have been the respondent's argument on the point?

The respondent's argument on the point has been to read one thing in the heading to s 92E of the Act, particularly the word "generally", and another D in the substantive provisions of that section.

Mr *Magwaliba*, for the respondent, first noted that the heading to s 92E of the Act is "Appeals to the Labour Court *generally*" and then argued strenuously that the section was concerned with *general* appeals to the Labour Court and that therefore there also ought to be *special* appeals to that court. He E submitted that an appeal from the decision of an arbitrator to the Labour Court as provided for in s 98(10) of the Act is not such a *general* appeal as is contemplated by s 92E of the Act, but that it is one of the *special* appeals. On that basis, he contended that such an appeal is not one covered by s 92E(2) of the Act and that it has the effect of suspending the decision appealed against in terms of the common law rule. F

As counsel's argument seemed fastened on the word "*generally*" which is only found in the heading to s 92E and not in the substantive provisions of that section, I drew his attention to s 7 of the Interpretation Act which provides that *inter alia* headings and marginal notes form no part of the enactment and are deemed to have been inserted for convenience of reference only. G Mr *Magwaliba* responded by referring to the Supreme Court case of *Blue Ranges Estate (Pvt) Ltd v Muduviri* 2009 (1) ZLR 368 (S) as authority for the proposition that headings can in fact be taken into account when considering the substantive provisions of an enactment.

However, I have found nothing in *Muduviri's* case that is quite relevant to the present matter, and certainly nothing in relation to the treatment to be accorded H

Mafusire J

A headings, notes and marginal references in the interpretation of statutes. In that case the Supreme Court, after examining the relevant provisions of the rules of that court, held that a judge of that court, sitting alone in chambers, had no jurisdiction to remove or strike out an appeal which is pending before that court because such an appeal is made to the court for determination by that court when duly constituted. The court noted that the Supreme Court is B duly constituted by three judges sitting together in open court.

The issue dealt with by the Supreme Court in *Muduviri* is not the same as the one confronting me in the present application. I reject the respondent's fanciful attempt at splitting hairs and the word play on "*generally*". The legislature in s 92E of the Labour Act could not have put the position any C plainer. If it was intended to categorise an appeal from the decision of the arbitrator as *special* and therefore as one different from the general appeals referred to in s 92E, whose effect would be not to suspend the decisions appealed against, then it would have been the simplest of things for the legislature to have said so. In my view, the provisions of ss 92E and 98 are so plain as to require no such tortuous constructions as urged by the respondent. D Appeals from the decisions of an arbitrator are made in terms of s 98(10) of the Labour Act. Such appeals are appeals "… in terms of this Act…" within the meaning of s 92E. Such appeals do not have the effect of suspending the determinations or decisions appealed against. I respectfully associate myself with the judgment of Patel J in *Baudi's* case above.

E In the respondent's heads of argument, drafted by counsel's instructing legal practitioners, it was contended that judgments of this court to the effect that the decision of an arbitrator is not suspended by an appeal to the Labour Court as provided for by s 92E were wrongly decided as they purportedly went against the decision of the Supreme Court in *Net One Cellular (Pvt) Ltd v Net One Employees & Anor* 2005 (1) ZLR 275 (S).

F Decisions of this court which held that decisions of an arbitrator are not suspended by appeals to the Labour Court include the aforesaid cases of *Baudi* and *Ndlovu*. Other cases include *DHL International Ltd v Madzikanda* 2010 (1) ZLR 201 (H), a judgment of Makarau JP, as she then was; and *Samudzimu v Dairibord Holdings Ltd* 2010 (2) ZLR 357 (H), a judgment G of Chiweshe JP.

In the *DHL International* case, Makarau JP had this to say at 206E-F:

> "In my view, the amendment to the law in 2005 to provide that appeals to the Labour Court would not suspend the decision appealed against was clearly meant to vary the common law position that was prevailing prior to the amendment. That for the purposes of the Act the employee is regarded as dismissed pending H the determination of the appeal appears to me to be beyond dispute."

Mafusire J

In *Samudzimu* Chiweshe JP stated as follows at 360D-E: A

"In the present case the respondent has lodged an appeal with the Labour Court. The appeal is still pending. Should the respondent wish to have the arbitrator's determination suspended pending appeal or dealt with in any other interim way, it is to that court that it must direct its application.

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

I respectfully associate myself with the remarks in those two cases.

The Supreme Court case of *Net One Cellular (Pvt) Ltd* above was a 2005 decision. It considered equivalent provisions of the Labour Act in relation to appeals from decisions of the arbitrator to the Labour Court *before* the C amendment to the Labour Act in 2007 by Act 17 of 2007. Before it was repealed s 97 in the old Act read as follows:

"97 Appeals to Labour Court

(1) Any person who is aggrieved by –

(a) any determination or direction of the Minister in terms of section *twenty five,* D *forty, forty-one, seventy-nine* or *eighty-two*, or in terms of any regulations made pursuant to section *seventeen*;

(b) a determination made under an employment code in terms of section *one hundred and one*; or

(c) the conduct of an investigation of a dispute or unfair labour practice by a E labour officer; or

(d) the conduct of any proceedings in terms of an employment code; may, within such time and in such manner as may be prescribed, appeal against such determination or conduct to the Labour Court.

(2) An appeal in terms of subsection (1) may –

(a) address the merits of the determination or decision appealed against; F

(b) seek a review of the determination or decision on any ground on which the High Court may review it;

(c) address the merits of the determination appealed against and seek its review on a ground referred to in paragraph (b).

(3) *An appeal in terms of subsection (1) shall not have the effect of suspending* G *the determination or decision appealed against.*

(4) Pending the determination of an appeal the Labour Court may make such interim determination in the matter as the justice of the case requires" (emphasis added).

One of the appeals in that case was from the decision of the arbitrator to the Labour Court. The Supreme Court noted that such an appeal was not one H

Mafusire J

A made in terms of s 97(1) of the Act. It held that an appeal from the decision of the arbitrator was not provided for in terms of that subsection.

The amendment to the Act in 2007 manifestly changed the position. The new wording in the new s 92E now covers all appeals in terms of the Act. That is a material difference.

B At the hearing Mr *Magwaliba* neither pressed the argument based on the *Net One Cellular* judgment nor relied on *Dhlodhlo v Deputy Sheriff of Marondera and Others* 2011 (1) ZLR 416 (H), a judgment of Gowora J, and *Mvududu v ARDA* 2011 (2) ZLR 449 (H), a judgment of Bhunu J. These latter two cases held that an appeal to the Labour Court against the decision of an arbitrator suspends the decision appealed against. The cases reverted to the C old position under the common law. In *Dhlodhlo* Gowora J firstly quoted s 92E of the Act. The learned judge then stated at 426C-D:

"In terms of subsection (2) the Legislature has finally put to rest the confusion in the law as to whether or not an appeal under the Act would suspend the operation of the decision or determination appealed against. The arbitral award was however granted in terms of s 98(9) of the Act. An appeal against the decision D of the arbitrator on a question of law lies to the Labour Court in accordance with the provisions of s 98(10) of the Act. Where s 92E provides that the noting of an appeal does not suspend the decision or determination, *there is no such provision in relation to an appeal against an award by an arbitrator*" (emphasis supplied).

Similarly, in *Mvududu* Bhunu J referred to s 92E of the Act and noted that E subs (2) thereof specifically provided that an appeal in terms of ss (1) shall not have the effect of suspending the determination or decision appealed against. The learned judge then said at 453C-E:

"The Supreme Court has already ruled in *Sagittarian (Pvt) Ltd v Workers Committee, Sagittarian (Pvt) Ltd* 2006 (1) ZLR 115 that the provisions of s 97(4) do not apply to an appeal made in terms of s 98 of the

Act.

F In other words, where an appeal is made in terms of s 98 of the Labour Act *there is no express provision in the Act to the effect that an appeal shall not have the effect of suspending the determination or decision appealed against.* There being no such provision one has to turn to the common law for an answer" (emphasis supplied).

I note that in *Baudi's* case Patel J did not refer to *Dhlodhlo* and *Mvududu*, G the decisions of which were directly in contrast to his. Be that as it may, it seems plain that the decisions in *Dhlodhlo* and *Mvududu* were, with all due respect, incorrect on the question of the effect of an appeal to the Labour Court from the decision of the arbitrator *vis-à-vis* the provisions of s 92E of the Act. I think it was incorrect to say that whereas s 92E of the Labour H Act provides that the noting of an appeal does not suspend the decision or

Mafusire J

determination appealed against, there is no such provision in relation to an A appeal against an award by an arbitrator. There is such a provision.

Section 92E is an omnibus provision regarding all appeals made in terms of the Labour Act. It must necessarily cover appeals from the determinations or decisions of the arbitrator to the Labour Court. There is nothing in the Act to suggest that the legislature evinced a contrary intention. *Sagittarian* B *(Pvt) Ltd v Workers Committee, Sagittarian (Pvt) Ltd (supra)*, relied upon by Bhunu J in *Mvududu,* was concerned with the provisions of the Act *before* the amendment referred to above. Consequently, it was manifestly incorrect to determine the matter under the provisions of the common law provisions when such a position had expressly been altered by statute.

In the premises the respondent's second ground of objection to the registration C of the arbitral award is also overruled.

The respondent's next ground of objection was that in an application for the registration of an arbitral award in terms of s 98 of the Act it is not just a copy of the award that must be submitted for registration but one which is certified. That this is so is plain in terms of subs (14) as read with subs D (13) of s 98. Mr *Magwaliba* dismissed the document appearing on p 27 of the record as irrelevant, incoherent and not an authentication of the arbitral award. Hereafter I shall refer to that document as "the impeached document".

The impeached document was itself a copy. It was attached to the back of a copy of the arbitral award. It was signed by the arbitrator, one C Mesikano. E Below I reproduce it in full:

"LABOUR ACT CHAPTER 28:01

Case: …. 0925/12 CERTIFICATION OF DOCUMENTS

Ref: Cmes 219(Certificate In Terms of Section 98(14) of the Labour Act)

In terms of the Arbitration Act of 1996, I, Christopher Mesikano, being the F Arbitrator, do hereby certify that this is a true copy of the Arbitration Award which contains the calculations of the parties involved amounting to forty nine thousand three hundred and seventy two dollars (US$49 372.00 only)

BEFORE AFTER ZIMRA TAXATION DEDUCTIONS.

Between: SENELE DHLOMO & LOWVELD RHINO TRUST –

(Parties to the dispute)

Being: QUANTUM OF ARBITRAL AWARD – G

Concerning: QUANTUM OF AWARD DATED 2ND SEPT 206

Hon. C. MESIKANO

ARBITRATOR

Date……. 2012 Place Harare"

In attacking it, Mr *Magwaliba* pointed out that, whilst the impeached document purported in its heading to have been a certificate in terms of the Labour H

Mafusire J

A Act, its contents in fact referred to the Arbitration Act of 1996. He also drew attention to the incorrect date, "2nd Sept 206"; the fact that the document was itself a copy and that this was just

stuck at the back of the copy of the award. He said that there was no telling that the document in fact related to the arbitral award in question.

I find the respondent's objection on this ground as opportunistic and mere nit picking. The impeached document may have lacked care and precision in its preparation but I am satisfied that it substantially complies with the requirements for certification. It sufficiently identified the arbitral award in question by, among other things, some case reference number, the names of the parties, the name of the arbitrator and the quantum involved. Furthermore, in the voluminous papers placed before me by both parties, there were annexed the copies of the documents in the proceedings pending in the Labour Court. Those documents included several copies of the arbitral award. Thus by his own documents the respondent did confirm that the award sought to be registered was indeed the same award which was now the subject matter of the dispute. It was common cause that it was the award in question.

I am prepared to condone the lack of precision in the certification of the arbitral award. I think that where a party has so substantially complied with the requirements of the law as the applicant has done in this case and where there is no discernible prejudice to the other party it "would make justice turn on its head" to deny relief in such circumstances [1]. I dismiss the respondent's ground of objection on this point.

The respondent's next ground of objection was that the documents tendered by the applicant for the registration of the arbitral award were inadequate. It was argued that in terms of art 35 a party seeking the registration with this court of an arbitral award for enforcement purposes is required to submit not only the duly authenticated original of the award or a duly certified copy thereof, but also the original arbitration agreement. Article 35(2) reads:

> "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 in the English language …."

I also note that s 5 of the Arbitration Act provides that what shall be construed as the arbitration agreement in an enactment that provides for a matter to be determined by arbitration is the requirement itself. It reads as follows:

Mafusire J

> **"5 Application of Act to arbitration under other enactments**
>
> (1) Subject to subsection (2), where an enactment requires any matter to be determined by an arbitrator or by arbitration in accordance with any law relating to arbitration, *such requirement shall be deemed to be an arbitration agreement for the purposes of this Act*.
>
> (2) Where an enactment provides for the determination of any matter by arbitration, the provisions of that enactment, to the extent that they are inconsistent with this Act, shall prevail" (emphasis added).

The respondent cited *Mandikonza and Another v Cutnal Trading (Pvt) Ltd and Others* 2004 (2) ZLR 340 (H), a judgment of Uchena J, as authority for the proposition that it is a requirement in an application for the registration of an arbitral award for enforcement that the arbitration agreement be submitted. The learned judge stated as follows at 342G-343A:

> "The requirements under article 35 are that the application shall be in writing and be accompanied by the following documents:
>
> (a) a duly authenticated original award or certified copy thereof;
>
> (b) *the original arbitration agreement or a certified copy thereof; and*
>
> (c) if the award or agreement is not in English a duly certified translation thereof into the English Language.
>
> It seems to me whoever has to recognize and order the enforcement of the award must be someone qualified to understand the application, the arbitral award, and [the] arbitration agreement."

In casu the respondent submitted that the applicant ought to have attached the reference to arbitration form in lieu of the arbitration agreement or, alternatively, her statement of claim before the arbitrator together with the respondent's statement of defence.

Mandikonza's case was not dealing with an arbitral award which had been the outcome of arbitration proceedings in terms of the Labour Act. It dealt with an arbitration agreement proper which the parties themselves had allegedly penned. Furthermore, the main issue for consideration was whether an application for the registration of an arbitral award for the purposes of enforcement in

terms of the Arbitration Act was one to be made to the registrar of this court or to the court for the consideration of a judge. The court held that G it was one to be made to court for the consideration of a judge who, unlike the registrar, would be qualified to apply his judicial mind to recognize and understand the application, the arbitral award and the arbitration agreement. The court was not dealing with an arbitral process under an employment situation which is governed by the Labour Act. Therefore, that ruling in that case would not be relevant to the present matter. H

2013 (2) ZLR p195

Mafusire J

A I have already noted that the Labour Act in s 98(2) enjoins the provisions of the Arbitration Act to apply to compulsory arbitrations and that s 5 of the Arbitration Act says that the requirement in an enactment to submit to arbitration shall be deemed to be the arbitration agreement. However, in terms of s 98 of the Labour Act and s 5 of the Arbitration Act, the application of the Arbitration Act to arbitrations is made subservient to the Labour Act. B The Labour Act does not require the submission of the arbitration agreement in an application for the registration of an arbitral award with this court for enforcement purposes. In my view, compulsory arbitrations under s 98 of the Labour Act are by operation of the law. The fact that in terms of s 98(3) the parties may be afforded an opportunity to make representations, or that in C terms of s 98(4) they may be consulted in the determination of the arbitrator's terms of reference, does not, in my view, detract from the fact that where conciliation has failed to resolve the employment dispute, it is a statutory requirement that the dispute be referred for compulsory arbitration. It is the Labour Court or the labour officer that refers the dispute for compulsory arbitration, appoint the arbitrator and fix the terms of reference for the D arbitrator. It is not a matter governed exclusively by the private agreement of the parties as in most commercial arbitrations.

In *Samudzimu v Dairibord supra*, Chiweshe JP, dealing with the position of the Labour Act versus the Arbitration Act regarding applications for the registration of arbitral awards with this court for the purposes of enforcement, E held that the Labour Act takes precedence over any other law. At p 360 he stated:

> "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, F the legislature must have intended that such matters be dealt with by the Labour Court to the exclusion of any other court.
>
> Articles 34 and 36 of the UNCITRAL Model Law set out in the Schedule to the Arbitration Act are not applicable in cases where the award sought to be challenged relates to a labour dispute. The mechanisms of challenging such awards are provided for in the Labour Act and may be accessed through the medium of the Labour Court."

G I am satisfied the failure by the applicant in the present matter to annex the reference to arbitration form or the statement of claim and of defence as the substitutes for the arbitration agreement does not form a legitimate ground for opposing the application for the registration of the arbitral award for the purposes of enforcement in terms of s 98(14) of the Labour Act. The H respondent's objection on this ground is also overruled.

2013 (2) ZLR p196

Mafusire J

The last ground of objection by the respondent to the registration of the A arbitral award for enforcement would in some respect necessarily require an assessment of the merits of its appeal and the merits of the application for a suspension of the operation of the arbitration awards both of which are pending before the Labour Court. In its heads of argument the respondent makes the point that:

> "The question of whether or not the appeal currently pending before the Labour B Court has merits is not something which this Honourable Court can determine."

However, the respondent went on to submit that the applicant is a person of straw such that if the award is registered and execution follows the respondent would suffer an irreparable harm in the event that its appeal succeeds.

This court has steadfastly refrained from getting involved in matters that C properly lie for determination by the Labour Court. See, for example, *Ndlovu* and *Samudzimu*, referred to above.

The issue raised by the respondent under this head of objection properly lies for determination by the Labour Court. Therefore the objection lacks merit. It is dismissed.

In the final result the respondent's objections to the application by the applicant D for the registration of the arbitral award made in favour of the applicant in September 2012 are all overruled. The application is granted with costs. I make the following orders:

1. The arbitral award dated 5 September 2012 by arbitrator C Mesikano be and is hereby registered as an order of this court;
2. The respondent is hereby ordered to pay the applicant the sum of E US$49 372 within five days of the date of service of this order;
3. The respondent shall pay the applicant's costs of suit.

Matsikidze & Mucheche, legal practitioners for applicant F

Wintertons, legal practitioners for respondent

1 See the remarks in *ZESA v Maposa* 1999 (2) ZLR 452 (S) at p 466 which were quoted by Makarau J in *Pamire & Ors v Dumbutshena NO & Anor* 2001 (1) ZLR 123 (H) at p 127.

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Document 23 of 79

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2013/Volume 2/MIDKWE MINERALS (PVT) LTD v KWEKWE CONSONLIDATED GOLD MINES (PVT) LTD & ORS 2013 (2) ZLR 197 (S)

MIDKWE MINERALS (PVT) LTD v KWEKWE CONSONLIDATED GOLD MINES (PVT) LTD & ORS 2013 (2) ZLR 197 (S)

Citation	2013 (2) ZLR 197 (S)
Case No	Judgment No. S-54-13
Court	Supreme Court, Harare
Judge	Chidyausiku CJ, Ziyambi JA & Mutema AJA
Heard	2 September 2013
Judgment	2 September 2013
Counsel	*C Rungwanda*, for the appellant *S Mazibisa* with *V Matatu*, for the respondents
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Legal practitioner – *conduct and ethics – duty to court – preparation of case – request for postponement – practitioner must be prepared to proceed in event of refusal of request for postponement*

Practice and procedure – *postponement – grant of – in discretion of court –* D *parties must be prepared to proceed in event of refusal of postponement*

Headnote

The grant or otherwise of a postponement is in the discretion of the court. A party seeking the grant of a postponement or other indulgence at the hearing must come prepared for a grant or refusal of its request. A legal E practitioner must be prepared, in the event of a refusal by the court to grant a postponement, to proceed with the hearing if so ordered. To appear before the court totally unprepared and totally ignorant of the merits of the case smacks of negligence on the part of the legal practitioner.

Case information

C Rungwanda, for the appellant

F *S Mazibisa* with *v Matatu*, for the respondents

Judgment

Ziyambi JA: After hearing submissions by counsel, the court dismissed the appeal with costs on the higher scale of legal practitioner and client and indicated that the reasons for its judgment would follow. The following are the reasons.

G On 1 February 2006 and in terms of the Mines and Minerals Act [*Chapter 21:05*] the first respondent ("KCGM") as grantor and the Reserve Bank of Zimbabwe as tributor entered into a standard tribute agreement as well as a rental agreement in respect of Chaka Gold Plant. The life span of the agreement was three years ending 2009 and renewable for another three years H to expire on 2 February 2012. The agreement was registered with the Mining

---

Ziyambi JA

Commissioner. The Reserve Bank during the initial term of the agreement A mined the tributed claims and operated the Chaka Gold Plant through its subsidiary company Carslone Enterprises (Pvt) Ltd ("Carslone"), the second respondent herein. However, following a shift in policy, the Reserve Bank decided to shed all quasi-fiscal operations and the renewal of the tribute agreement was concluded between KCGM and Carslone. B

On 15 December 2011, shortly before the expiry of the agreement, Carslone wrote to the KCGM as follows:

> "Dear Sir
>
> RE: CARSLONE TRIBUTES, CHAKA PLANT
>
> 1.0 I refer to our telephone conversation and advise as follows:-
>
> 1.1 The Carslone tributes from KCGM will expire in February, 2012. C
>
> 1.2 The Chaka Plant rental agreement will also automatically expire at the same time.
>
> 1.3 There are outstanding amounts for the tribute royalties and plant rental which you may discuss with Mr W. Kapofu and Mr E. Shuro for their correctness.
>
> 1.4 As we can no longer continue with quasi-fiscal operations, we recommend D Midkwe Mining Services to be considered by KCGM to take over from Carslone. Your contact person is Honourable Mutomba.
>
> 1.5 Carslone will continue to rent out the excavator and two dumpers to Midkwe to ensure payment to the creditors outstanding as at today.
>
> 1.6 Your company may, as per recommendation, negotiate new tribute and E rental agreements to replace our current arrangements at their expiration.
>
> I would like to thank your company for the professional manner in which you handled business with Carslone Enterprises. We undertake to do our best to pay the outstanding debts due to KCGM.
>
> Our contact person remains Mr Wonder Kapofu, whom you are very familiar with.
>
> Yours faithfully, F
>
> M E Chiremba
>
> Chairman"

This letter was followed by a memorandum addressed to Carslone's Plant Engineer at Chaka Gold Plant which read as follows.:

" MEMO

TO:	Mr C. Knight	Plant Engineer, Chaka Gold Plant G
FROM:	Mr W. Kapofu	Details not supplied
CC	Mr A. Adolfo	Technical Services Manager
CC	Mr ET Nhamo	GM Homestake Mining Group
DATE	30 January 2012	
RE:	EXPIRY OF TRIBUTE FOR CASLONE ENTERPRISES AND HANDOVER OF ASSETS H	

Ziyambi JA

1. The A above issue refers.
2. Attached are letters from Homestake/KCGM as well as from their lawyers, Matatu and Partners; as you aware and can deduce from the letters the tribute agreement has expired for Carslone Enterprises. Please therefore, render their officials all the necessary assistance, in the most utmost professional manner, to facilitate a smooth hand over take over of all the assets from B that were handed over to Carslone Enterprises in 2006.
3. Thanking you for your usual co-operation".

Despite this memorandum, on the expiry of the lease Carslone continued to mine at Chaka Plant and refused to hand the plant over to KCGM. Thus it was that KCGM sought and was granted by the High Court on 29 February C 2012, an interim interdict in the following terms:

"Pending the confirmation or discharge of the order, Applicant is granted the following interim relief:-

(a) The Respondent be and is hereby interdicted from carrying out any mining operations on any of Applicant's Mining Claims or any operations at Chaka Gold Plant in whatever nature whatsoever.

(b) The D Respondent be and is hereby interdicted to ensure that any business partners, associates, previous employees or current employees refrain from carrying out any mining operations on mining claims previously tribute by the Respondent or the Reserve Bank of Zimbabwe and from any operations at Chaka Gold Plant, 4.5km peg, Kwekwe – Gokwe Road, Kwekwe".

On 5 March 2012, the order was executed and the Deputy Sheriff closed E down Chaka Gold Plant. The appellant immediately, on 9 March 2012, filed an urgent application to the High Court in which it sought and obtained the following order:

"PROVISIONAL ORDER SOUGHT

(a) The first and second respondents be and are hereby interdicted from disturbing Applicant's operations at Chaka Gold Plant and it's mining claims especially F using court order under Case No. HC 683/12 against Applicant.

(b) In the event that the Applicant's custody possession and control had been disturbed by the Respondents the Respondents are hereby ordered to restore Applicant's peaceful possession and control of Chaka Gold Plant and its mining claims".

The order lacked the characteristics of a provisional order. By all accounts it G was a final order. Nevertheless the two matters came before the High Court for confirmation of the provisional orders

and were consolidated. Kamocha J in his judgment dated 8 November 2012 confirmed the first order and discharged the second. This appeal is against the judgment of Kamocha J.

Much has been made by the appellant of the fact that the order of 29 February H 2012 did not apply to it as it was not one of the parties to the application.

2013 (2) ZLR p200

Ziyambi JA

However the order includes the business associates of Carslone and it is A clear from an affidavit filed by William Mutomba who described himself as a director of the appellant, that the latter entered into a joint venture with Carslone for mining at Chaka plant. That affidavit was filed in the High Court on 1 February 2012 in a matter in which the appellant was the first applicant and Carslone the second respondent. Paragraph 5 of the affidavit B reads as follows:

> "5. On or about 31 March 2011, the first Applicant and the second Respondent entered into an agreement whereby the first Applicant took over the second Respondent's business as a going concern at Chaka Gold Plant, No. 1 Gokwe Road, Kwekwe. I attach hereto the agreement as Annexure 'A'. Further to that agreement (Annexure 'A') the parties entered into a joint venture agreement C on the first day of April 2011, wherein the second Respondent indicated that it is '*the holder of mining rights in terms of a tribute agreement with respect to certain gold claims situated in Kwekwe, namely Kwekwe Consolidated Gold Mines Claims'*. I attach hereto the joint venture agreement as Annexure 'B'. *As this Honourable Court will note from Annexure 'B', Mr Mirirai E. Chiremba, as the chairman of the Board for the second Respondent signed* D *the agreement as a representative for the second Respondent".*

The appellant has not established any right whatsoever to occupy and mine on the premises which belong to the respondent. The tribute agreement with Carslone expired on 2 February 2012 as did the rental agreement which automatically expired at the same time. No tribute and rental agreements were concluded between the appellant and KCGM. The Mining Commissioner in E his letter to KCGM dated 29 February 2012 advised as follows:

> "Dear Sir
>
> REF: Current status of Tribute Agreement No. U/R05/06 KCGM in favour of RBZ
>
> Please be advised that according to records in this office, the above tribute lapsed F on 3 February 2012 after six years to 2 February 2012.
>
> Any person who is mining under the former agreement is doing so in contravention of Mining Law and should be reported to the police and section 289 of the Mines and Minerals Act (Chapter 21:05) should be invoked".

The court *a quo* correctly found in my view that the appellant was mining in contravention of the law when he approached the court for the second G provisional order on 9 March 2012. On p 4 of the judgment the court said:

> "The applicant of the provisional order granted on 9 March 2012 under case number HC 800/12 was clearly mining in contravention of the mining law. This ought to have been clear to the applicant yet it still sought to have the provisional order confirmed when in fact it does not even have a *prima facie* right or real right to permanently interdict the owners from retaking their mining claims. There is H

2013 (2) ZLR p201

Ziyambi JA

> A no document filed of record from which the applicant in that case could derive a right.
>
> In the result the provisional order granted in that case must be discharged while the provisional order granted under case HC 683/12 is confirmed".

In the absence of a tribute agreement between it and KCGM the appellant B has failed to establish a right to mine on the mining claims in question. The judgment of the court *a quo* is unassailable. The appeal is devoid of merit.

As to the question of costs, an order for punitive costs was sought by the respondent. The request is in our view appropriate. The appellant has persisted in this appeal notwithstanding that it ought to have been quite clear to it that there was no legal justification for remaining in occupation of Chaka Gold C Plant and mining the claims in question. Indeed the Mining Commissioner on 17 August 2012 obtained a provisional order requiring the appellant to cease its mining activities on the said premises and to remove its machinery and workforce from the site, yet the appellant has persisted in this appeal. There is no doubt that this is a proper case for a punitive order of costs.

D Before concluding this judgment, I wish to express the disapproval of this court of the manner in which this appeal was conducted by the appellant. At the onset of the hearing, Mr *Rungwanda* made an application to have the matter struck off the roll. The reason tendered for this application was that Mr *Uriri* whom he had briefed to argue the matter was "attending to family matters". He could give no further details. The application was opposed by E Mr *Mazibisa* on three grounds. Firstly, that the appellant was unwilling to prosecute the appeal and was employing delaying tactics. It had not paid the costs of preparation of the record nor had it paid security for costs as required by the rules of this court. It was KCGM who had applied to the Registrar to have the matter set down for hearing. Secondly, he was only F notified, in court, of the intention to make this application and was unable to forewarn his colleague who appeared with him for KCGM and who had travelled from Kwekwe to attend the hearing. Thirdly, he alleged that the application lacks *bona fides* because the appellant is in control of the gold processing plant and has nothing to lose and everything to gain by the delay in finalizing the matter.

G Mr *Rungwanda* in reply advised the court that although he had instructed Mr *Uriri* to argue the appeal, he had no idea as to why Mr *Uriri* was unable to attend court. He equally had no personal knowledge of the case and was not in a position to argue the matter, but stood by the heads of argument prepared by Mr *Uriri.* The court took into account the submissions made in the heads H of argument prepared by Mr *Uriri* in the determination of the appeal.

Ziyambi JA

The conduct of the appellant's legal practitioners exhibits disdain and A disrespect for the court which had travelled to Bulawayo from Harare to hear the appeal, only to be told at the hearing that the appellant wanted the appeal to be postponed *sine die*.

The grant or otherwise of a postponement is in the discretion of the court. A party seeking the grant of a postponement or other indulgence at the B hearing must come prepared for a grant or refusal of its request. A legal practitioner must be prepared, in the event of a refusal by the court to grant a postponement, to proceed with the hearing if so ordered. In this case the legal practitioners for the appellant had filed heads of argument as far back as 10 July 2013. To appear before the court totally unprepared and totally ignorant of the merits of the case in my view smacks of negligence on the C part of the legal practitioner. Mr *Rungwanda* ought to have come prepared to argue the matter in the event that his application for deferment was refused.

CHIDYAUSIKU CJ and MUTEMA AJA concurred D

Garikayi & Company, appellant's legal practitioners

Mutatu & Partners, respondents' legal practitioners E

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Document 24 of 79

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2013/Volume 2/MUSEVENZO v BEJI & ANOR 2013 (2) ZLR 203 (H)

MUSEVENZO v BEJI & ANOR 2013 (2) ZLR 203 (H)

Citation	2013 (2) ZLR 203 (H)
Case No	Judgment No. HH-268-13
Court	High Court, Harare
Judge	Mafusire J

Heard	1 July 2013; *CAV*
Judgment	4 September 2013
Counsel	*W Muchengeti*, for the applicant *M M Ndebele*, for the respondent
Case Type	Opposed application
Annotations	No case annotations to date

Flynote

Practice and procedure – *application – notice of motion – dispute of fact – genuine dispute – approach court may take – when relief may be granted in spite of existence of dispute of fact*

Headnote

D In motion proceedings, a court should endeavour to resolve the dispute raised in affidavits without the hearing of evidence. It must take a robust and common sense approach and not an over fastidious one, always provided that it is convinced that there is no real possibility of any resolution doing an injustice to the other party concerned. Consequently, there is a heavy E onus upon an applicant seeking relief in motion proceedings, without the calling of evidence, where there is a *bona fide* and not merely an illusory dispute of fact. Where there is a genuine dispute of fact on the papers the court can proceed in one of several ways: (a) it can take a robust view of the facts and resolve the dispute on the papers; (b) it can permit F or require any person to give oral evidence in terms of r 229B of the High Court Rules if it is in the interests of justice to hear such evidence; (c) it can refer the matter to trial, with the application standing as the summons or the papers already filed of record standing as pleadings; or (d) it can dismiss the application altogether, if the applicant should have realised the dispute when launching the application.

G Even where real disputes of facts emerge, relief can be granted if the facts stated by the applicant, together with the admitted facts in the respondent's affidavit, justify such an order.

Cases referred to

H *Masukusa v National Foods Ltd & Anor* 1983 (1) ZLR 232 (H)

Mafusire J

Plascon-Evans Paints Ltd v van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) A

Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949 (3) SA 1155 (T)

Savanhu v Marere NO & Ors 2009 (1) ZLR 320 (S)

Van Niekerk v Van Niekerk & Ors 1999 (1) ZLR 421 (S)

Zimbabwe Bonded Fibreglass (Pvt) Ltd v Peech 1987 (2) ZLR 338 (S) B

Case information

W Muchengeti, for the applicant

M M Ndebele, for the respondent

Judgment

Mafusire J: This is an application for an order of specific performance. The C applicant claimed that in February 2001 he had bought the first respondent's rights, title and interest in the property known

as Stand 2851/9 Mutobwe Street, Masvingo (hereafter referred to as the property) for the sum of ZW$250 000, which he claimed to have paid in full. The applicant had obtained vacant occupation of the property immediately afterwards. He was still in occupation 12 years later when the matter came up for determination. It being the second D respondent's property, the actual relief sought by the applicant was an order directing the first respondent to cede and transfer to him his rights and interest in the property. The second respondent had consented to the sale. In October 2006 it had written to the applicant to pay the cession fee and to come and sign the relevant cession forms. The applicant had complied. E

The respondent admitted the sale. He admitted being paid by the applicant for the property. However, he opposed the relief sought on the basis that what the applicant had paid him was only half the purchase price and that the other half had remained outstanding. The Zimbabwean currency having become dysfunctional, the first respondent estimated that the balance of the purchase price was US$7 000. He said if he was paid this amount he would F sign the cession forms.

At the hearing the applicant asked for default judgment on the basis that the first respondent had been automatically barred for failure to file heads of argument timeously. In terms of r 238(2b) as read with subrr (2) and (2a) of the High Court Rules 1971 (the Rules) a respondent who is to be G represented by a legal practitioner at the hearing of an opposed application matter is required to file heads of argument within 10 days after the applicant has filed his or hers or else the respondent becomes barred. In this matter, the first respondent's heads had been filed in June 2013. That was slightly more than a year out of time. Mr *Ndebele*, for the first respondent, applied for condonation. Mr *Muchengeti*, for the applicant, opposed the application. H

Mafusire J

A The condonation application was based on the claim that after the heads had been drafted they had been sent by courier to the first respondent for his verification, but that the first respondent had moved residence and had therefore not received them. However, it was not clear whether or not the first respondent had eventually received the heads before they were finally filed more than a year later.

B I opted to hear argument on the merits of the main application, after which I would give my ruling on both the interlocutory application for condonation and the main application for specific performance. At the end of the hearing, I granted condonation but granted the main application on the merits in terms of the draft. I gave an outline of my reasons *ex tempore* and indicated that the C full reasons would be made available only on request in writing. That was on 1 July 2013. On 24 July 2013 first respondent's legal practitioners wrote to request a full judgment in the matter. Below is the judgment.

At the end of the hearing I was satisfied that the applicant's version of events was more consonant with the probabilities in the case. Attached to the applicant's papers was a copy of a hand written letter by the first respondent D to the second respondent, stating unequivocally that he had paid for the property and wanted to cede his rights to the applicant. In that letter, the first respondent had implored the second respondent to accept the change of ownership. The material portion of the letter read as follows:

> "Re: Cession STD No 2851/9 Mutobwe St
>
> E I fully paid off the above House. I therefore want to cede my rights over this property to Musevenzo Venganai ID No 04-099102 V 04. Can you please accept the change of ownership.
>
> Yours faithfully
>
> Silvesta Beji."

In the notice of opposition the first respondent claimed that the above letter F had not been attached to the application. However, if it was his set of papers that did not have the attachment, the first respondent could have simply asked for one to be furnished. At any rate, the applicant had attached a second copy of the same letter to his answering affidavit. Nowhere, except in his heads of argument, filed more than a year out of time, did the first respondent challenge the authenticity of that letter.

G The first respondent admitted that the applicant had paid for the property but claimed that the payment had amounted to only half the purchase price. He admitted to have visited the offices of the second respondent with the applicant, but claimed that the visit was only for the purpose of

advising the second respondent that he had sold his rights in the property to the applicant H and that he would sign the cession forms only upon being paid the balance

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Mafusire J

of the purchase price. The applicant had averred that the purpose of that visit A was to advise the second respondent of the agreement.

To the aforesaid letter from the second respondent to the applicant in 2006 in which the second respondent invited the applicant to come and pay the cession fees and to sign the cession forms, the first respondent said he was raising no issue. B

In February 2012 the applicant's legal practitioner had written to the first respondent, *inter alia* narrating the agreement of sale, the payment by the applicant of the cession fees and demanding that the first respondent should attend to the signing of the cession forms. The applicant averred that the first respondent had received the letter but that he had refused to sign for it. In C response to that the first respondent admitted receipt of the letter and only denied that he had refused to sign for it.

The first respondent claimed that there was a dispute of fact that was incapable of resolution on the papers. In his heads of argument it was denied that the first respondent had been the author of the handwritten letter referred to above. However, this denial had no foundation in fact. The second respondent had D made no such denial himself.

A dispute of fact must be real and not fanciful. In *Zimbabwe Bonded Fibreglass (Pvt) Ltd v Peech* 1987 (2) ZLR 338 (S) at 339, Gubbay JA, as he then was, stated:

> "It is, I think, well established that in motion proceedings a court should endeavour E to resolve the dispute raised in affidavits without the hearing of evidence. It must take a robust and common sense approach and not an over fastidious one; always provided that it is convinced that there is no real possibility of any resolution doing an injustice to the other party concerned. Consequently there is a heavy onus upon an applicant seeking relief in motion proceedings, without the calling of evidence, where there is a *bona fide* and not merely an illusory F dispute of fact. See *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1165; *Soffiantini v Mould* 1956 (4) SA 150 (E) at 154; *Joosab & Ors v Shah* 1972 (1) RLR 137 (G) at 138G-H; *Lalla v Spafford NO & Ors* 1973 (2) RLR 241 (G) at 243B; *Masukusa v National Foods Ltd & Anor* 1983 (1) ZLR 232 (H)."

Where there is a genuine dispute of fact on the papers the court can proceed G in one of several ways:

(1) The court can take a robust view of the facts and resolve the dispute on the papers: see *Masukusa v National Foods Ltd & Anor* 1983 (1) ZLR 232 (H); *Zimbabwe Bonded Fibreglass (Pvt) Ltd v Peech (supra)*; *Van Niekerk v Van Niekerk & Ors* 1999 (1) ZLR 421 (S) and *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T). H

Mafusire J

(2) The A court can permit or require any person to give oral evidence in terms of r 229B of the Rules if it is in the interests of justice to hear such evidence;

(3) The court can refer the matter to trial with the application standing as the summons or the papers already filed of record standing as pleadings; see *Masukusa's* case above,

(4) The B court can dismiss the application altogether if the applicant should have realised the dispute when launching the application; see *Masukusa's* case above; *Savanhu v Marere NO & Ors* 2009 (1) ZLR 320 (S); *Plascon-Evans Paints Ltd v van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).

In motion proceedings where real disputes of facts emerge, relief can be C granted if the facts stated by the applicant together with the admitted facts in the respondent's affidavit justify such an order. In the aforesaid South African case of *Plascon-Evans* above Corbett JA stated as follows at 634H-635B:

> "It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other D form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the court to give such final relief on the papers before

it is, however, not confined to such situation. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or *bona fide* dispute of fact (see in E this regard *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1163-5; *da Matta v Otto NO* 1972 (3) SA 858 (A) at 882D-H). If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination under r 6(5)(g) of the Uniform Rules of Court (cf *Petersen v Cuthbert & Co Ltd* 1945 AD 420 at 428; *Room Hire* case *supra* at 1164) and the court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the F basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks (see e.g. *Rikhoto v East Rand Administration Board and Another* 1983 (4) SA 278 (W) at 283E-F)"

The approach in *Plascon-Evans* was followed by our Supreme Court in G *Savanhu's* case above. At 324D-E Malaba DCJ said:

"The appellant chose to proceed by way of court application to claim the order of specific performance against the first respondent. As the proceedings were by way of a court application and there were disputes of fact, the final relief could only have been granted if the facts stated by the first respondent together with the admitted facts in the appellant's affidavit justified such an order: H *Plascon-Evans Paints Ltd v van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634H-635B"

2013 (2) ZLR p208

Mafusire J

In the present case there were no genuine disputes of facts. It was not even a A situation where the court would be called upon to adopt a robust approach in order to resolve a dispute of facts apparent on the papers. The first respondent admitted all the essential facts. I was convinced that the respondent's claim that what the applicant had paid him in respect of the cession was just but half of what he wanted was plainly an afterthought. He provided no evidence B of this. Such a claim does not accord with the probabilities. It is not probable that without having been paid in full the respondent could have written to the second respondent not only confirming the sale but also giving instructions for the cession. Furthermore, he would not have given vacant occupation of the property to the first respondent and for 12 years have done nothing about claiming what had allegedly remained outstanding on the purchase price. C He would not have accompanied the applicant to the second respondent's offices to inform it of the sale if he was still owed half the agreed amount. That the second respondent would have asked for and received payment of the cession fees from the applicant only confirmed the agreement that the parties had reached and that such agreement had been endorsed by the second respondent as the responsible authority and actual owner of the property . D

In the founding affidavit the applicant claimed that the first respondent was withholding signing the cession forms because not only was he demanding more money but also that he was holding the applicant to ransom for the damages allegedly caused to the respondent by certain of the applicant's relatives. The respondent's claim that he wanted US$7000 as the balance E of the purchase price neatly dovetails with what the applicant alleged. That is unacceptable.

The first respondent had no defence. Opposition to the relief sought by the applicant was demonstrably spiteful. At the end of the hearing I granted an order in terms of the draft. The order was as follows: F

IT IS ORDERED THAT:

1. The first respondent be and is hereby ordered to sign all the cession forms necessary to cede his right, title and interest in Stand No. 2851/9 Mutobwe Street, Masvingo, to the applicant within 7 days of the date of this order.
2. The deputy sheriff, Masvingo, be and is hereby authorised to sign the G necessary forms should the first respondent fail to comply with paragraph 1 above.
3. The first respondent shall pay the costs of suit.

Matimba & Muchengeti, legal practitioners for applicant

Chadyiwa & Associates, legal practitioners for respondent H

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Document 25 of 79

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2013/Volume 2/PARSON & ANOR v CHIBANDA NO & ANOR 2013 (2) ZLR 209 (H)

PARSON & ANOR v CHIBANDA NO & ANOR 2013 (2) ZLR 209 (H)

Citation	2013 (2) ZLR 209 (H)
Case No	Judgment No. HH- 273-13
Court	High Court, Harare
Judge	Musakwa J
Heard	30 August 2013; CAV
Judgment	5 September 2013
Counsel	*H Nkomo,* for the applicants Mrs *S Fero,* for the respondents
Case Type	Urgent chamber application
Annotations	No case annotations to date

Flynote

Criminal procedure – *plea – plea and exception made together – court's discretion as to which to hear first – exception upheld – accused not entitled to verdict – issues raised by plea must still be tried*

Headnote

D The applicants pleaded not guilty in the magistrates court to a charge of fraud. At the time of pleading they also excepted to the charge on the ground that it did not disclose an offence. The exception was upheld and the magistrate ordered an amendment to the charge. They applied to the High Court for a stay of the criminal proceedings instituted E against them pending the determination of a review application that had been filed with the court. It was argued that because the applicants had pleaded and excepted at the same time and the exception was upheld, the trial court could not order that the charge be amended and should have ordered the discharge of the applicants. State counsel argued that where an accused pleads not guilty, irrespective of whether he has also F excepted, the matter proceeds to trial.

Held: it is not correct to say that once an accused person pleads and excepts together, then he is entitled to a verdict. This is because an objection to a defective charge or indictment can only be made by way of exception in terms of s 170 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. A court before which an exception is made has a discretion to order G an amendment if this does not prejudice the accused in his defence. The trial court was entitled to order the amendment *mero motu*. In any event, once an accused pleads to a charge the issues raised by such plea must be tried. The applicants had filed a defence outline in which they denied the charge. That on its own meant that they were not prejudiced in their H defence. The charge was defective, but a defectiv e charge may be cured

Musakwa J

by evidence: s 203 of the Act, and the outline of the State case made A clear what the allegations were against the applicants. There was thus no prospect of success in the review proceedings that had been instituted.

Cases cited

Attorney-General v Makamba 2005 (2) ZLR 54 (S) B

Dambodzvuka & Anor v Sithole NO & Anor 2004 (2) ZLR 242 (H)

S v Sikharama 1984 (1) ZLR 170 (H)

Legislation considered

Criminal Procedure and Evidence Act [*Chapter 9:07*], ss 146, 170,171,178,180 &186 C

Case information

H Nkomo, for the applicants

Mrs *S Fero,* for the respondents

Judgment

Musakwa J: This is an application for stay of criminal proceedings instituted D against the applicants pending the determination of a review application that has been filed with this court.

The applicants have, in the magistrates court, pleaded not guilty to a charge of fraud. At the time of pleading they also excepted to the charge on the ground that it does not disclose an offence. E

The charge against the applicants is framed as follows:

> "In that between 28 March 2013 and 17 May 2013 and at Alliance Insurance Company, Westgate, Harare, William Lorenzo Parson, Wendell Parson or one or both of them unlawfully and with intent to defraud misrepresented to Alliance Insurance Company by presenting claim forms which indicated that William Lorenzo Parson was involved in a road traffic accident on 28 March 2013 instead F of 16 March 2013. As a result of this misrepresentation, Alliance Insurance Company processed a claim of USD 25 000 for the Ford Ranger, registration number ABI 0788, which was involved in an accident and was said to be beyond economic repair, to the prejudice of Alliance Insurance Company."

The outline of the State case alleges that on 16 March 2013 the first applicant G was involved in an accident whilst driving a Ford Ranger, registration number ABI 0788. The motor vehicle was damaged beyond economic repair. It was not insured. The accident was reported at Borrowdale Police Station. On 18 March 2013 the second applicant approached AK Insurance Brokers and applied to insure the motor vehicle together with two trailers. A comprehensive policy was issued , commencing from 18 March 2013 to 26 October 2013. H

Musakwa J

A The applicants subsequently filed a claim purporting that the accident had occurred on 28 March 2013. An indemnity of US$23 750 was then processed. Before awarding the claim Alliance Insurance Company conducted investigations through their risk department in collaboration with Borrowdale Police. It was then established that the accident had occurred on 16 March and not 28 March. The first applicant approached Weber Sithole of the risk B department and offered him US$2 000 as an inducement to process the claim. On 17 March 2013 the second applicant went to Alliance Insurance Company to collect the US$23 750 and he was then arrested.

Mr *Nkomo* submitted that, because the applicants pleaded and excepted at the same time and the exception was upheld, there was no question for the C trial court to order that the charge be amended. He thus submitted that the trial court should have ordered the discharge of the applicants. In support of this submission he referred to s 180(6) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] which states that:

> "Any person who has been called upon to plead to any indictment, summons or charge shall, except as is otherwise provided in this Act or in any other enactment, D be entitled to demand that he be either acquitted or found guilty by the judge or magistrate before whom he pleaded:
>
> Provided that –

(i) where a plea of not guilty has been recorded, whether in terms of section two hundred and seventy-two or otherwise, the trial may be continued E before another judge or magistrate if no evidence has been adduced;

(ii) where a plea of guilty has been recorded, the trial may be continued before another judge or magistrate if no evidence has been adduced or no explanation has been given or inquiry made in terms of paragraph (b) of subsection (2) of section two hundred and seventy-one."

However, Mrs *Fero* countered Mr *Nkomo*'s submission by referring to F proviso (i) to s 180(6). She argued that where an accused pleads not guilty irrespective of whether he has also excepted, the matter proceeds to trial. She also cited s 170 of the Act which provides that:

"(1) Any objection to an indictment for any formal defect apparent on the face thereof shall be taken by exception or by application to quash such indictment G before the accused has pleaded, but not afterwards.

(2) Any objection to a summons or charge for any formal defect apparent on the face thereof which is to be tried by a magistrates court shall be taken by exception before the accused has pleaded, but not afterwards.

(3) Any court before which any objection is taken in terms of subsection (1) or (2) may, if it is thought necessary and the accused is not prejudiced as to his H defence, cause the indictment, summons or charge to be forthwith amended in the

requisite particular by some officer of the court or other person, and thereupon A the trial shall proceed as if no such defect had appeared."

The above provision does not dispose of the matter because Mrs *Fero* again relied on s 171 which states that:

"When the accused pleads and excepts together, it shall be in the discretion of the court whether the plea or exception shall be first disposed of." B

Therefore Mr *Nkomo* was not correct in his submission that the applicants were entitled to a verdict once the trial court upheld the exception. In the first place, Mr *Nkomo* lost sight of s 180(1) which states that

"If the accused does not object that he has not been duly served with a copy of the indictment, summons or charge or apply to have it quashed under section *one hundred and seventy-eight*, he shall either plead to it or except to it on the C ground that it does not disclose any offence cognizable by the court"

The applicants did not invoke s 178 which relates to the quashing of an indictment that is calculated to embarrass or prejudice an accused in his defence.

It does not follow that, once an accused pleads and excepts together, then he D is entitled to a verdict. This is because an objection to a defective charge or indictment can only be done by way of exception in terms of s 170. A court before which an exception is made has the discretion to order an amendment if this does not prejudice the accused in his defence. It is therefore erroneous for Mr *Nkomo* to argue that the trial court erred in ordering the amendment E *mero motu*. In any event, once an accused pleads to a charge the issues raised by such plea must be tried. In this respect see s 186, which states that

"If the accused pleads any plea or pleas other than the plea of guilty or a plea to the jurisdiction of the court, he is, by such plea without any further form, deemed to have demanded that the issues raised by such plea or pleas shall be tried by the court." F

It is worth noting that the applicants filed a defence outline in which they denied the charge. That, on its own, already means they were not prejudiced in their defence. That notwithstanding, the charge preferred against them was not drafted with precision. The essentials of an indictment are well summed up in s 146 which states: G

"(1) Subject to this Act and except as otherwise provided in any other enactment, each count of the indictment, summons or charge shall set forth the offence with which the accused is charged in such manner, and with such particulars as to the alleged time and place of committing the offence and the person, if any, against whom and the property, if any, in respect of which the offence is alleged to have been committed, as may be reasonably sufficient to inform the accused of the nature of the charge. H

A (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 B 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.

(3) Where any of the particulars referred to in this section are unknown to the C 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 or her with that crime by its name only.

(5) No indictment, summons or charge alleging the commission of a crime D 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."

See also *S v Sikarama* 1984 (1) ZLR 170 (H).

It is noted that the offence in the present case is described by name. The dates and place of commission, as well as the person against whom the offence E was allegedly committed, are stated. The drafter of the charge omitted to allege that when the applicants insured the motor vehicle on 28 March it had already been written off in an accident on 16 March.

This comes out well in the outline of the State case. A charge or indictment does not exist in a vacuum. It is beyond question that it is prepared from witnesses' evidence which is condensed in an outline of State case. That is F why a defective charge may be cured by evidence. See s 203.

In the light of these observations, is there merit in ordering a stay of proceedings pending review of the trial court's decision to uphold the exception and order amendment of the charge? Mr *Nkomo* submitted that the State will not be prejudiced by a stay of proceedings. It is significant to note that after the trial G court pronounced its decision on the exception counsel for the applicants made the following submission:

"I have no problems proceeding with the charge in its present state."

On the other hand, Mrs *Fero* submitted that the charge is going to be amended to disclose the missing averments. Assuming that the State does H not amend the charge as ordered (which in my view is inconceivable), Mrs

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Musakwa J

Fero further submitted that it would risk an application for discharge at the A close of its case. Thus, according to Mrs *Fero*, the applicants' remedy lies in an appeal and not a review. This, I take it, would be the remedy in the event of a conviction.

With the clear provisions of the law that I have articulated, I am of the view that there is no prospect of success in the review proceedings that have been B instituted. It is generally accepted that superior courts are reluctant to interfere with uncompleted proceedings. They only do so where grave injustice might be occasioned. In this respect see *Attorney-General v Makamba* 2005 (2) ZLR 54 (S) and the authorities cited therein, as well as *Dombodzvuku & Anor v Sithole NO & Anor* 2004 (2) ZLR 242 (H)*.

In the result, the application is hereby dismissed with costs. C

Mtetwa & Nyambirai, applicants' legal practitioners

Attorney-General's Office, respondents' legal practitioners D

* See also *S v John*, above, at p 154 of this volume. – *Editor*.

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Document 26 of 79

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2013/Volume 2/WILLIAM BAIN & CO HOLDINGS (PVT) LTD v CHIKWANDA 2013 (2) ZLR 215 (H)

WILLIAM BAIN & CO HOLDINGS (PVT) LTD v CHIKWANDA 2013 (2) ZLR 215 (H)

Citation	2013 (2) ZLR 215 (H)
Case No	Judgment No. HH-290-13
Court	High Court, Harare
Judge	Mafusire J
Heard	1 July 2013; *CAV*
Judgment	11 September 2013
Counsel	*G Nyamayi* and *D Drury*, for the applicant *O Mushuma* for the respondent
Case Type	Civil application
Annotations	No case annotations to date

Flynote

Practice and procedure – *bar – automatic bar for failure to enter appearance to defend – upliftment of – application – what applicant must show – must give reasonable explanation for default and show that he has a bona* D *fide defence on the merits – wilful default – what constitutes*

Words and phrases – *"wilful default" – what amounts to – willful default akin to a waver of one's rights*

Headnote

E For the purpose of r 84 of the High Court Rules 1971 (RGN 1047 of 1971), which deals with the uplifting of the automatic bar in default of an appearance to defend a summons, an applicant must explain the reason for the delay in entering such appearance and thereafter convince the court that he has a *bona fide* defence on the merits. Difficulties may arise where the application is opposed on the basis that the applicant was in F wilful default, which is akin to a waiver of one's rights. An applicant who, with full knowledge of his rights, decides not to follow up on them and fully appreciates the consequences of not doing so, is deemed to have waived his rights. However, while the concept of wilful default may be easy to define, it is seldom clear cut in practice. In most cases, it is a question of the degree of negligence on the part of the applicant, and G the court will be called upon to decide whether or not that negligence amounts to willful default. In coming to a conclusion, there is a certain weighing of the balance between the extent of the negligence and the merits of the defence.

Notwithstanding a successful application for the uplifting of the automatic H bar, the court ordered the applicant to bear the costs of the respondent's

unsuccessfully opposition thereto where, on the facts, that opposition A was not only reasonable but also compelling.

Cases cited

Chidziva & Ors v Zimbabwe Iron & Steel Co Ltd 1997 (2) ZLR 368 (S)

Commercial Bank of Zimbabwe Ltd v MM Builders & Suppliers (Pvt) Ltd 1996 (2) ZLR 420 (H) B

Deweras Farms (Pvt) Ltd & Ors v Zimbank 1997 (2) ZLR 47 (H)

GMB v Muchero 2008 (1) ZLR 216 (S)

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

Legislation considered C

High Court Rules 1971 (RGN 1047 of 1971), r 84

Case information

G Nyamayi and *D Drury*, for the applicant

O Mushuma for the respondent

Judgment

Mafusire J: This is an application for the uplifting of the automatic bar. The D applicant had failed to enter an appearance to defend respondent's summons which had claimed payment of an amount of US64 000 as damages for breach of contract. The summons had been served on applicant's salesman, one Misheck Sande. Sande is said to have passed on the summons to the receptionist. The receptionist was not mentioned. There was no information E on what the receptionist had done with the summons.

In the application to uplift the bar the applicant's founding affidavit was deposed to by its finance director, one Bright Mudzvova. He averred that it was company policy that any company employee that received court process would pass it on to either himself or the finance manager. He said that in F the present case that procedure had not been followed. He had not seen the summons. No one in management had seen or become aware of it.

The applicant had got to know about the respondent's claim through its legal practitioner. The legal practitioner had attended the unopposed motion court in respect of her other matters on the day that the respondent happened to have G enrolled his claim for a default judgment. She had engaged the respondent's legal practitioner and had subsequently telephoned the applicant. The default judgment had apparently not been entered. However, it was not explained whether this had been due to the efforts of the applicant's legal practitioner or some other reason. But having realised that it had automatically been barred, the applicant had immediately launched the present proceedings. H

Mafusire J

A The respondent opposed the application on the basis that the applicant had been in wilful default and that, on the merits, it had no *bona fide* defence. the respondent maintained that there had been no reasonable explanation for the applicant's failure to enter an appearance to defend timeously. No affidavit from the receptionist had been filed to explain what he or she had done with the summons. Bright Mudzvova, the applicant's deponent, was B not the only director of the applicant to whom process could be referred.

The respondent's other submissions were that long before his summons had been issued the parties had, through their lawyers, written each other letters of demand and had both threatened action. On his part, the respondent had proceeded to issue summons and had had it properly served. Thus, according C to the respondent, applicant must have anticipated that the process would be issued after his letter of demand.

On why he had chosen to serve the summons directly on the applicant when he knew that it was duly represented, the respondent maintained that he had had no obligation to do so. Once it had received the process it should have been D up to the applicant to refer the summons to a legal practitioner of its choice.

On the merits, the respondent maintained that the applicant had no defence. His claim had arisen as a result of the applicant's failure to make timeous delivery of a potato digger which the respondent

had purchased from the applicant.

The respondent's version of events was that he had wanted to import a potato E digger to facilitate the harvest of 10 hectares of potatoes. He had sourced this machine from a German company. He would import it through an agent in South Africa. But before he had committed himself to the importation of the implement, he had approached the applicant for an assurance that it would be able to provide him with spares. The applicant was in the business F of manufacturing agricultural equipment. The respondent said he had held discussions with the applicant's managing director who had convinced him that the applicant could manufacture the implement among its range of products. He had been dissuaded from pursuing the importation route and had been persuaded to place an order with the applicant.

G According to the respondent, the price for the machine had been agreed upon. A deposit of around one half of the purchase price had been paid. The balance would be paid upon delivery. It had also been agreed that the machine would be delivered by not later than the first week of December 2011. He said this period had been critical. Among other things, this would be the harvesting time. Failure to deliver timeously would pose a huge risk. The crop could H be ruined by the elements. However, contrary to the express terms of the

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agreement, the applicant had not only failed to deliver the machine on time A but also, when it had done so towards the Christmas period, the machine had malfunctioned owing to poor workmanship. The applicant's repeated attempts to fix it had initially failed. It had eventually succeeded only in January of the following year. But by that time it had become too late. Due to the incessant rains that had fallen from mid-December 2011 to January B 2012, the potato crop had been ruined. The amount claimed was said to be the damages incurred by the respondent as a result of the applicant's breach. The respondent alleged the contract had been concluded with no less than applicant's senior personnel that had included the managing director, the finance director himself, Mudzvova, who was the deponent to the applicant's founding affidavit, the general manager of the applicant's manufacturing C division and the general manager of the applicant's trading division.

On its part, the applicant acknowledged the contract. However, it disputed virtually everything else said by the respondent. In particular, it denied that the contract had been specific on the time of delivery. It denied that any of the senior personnel mentioned by the respondent had been part of the meeting during which the contract had been concluded. The managing D director was said to have since left the applicant by the time of the meeting alleged by the respondent. None of the rest of the other senior members of management alleged by the respondent, including Mudzvova himself, had known anything about the meeting. Applicant further averred that not only had it intended to defend the respondent's claim but also that it had intended E to sue the respondent for the balance of the purchase price.

The applicant further claimed that the respondent's summons was defective in numerous respects; not least the alleged failure by the respondent to plead the names of the parties to the contract and, purportedly, his attempt at setting off what was clearly a delictual claim against a liquidated claim. F

After hearing argument I granted the application *ex tempore* but ordered that the applicant would pay the respondent's costs of suit. I said my full reasons would be made available on request. The respondent has written to request judgment on the matter. Below is my judgment.

An application for the uplifting of the automatic bar in default of appearance to defend is made in terms of Order 12 r 84 of the High Court of Zimbabwe G Rules (the Rules). That rule reads as follows:

> **"84. Removal of bar**
>
> (1) A party who has been barred may –
>
> (a) make a chamber application to remove the bar; or
>
> (b) make an oral application at the hearing, if any, of the action or suit concerned; H

> A and the judge or court may allow the application on such terms as to costs and otherwise as he or it, as the case may be, thinks fit."

The court or judge hearing the application for the removal of the bar undoubtedly has an unfettered discretion to grant or refuse the application. That discretion is of course exercised judiciously and not capriciously or whimsically. The current r 84 was amended in 1996 by SI 33 of 1996. The B rule sets out no guidelines or parameters on how that discretion might be exercised. Undoubtedly it is left to the court or the judge. The old rule offered some guidance, albeit very little. An application for the removal of the bar had to be supported by an affidavit of merits and other sufficient grounds. The old rule read as follows:

> C "The court may *upon an affidavit of merits and other sufficient grounds* order the removal of a bar on such terms as to costs or otherwise as it deems just" (emphasis added).

However, despite the amendment, and as the respondent rightly points out in his heads of argument, it is still a requirement under the new r 84 that an application for the removal of the bar has to show good and sufficient D grounds. Not only must there be a reasonable explanation for the default but also the applicant must show its defence on the merits. Dealing with the new r 84, Garwe JA stated as follows in *Grain Marketing Board v Muchero* 2008 (1) ZLR 216 (S) at 220D-F:

> "It is clear from the above provisions that, once a party is barred, the matter is E treated as unopposed unless the party so barred makes an application before the court for the upliftment of the bar. It is also clear that, in making the application to uplift the bar, the party that has been barred can either file a chamber (not court) application to uplift the bar or, where that has not been done, the party can make an oral application at the hearing. The practice in the High Court, so far as I am aware, is that only in very few instances have oral applications to F uplift the bar been entertained by the court. This is because, in such a case, *the applicant must explain the reason for the delay, and thereafter convince the court that he has a* bona fide *defence on the merits*" (emphasis added).

What constitutes wilful default and a *bona fide* defence depends on the merits of each case. In *Zimbabwe Banking Corp Ltd v Masendeke* 1995 (2) ZLR 400 (S) (the *Zimbank* case), the Supreme Court, in the judgment by G McNally JA, held that wilful default occurred when a party freely takes a decision to refrain from appearing with full knowledge of the service or set down of the matter.

In my view, wilful default is akin to a waiver of one's rights. If a party, with full knowledge of his or her rights decides not to follow up on them H and fully appreciating the consequences of not doing so, is deemed to have

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Mafusire J

waived such rights: *Chidziva & Ors v Zimbabwe Iron & Steel Co Ltd* 1997 (2) ZLR 368 (S) A .

The concept of wilful default may be quite easy to define on paper but somewhat difficult to identify in practice. It is seldom clearcut. In most cases, it is a question of the degree of negligence by the defaulting party that the court is called upon to weigh and to determine whether or not that B negligence amounts to wilful default in any given case. In the *Zimbank* case the learned judge of appeal put it as follows, at p 403:

> "The wilfulness of a default is seldom, if ever clear-cut. There is almost always an element of negligence, and the question arises whether it was gross negligence and whether it was so gross as to amount to wilfulness. And in coming to a conclusion there is a certain weighing of the balance between the extent of the C negligence and the merits of the defence. See *Songore v Olivine Industries (Pvt) Ltd* 1988 (2) ZLR 210; *Stockil v Griffiths* 1992 (1) ZLR 172; and *Mdokwani v Shoniwa* [1992 (1) ZLR 269 (S)]."

Deweras Farm (Pvt) Ltd & Ors v Zimbabwe Banking Corp 1997 (2) ZLR 47 (H) in many ways helps to illustrate the concept of wilful default. For many D years it had been the practice that a claim for the repayment of a bank loan, for example, would be presented without a clear breakdown of the various components of that loan, such as the capital advance, the interest accrued, the bank charges and the appropriation of the repayments made. That position changed with the landmark decision by this court in *Commercial Bank of Zimbabwe Ltd v MM Builders & Suppliers (Pvt) Ltd* 1996 (2) ZLR 420 (H) E in which it was held, among other things that, irrespective of the manner of its computation and the manner of the appropriation of the repayments by the borrower the interest accrued on a bank loan or overdraft does not lose its identity as such and that a claim for the repayments of a bank loan or overdraft has to specify the different components of the debt. F

The applicants in *Deweras Farm* case had purposefully refrained from defending the claim when the bank had sued for the repayment of the overdraft. Its reason for not defending had been that it had relied on the bank's expertise in calculating the indebtedness and that the decision not to contest the claim had been made in the honest and reasonable belief that G the bank had correctly calculated

the amount outstanding and the interest accrued. However, in the advent of the *MM Builders*' case, the applicants applied for rescission of judgment on the basis that they had been unable to calculate the capital sum, that the interest rates had not been agreed upon and that the appropriation of the interest had been contrary to the manner approved in the *MM Builders*' case. H

2013 (2) ZLR p221

Mafusire J

A Gillespie J, citing, *inter alia*, the *Zimbank* case, held that the traditional perception of wilful default is that it occurs when a party, with full knowledge of the service or set-down of the matter and the risks attendant on the default, freely takes a decision to refrain from appearing. He repeated that the wilfulness of a default is seldom, if ever, clear-cut and that there is almost always an element of negligence. In such a situation there is a certain weighing of the B extent of the negligence and the merits of the defence.

The applicants in the *Deweras Farm* case had explained that their deliberate default was because they had entertained a genuine belief that the debt had been due and that no defence had existed and that they would not have acquiesced had they known of the availability of the defence. Gillespie J C noted that the explanation had been satisfactory and acceptable in principle but nonetheless he still held that the default had been wilful. Furthermore, the applicant had failed to show a good and sufficient cause for the rescission. By virtue of the default judgment against them, the amount had been due by them. They had failed to proffer a *prima facie* defence to that debt or provisional calculations in defence of the balance.

D In the present matter I damned the applicant but nonetheless granted it the relief it sought. In my view the applicant was demonstrably sluggard in the protection of its interest. At the stage when the parties were still exchanging letters, the applicant was the first to make demand for payment. However, faced with an emphatic counterclaim the applicant recoiled into its shell. When the respondent's summons eventually came, the applicant erred. It E has failed to account for that summons despite the admission that Sande, the salesman, had received it. If it had been company policy that all court processes had to be submitted to the finance director or the finance manager, why then did Sande take the summons to the receptionist? Had he given instructions that the summons be forwarded to the finance director or the F finance manager in line with the alleged company policy? Unfortunately the application did not say.

In the application there was no affidavit by Sande. The receptionist who was said to have received the summons remained unnamed. Needless to say there was no affidavit from him or her as well. Mudzova denies virtually G everything else said by the respondent about the terms of the contract but proffered no version of his own. He admitted the contract. He rejected all the names mentioned by the respondent as having represented the applicant during the conclusion of the contract, including himself. But he did not tell who then the parties were. He did not tell when it was that delivery of the potato digger had to be made to the respondent. In my view, Mudzvova's H affidavit concealed more than it revealed.

2013 (2) ZLR p222

Mafusire J

However, in spite of my very serious misgivings about the applicant's A explanation of the default I felt that the circumstances of this case were remarkably similar to those of the *Zimbank* case. In that case the Supreme Court took a dim view of the conduct of the respondent's legal practitioner whom it considered had not only snatched at a judgment but had also unreasonably clung to it. B

In the *Zimbank* case, as in the present matter, the respondent's suit had been preceded by a letter of demand. The letter had been acknowledged and had been said to have been under consideration. In the present case the applicant had not merely acknowledged the letter of demand but had expressly denied liability. It had also categorically promised to issue its own summons, which it had earlier on warned about. C

In the *Zimbank* case the summons had been served on the accountant of one of the branches of the applicant. The accountant had referred it to applicant's Head Office where it had reached the office of the General Manager. In the present matter the summons had been served on the salesman, who had referred it to a receptionist. In the *Zimbank* case the summons had been inexplicably D filed away. The general manager had not seen it. In the present case it is not known what had become of the summons. But neither Mudzvova, the finance director, nor the finance manager had seen it.

Just as in this case, default judgment had in the *Zimbank* case been sought without any further communication when no appearance to defend had been entered. In the *Zimbank* case the applicant had become aware of the E default judgment on the day that it had been granted. In the present case, the applicant, through its legal practitioner, became aware of the effort to take judgment on the day the case had been enrolled in motion court. In the *Zimbank* case an application for rescission of judgment was filed on the same day that the judgment had been granted. In the present case an application F for the upliftment of the bar was filed just a few days afterwards.

In the *Zimbank* case the Supreme Court expressed disquiet over the conduct of the respondent's legal practitioner in contesting the application for rescission of judgment. He narrowly escaped an order of costs *de bonis propriis*. McNally JA, at p 402E, made the following terse remarks (Korsah JA and Muchechetere JA) agreeing: G

> "Here there was a mistake. It was clearly a mistake. Zimbank had no possible reason to allow the claim against it… to go by default. *No-one, and in that term I include Mr Moyo of Chikumbirike and Associates who acted for Masendeke, could have reasonably have thought otherwise.*
>
> The mistake was, like many mistakes where documents go astray in the filing system of an organisation, inexplicable. *And one wonders how the court would* H

Mafusire J

> A *benefit if a minute and detailed investigation were to reveal how the summons came to be filed without coming to the attention of the general manager. The important explanation is that it was filed, and it did not come to his attention*" (emphasis added).

At p 403D-F:

> "Speaking for myself, I would say that a lawyer in Mr *Moyo*'s position must have B at least suspected, when no appearance was entered by Zimbank, that something had gone wrong. A telephone call to Zimbank's legal department would, as we can now see by hind-sight, have saved a lot of trouble and expense.
>
> He did not do that. He obtained default judgment. But he must have at least half-expected that what did in fact happen, would happen. *In future cases, we may have to consider awarding costs personally against legal practitioners* C *who not only 'snatch at their judgments' but then stubbornly and unreasonably cling to them*" (emphasis added).

In casu, Mr *Mushuma* for the respondent, despite the applicant's heavy reliance on it, made no reference to the *Zimbank* case. So while the absence of explanatory affidavits from the receptionist and Sande were conspicuous, such detail would not benefit the court when Mudzvova was saying neither D he nor the finance manager had seen the summons. No-one, including Mr *Mushuma,* could reasonably have thought that the applicant, which had a liquid claim against the respondent and had already denied liability for the respondent's claim for damages, would allow the claim against it to go by default, and particularly given the size of that claim.It was after a careful E consideration of the approach in the *Zimbank* case that I allowed the application for the upliftment of the bar.

On the question of the costs of the application in this court, the Supreme Court, in the *Zimbank* case at p 403C-D, had this to say:

> "We were in no doubt that the appeal should succeed with costs, but were in more difficulty about the costs of the application for rescission. We may have F been over generous in allowing Mr Masendeke his costs. *On the other hand, it is difficult to say that he should not have opposed the application when in the event the learned judge found his opposition to be not only reasonable but compelling*" (emphasis added).

In casu I felt that, despite its success, the applicant ought to bear the G respondent's costs. I did not think that, even with *Zimbank's* case in mind, the respondent's opposition was unreasonable. It was compelling. There were quite a number of issues that went unexplained. Apart from the issues of the absence of an explanation from the receptionist and why Sande would go against company policy, the most disquieting thing was that applicant denied virtually everything said by the respondent in respect of the meetings that H led to the conclusion of the contract. It denied the terms of the contract as

Mafusire J

alleged by the respondent but said nothing of its own. It was evident during A argument that the applicant's two counsel had adopted the attitude that, since the applicant's circumstances were

similar to those of Zimbank in the *Zimbank's* case, it was entitled to the relief sought. It was largely for that reason that I felt that the applicant had to bear the costs of the application.

Honey & Blanckenberg, applicant's legal practitioners

Mushuma Law Chambers, respondent's legal practitioners

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Document 27 of 79

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2013/Volume 2/S v MOYO 2013 (2) ZLR 225 (H)

S v MOYO 2013 (2) ZLR 225 (H)

Citation	2013 (2) ZLR 225 (H)
Case No	Judgment No. HB-123-13
Court	High Court, Bulawayo
Judge	Kamocha J
Heard	12 September 2013
Judgment	12 September 2013
Counsel	Details not supplied
Case Type	Review judgment
Annotations	No case annotations to date

Flynote

Criminal law – *offences under Criminal Law Code – bigamy (s 104) – second marriage entered into outside Zimbabwe – courts of Zimbabwe having no jurisdiction to entertain charge*

Headnote

The accused had married a woman in Zimbabwe in terms of the Marriage Act and, a few years later, knowing that the marriage still subsisted, purported to enter into another monogamous marriage in South Africa. He was charged before a magistrates court in Zimbabwe with bigamy and convicted. On review:

Held, that the courts of Zimbabwe have no jurisdiction to convict of bigamy in a case like this where the alleged bigamous marriage took place in some other country.

Cases referred to

S v Olsen 1970 RLR 177 (G); 1970 (3) SA 454 (R)

Legislation considered

Matrimonial Causes Act [*Chapter 5:13*] s 2

Judgment

Kamocha J:The accused, who was aged 58 years, was charged with contravening s 104 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] (bigamy). On 15 January 1993 he married one Lady Moyo G in a monogamous marriage in Zimbabwe and, while knowing the marriage still subsisted, intentionally purported to enter into another monogamous marriage with one Deborah Nkonjane on 12 July 1996 in South Africa. He appeared in court at Filabusi and tendered a plea of guilty to the charge and was sentenced to pay a fine of $300 (R3 000) or in default of payment, 60 H days' imprisonment. Further the court stated that:

2013 (2) ZLR p226

Kamocha J

> "Accused's marriage to Deborah Nkonjane solemnized in South Africa on 12/07/96, A marriage certificate B4072860 [exhibit 2] is pronounced null and void".

When the proceedings came on automatic review, Ndou J, who has since resigned from service, raised a query with the trial magistrate whether he had the power to declare a "civil" marriage a nullity. The trial magistrate conceded his error and sought guidance from the learned judge, who wrote B to the Attorney-General seeking his views as follows:

> "(a) As far as the bigamy is concerned, the offending marriage was entered into in South Africa. This implies that the offence was committed in South Africa. Does the court in Filabusi have jurisdiction to entertain the bigamy charge?
>
> (b) The learned magistrate pronounced the second marriage a nullity. Obvious (*sic)* it is only the High Court that can do so – section 2 – definition of C 'appropriate court'".

The Attorney-General Office's views were as follows:-

> "The Attorney-General's response to the first concern raised above is that Zimbabwean courts have no extra-territorial jurisdiction in respect of bigamy. The facts in this case are similar to those in *S v Olsen* 1970 (3) SA 454 (R); 1970 RLR 177 (G). D
>
> In *S v Olsen, supra,* the accused was convicted of bigamy by a magistrate. The charge recited that the accused had married a certain spinster in South Africa o 13 February 1962, and on 30 June 1969 in Zambia, while still married to the aforesaid spinster, he married a certain divorcee.
>
> It was not in dispute that the accused and his wife and the alleged 'bigamous wife' were at the date of trial all residing in Rhodesia. The question is whether E the accused was correctly convicted of bigamy in view of his action, that is, the second marriage having taken place outside Rhodesia.
>
> It was held that the *courts of Rhodesia (now Zimbabwe) have no jurisdiction to convict of bigamy in a case like this where the alleged bigamous marriage took place in some other country*.
>
> The conviction was quashed and the sentence set aside. In light of *S v Oslen,* F *supra,* the Attorney-General submits that the court in Filabusi has no jurisdiction to entertain the bigamy charge, and as such, the Honourable Judge is entitled to exercise his discretion to quash the conviction and set aside the sentence as in *S v Olsen, supra*.
>
> In respect of the second concern raised by the judge, the Attorney-General submits that if the first concern has been satisfactorily addressed, then the second G concern automatically falls away."

I am grateful for the Attorney-General Office's useful views. The Filabusi magistrates court had no authority to entertain a bigamy case where the offending marriage was entered into in South Africa.

The accused was married in a monogamous marriage in terms of the Marriages Act [*Chapter 5:11*], commonly known as a civil marriage. It is H

2013 (2) ZLR p227

Kamocha J

A only the High Court as the appropriate court which had the power to annul a civil marriage. The magistrates court is the appropriate court in relation to any marriage entered into in accordance with customary law, including a marriage solemnized in terms of the Customary Marriages Act [*Chapter 5:07*]. See s 2 of the Matrimonial Causes Act [*Chapter 5:13*].

In the result I would set aside both conviction and sentence in this matter. B The accused was sentenced to pay a fine of $300 (R3 000) or in default of payment 60 days. He is entitled to be given

back his money if he had paid the fine. The magistrate in charge of Filabusi magistrates court must ensure that the money is given back to him.

C Mutema J concurs.

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Document 28 of 79

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2013/Volume 2/S v BREDENKAMP 2013 (2) ZLR 228 (H)

S v BREDENKAMP 2013 (2) ZLR 228 (H)

Citation	2013 (2) ZLR 228 (H)
Case No	Judgment No. HH-305-13
Court	High Court, Harare
Judge	Chatukuta J and Assessors M T Mutambikwa & T R Gweme
Heard	9 September 2013; 12 September 2013
Judgment	12 September 2013
Counsel	*E Mavuto*, with him *M Reza* and *I Chingarande*, for the State *E Matinenga*, with him *D Mehta*, for the accused
Case Type	Criminal trial
Annotations	No case annotations to date

Flynote

Constitutional law – *Prosecutor-General – duties of – duty to exercise functions impartially and without fear, favour, prejudice or bias – Prosecutor-General declining to prosecute on grounds that dispute was a civil one – reinstituting criminal proceedings under pressure from complainant – dereliction of constitutional duty*

Criminal procedure – *discharge at close of State case – when application* D *should be granted*

Legal practitioner – *conduct and ethics – Prosecutor-General – duties of*

Legal practitioner – *conduct and ethics – State counsel in criminal matter – duty to withdraw charge when evidence shows charge not sustainable* E

Headnote

The accused was charged with fraud arising out of a business deal between himself and the complainant. Initially the Attorney-General, then responsible for criminal prosecutions, had declined to prosecute on the grounds that the matter was a civil dispute. The Attorney-General nonetheless refused the complainant's request for certificate of *nolle* F *prosequi*. The Attorney-General brokered a settlement that the accused was to pay the complainant certain sums by a stipulated date. Sometime after that date, the Attorney-General changed his mind and decided to prosecute the accused, apparently under pressure from the complainant, presumably because the accused had not paid the sums in full. The accused applied for discharge at the close of the State case. G

Held, granting the application, that where the court considers that there is no evidence that the accused committed the offence it has no discretion but to acquit him. In establishing whether or not the accused committed the offence charged the court must consider whether (a) there is evidence to prove an essential element of the offence; (b) there is evidence on which a reasonable court, acting carefully, might properly convict; and (c) the H

A evidence adduced on behalf of the State is so manifestly unreliable that no reasonable court could safely act on it. The court can refrain from exercising its discretion in favour of the accused if, at the close of the State case, it has reason to suppose that the evidence adduced by the State might be supplemented by the defence evidence. It is the duty of the State to place evidence of probative value before the court in order B for the court to hold that the State has established a *prima facie* case against the accused, meaning proof of the commission of the offence which implicates the accused to such a degree as to call for an answer.

Held, further, that whilst the act of declining to prosecute a matter and refusing to grant a certificate of *nolle prosequi* does not bring a criminal matter C to finality and the Prosecutor-General can reinstitute a prosecution, that must take cognisance of the rights of the accused, particularly when the Prosecutor-General has communicated an earlier decision not to prosecute the matter. In this matter, the conduct of the Prosecutor-General to reinstitute prosecution amounted to a dereliction of his duty under the Constitution. He shied away from his responsibility to decline to D prosecute a matter and burdened the court with the responsibility to discharge the accused. Section 260 of the Constitution provides for the independence of the Prosecutor-General. Subsection (2) provides that the Prosecutor-General is not subject to the direction or control of anyone and "must exercise his or her functions impartially and without E fear, favour, prejudice or bias." Here, the driving force behind the prosecution was the complainant. The Prosecutor-General succumbed to the pressure from the complainant to prosecute an apparently civil matter and therefore acted in complicity with the complainant to use a criminal court to put pressure on the accused in order to collect a civil debt. State counsel appeared to go through the motions of a trial merely to satisfy F a persistent complainant, even in the face of inherently inadequate and inconsistent State evidence. The proper course that would have been expected of counsel was to withdraw the charge at the close of the State case. State counsel under the National Prosecuting Authority, just like any other officer of the court, owe a duty to the court to assess the strength of their case as the trial proceeds. Where it becomes apparent G that they cannot sustain the charge, they should withdraw the charge instead of defending the indefensible and shifting their responsibility onto the court, as happened in the present case.

Cases referred to

H *A-G v Bennett* 2011 (1) ZLR 396 (S)

Chatukuta J

A-G v Bvuma 1987 (2) ZLR 96 (S) A

A-G v Makamba 2005 (2) ZLR 54 (S)

A-G v Mzizi 1991 (2) ZLR 321 (S)

A-G v Paweni Trade Corp (Pvt) Ltd & Ors 1990 (1) ZLR 24 (S)

A-G v Tarwirei 1997 (1) ZLR 575 (S)

S v Kachipare 1998 (2) ZLR 271 (S) B

S v Kuruneri HH-59-07

S v Paradza 2006 (1) ZLR 20 (H)

S v Tsvangirai v 2003 (2) ZLR 88 (H)

Legislation considered

Constitution of Zimbabwe 2013, s 260 C

Criminal Procedure and Evidence Act [*Chapter 9:07*], s 198(3)

Case information

E Mavuto, with him *M Reza* and *I Chingarande*, for the State

E Matinenga, with him *D Mehta*, for the accused D

Judgment

Chatukuta J: This is an application for the discharge of the accused at the close of the State case in terms of s 198 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. The accused stands charged with one count of fraud and another count of contravening s 5(1)(a)(1) of the Exchange Control Act [*Chapter 22:05*], as read with s 4(1)(a)(ii) of the Exchange E Control Regulations 1996 (SI 109 of 1996). It is alleged in the first count that, between 1 February 2001 and 9 November 2002, the accused unlawfully and with intent to defraud, obtained from one Yakub Ibrahim Mohammed (Mohammed) an amount of US$4 212 123 after having misrepresented to Mohammed that he could repay the amount upon selling his mine in the F Democratic Republic of Congo (the DRC). Regarding the second count, it is alleged that the accused unlawfully borrowed the amount referred to in the first count knowing that Mohammed was not an authorised dealer.

The accused pleaded not guilty to both counts. He alleges that the amount was borrowed not by him but by KMC Ltd (KMC), a company in which his family had a substantial interest. The company borrowed the money to G finance its operations in the DRC. Some of the money was used to finance other companies which supplied goods and services to Zimbabwe during the country's involvement in the DRC. He contends that the matter before the court is a civil one against KMC.

Evidence was led by the State from the following witnesses. H

Chatukuta J

1. Yakub Ibrahim Mohammed A

He is the complainant in the matter. During the period in question, he was a director and shareholder of a South African company in the business of manufacturing and selling cigarettes. Some of the cigarettes were in a bonded warehouse here in Zimbabwe. The cigarettes were sold in foreign currency B to customers from countries such as Mozambique, Zambia and the DRC.

The accused approached him requesting for financial assistance to fund his mining activities in the DRC. The accused made the request in his personal capacity. The witness agreed to advance the accused some money. The accused undertook to repay the advance within a short period after the advancement. The agreement was verbal. The witness advanced the accused C about US$4.2 million over a period of time, between 2001 and 2002. The money so advanced was from the proceeds of the sale of the cigarettes in the bonded warehouse.

The accused did not repay the money as expected. He made numerous excuses not to pay. After a concerted effort to get payment, the accused finally agreed D that he would repay after selling his mine in the DRC. The mine was sold in June 2006 and no payment was made soon thereafter.

He approached one Raj Patel, who was the Finance Director for KMC, demanding payment after he heard of the sale of the mine. An attempt was made in October 2006 to pay him with the depositing of a sum of US$3.5 million into his Jersey, New York, USA account with Stanchart Bank. The E bank refused to accept the payment and returned the money to source. In 2008 he communicated by email with one Eddie Cassell also associated with KMC when he did not receive any payments demanding that the trustees administering the affairs of KMC pay him as he had advanced the money to KMC. Eddie Cassell responded, advising him that the attempted F payment in 2006 of US$3.5 million had been made in error as the accused was personally liable for the debt.

In 2008 he decided to take legal action. He instituted, together with a company called Sahiwa International (Pvt) Ltd (Sahiwa), a civil claim against the accused and a company called Breco Ltd for the recovery of the debt. It is during these civil proceedings that he discovered that the money G he advanced to the accused was never used in the DRC for the purported purpose. Some of the money was used by the accused for his personal needs here in Zimbabwe and some for a feeding programme in the DRC by the Ministry of Defence. It is then that he realized that the accused had

intended to defraud him by alleging that the money was needed to finance KMC's H mining activities. Had he known of the intended use of the money he would

Chatukuta J

not have advanced the accused the money. He then proceeded in 2009 to A make a report to the police for fraud.

The matter was duly investigated and the docket was referred to the Attorney-General. He was advised that the Attorney-General had declined to prosecute the case on the basis that the matter was in the public interest. A meeting was convened by the Attorney-General where the accused undertook to pay B the debt by February 2013. He failed to do so, hence the present criminal proceedings.

At the time he instituted the civil proceedings, the accused had paid a total sum of US$400 000. The first payment was for US$200 000 in March 2001 and the other US$200 000 was paid in October of the same year. It was C his belief that the accused paid that amount to give the impression that he was trustworthy and give the witness a false sense of security that payment would be made.

Under cross examination, he testified that at the time he advanced the money, the accused specifically told him that the money was for KMC operations. Part of the money was paid by way of cheques in Zimbabwean dollars and D the rest was in US dollars (physical or hard cash). He could not recall how much was advanced in Zimbabwean dollars and how much in US dollars. However, the bulk of the advancements were made in hard currency. He unilaterally converted the Zimbabwe dollars into US dollars for accounting purposes. The amount of US$4.2 million stated in the charge and claimed in E the civil action includes the Zimbabwe dollar disbursements after conversion.

He acknowledged that the US$400 000 and the US$ 3.5 million were paid out in order to reduce the accused's indebtedness. He further conceded that at the time when summons were issued in 2008, he was convinced that the relationship between him and the accused was of a civil nature. He however changed his evidence and stated that he had in fact made a report to the Fraud F Section of the ZRP before he instituted the civil proceedings. Initially he said he made the report in early 2008. He later said that it was between 2006 and 2007. He advised his lawyer Mr Mhiribidi of the report. Mr Mhiribidi made inquiries with the Police on the progress of the report to no avail. Despite being aware of the criminal report, Mr Mhiribidi advised him to proceed G with the civil matter and abandon the criminal case.

He accepted that he gave instructions to Mr Mhiribidi to institute civil proceedings on his own behalf and on behalf of Sahiwa. He was not aware that a notice of amendment had been filed on behalf of both plaintiffs in which he was supposed to cease to be a plaintiff in his personal capacity. He attributed the notice of amendment to one Advocate Bava from South Africa H

Chatukuta J

A and Advocate Uriri. He indicated that the two filed the notice of amendment without his authority. He however, conceded that the notice of amendment was in fact filed by Mr Mhiribidi as per Mr Mhiribidi's signature on the notice of amendment. He attributed Mr Mhiribidi's lapse in not advising him of the notice of amendment to health problems.

The accused conceded that he was supposed to have remitted the money B from the sale of cigarettes to South Africa. He had intended to so do upon being repaid by the accused. When the accused failed to repay the amount he personally paid the money in 2005 from an off-shore account.

2. Colin Richard Blyth-Wood

C He testified that he worked for the accused between 1978 and 1988 in Belgium as a financial director and between 1997 and 2006 at KMC in DRC. Between 2001 and 2006 he was the Managing Director of KMC and was based in the DRC. Upon disposal of KMC by the accused, he remained at the mine for four months only. He did not know anything about the case. He only became aware of the money owed to Mohammed on his return to Zimbabwe in 2006 D after having been approached by Mohammed. From time to time he came to Zimbabwe and would receive money from the

accused in hard currency for operations at KMC. He took to the DRC so much hard currency from Harare that he was directed by the DRC authorities to desist from bringing into that country any hard currency. Although the KMC records did not reflect any indebtedness to Mohammed, he did not dispute that the money E he took to the DRC might have been from Mohammed.

3. Gary Neil Webster

He worked for the accused from 1985 up to 1 December 2003. Initially he was an accountant and later accused's personal assistant. He was aware that F accused was advanced about US$4 million by Mohammed. The accused used the money for his farming operations here in Zimbabwe and some of the money was used in the DRC.

He resigned from employment with the accused on his own accord. The accused initially persuaded him to stay on. When he refused to stay on, the accused became abusive and threatened to have him killed. At one time the G accused stole his vehicle, a Land Cruiser, and gave it to his son. He however did not report the theft of his vehicle to the police as he thought the matter would be resolved amicably. He later paid the accused £10 000 in order to have the vehicle released back to him.

He conceded under cross examination that the money for the DRC operation H was from different sources. He did not dispute that some of the money could

have been from Mohammed. Some of the payments were made through him A for KMC and other companies in the DRC. He could not say how much of the money received from Mohammed was used for the accused's personal needs and how much was used in the DRC.

4. Luckson Mukazhi

He is a Chief Superintendent in the ZRP and has been in the police force for B 32 years. He was the investigating officer in the present matter. Sometime in June 2009, he commenced investigating the accused following a complaint by Mohammed. He recorded two warned and cautioned statements from the accused, one in relation to the fraud charge and the other to the exchange control charge. The accused denied both charges and stated that the first C count was a civil matter. The second count was nonsensical. The statements were admitted into evidence by consent.

Upon completion of investigations, the docket was referred to the Attorney-General for legal opinion. He was summoned to the Attorney-General's office where he was told that the matter had been closed in the public interest as D the money advanced to the accused had been used on army operations in the DRC.

The decision of the Attorney-General was communicated to Mohammed. The matter was resuscitated when Mohammed expressed his displeasure about the outcome. He again was summoned by the Attorney-General for a E meeting. Present were both parties, the accused and the complainant. It was agreed at the meeting that the accused would repay the complainant within six months. The six months were to expire in February 2013. The accused failed to pay within the agreed period.

The witness was aware that when the Attorney-General declined to prosecute, F the complainant had through his legal practitioner, Mr Samkange, sought a certificate of *nolle prosequi.* His request was turned down.

He was also aware that before he was assigned to investigate the present matter, another investigation had been conducted by the CID Serious Frauds Section in CR 237/05/09. The docket in that matter was closed by the police G on 7 May 2009 as it was considered that the complaint was of a civil nature. The police had indicated that the docket would be reopened if there were new developments. The complainant filed a complaint against the police officers who had investigated the matter. The witness was assigned to investigate that complaint. It was during the investigation of that complaint that the witness was assigned to reinvestigate the matter, hence the current prosecution. H

A He confirmed that there were no changed circumstances after the closure of CR 237/05/09. The investigations were resuscitated despite an earlier decision that the matter would only be re-opened if there were new developments because of the complainant's persistence. The other reason for bringing the matter to court was that the accused had failed to pay by February 2013 as agreed.

B At the close of the State case, the defence applied for the discharge of the accused. The State opposed the application.

The law

An application for discharge at the close of the State case is made in terms C of s 198(3) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] which states that:

> "If at the close of the case for the prosecution the court considers that there is no evidence that the accused committed the offence charged in the indictment, summons or charge, or any other offence of which he might be convicted thereon, it shall return a verdict of not guilty."

D The section has been discussed in a plethora of cases and the law applicable in an application of this nature is well settled. The position is that where the court considers that there is no evidence that the accused committed the offence it has no discretion but to acquit him. In establishing whether or not the accused committed the offence charged the court must consider whether

(a) there E is evidence to prove an essential element of the offence;

(b) there is evidence on which a reasonable court, acting carefully, might properly convict;

(c) the evidence adduced on behalf of the State is so manifestly unreliable that no reasonable court could safely act on it.

F See *A-G v Bvuma* 1987 (2) ZLR 96 (S), *A-G v Mzizi* 1991 (2) ZLR 321 (S), *A-G v Tarwirei* 1997 (1) ZLR 575 (S), *S v Kachipare* 1998 (2) ZLR 271 (S) at 276C-277A, *S v Tsvangirai* 2003 (2) ZLR 88 (H) at 89H-91A, *A-G v Makamba* 2005 (2) ZLR 54 (S) at 64G-65B, *S v Paradza* 2006 (1) ZLR 20 (H) at 24G-25F, *S v Kuruneri* HH-59-07 and *A-G v Bennett* 2011 (1) ZLR 396 (S) at 400D-401B.

G The court can refrain from exercising its discretion in favour of the accused if, at the close of the State case, it has reason to suppose that the evidence adduced by the State might be supplemented by the defence evidence (see *S v Kachipare supra* at 275). It is the duty of the State to place evidence of probative value before the court in order for the court to hold that the State H has established a *prima facie* case against the accused, meaning proof of the

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commission of the offence which implicates the accused to such a degree A as to call for an answer.

Both the accused's and the State counsel were agreed as to the above stated principles and I am indebted to Mr *Matinenga* for most of the authorities cited above. However, it is necessary to note that, whilst agreeing with the general principles, Mr *Reza* sought to distinguish *Bvuma*'s case from B the matter *in casu* on the basis that no evidence was led in that case. The distinction is correct in so far as it related to the first to the third counts. A proper reading of the entire case show that evidence was in fact led regarding the fourth count and therefore the principles therein cited apply. In any event, the same principles have been adopted with approval in latter cases where evidence was led. C

Submission by the accused

Mr *Matinenga* submitted that the State had failed to place before the court evidence that the accused committed the first count as is required in the plethora of cases cited above. He submitted that the misrepresentation stated in the charge is at variance with the misrepresentation advanced by the D complainant in his evidence. As a result there was no evidence to establish an essential element of the offence. He submitted that the payments made to the complainant were intended to reduce the indebtedness of KMC to the complainant. The matter was therefore of a civil nature given the nature of the transaction between the complainant and KMC and the history of the case. E

He submitted that the complainant conceded that he was of the opinion that the money was being advanced to KMC as opposed to the accused in his personal capacity. The inconsistencies in the complainant's evidence rendered the evidence unreliable and no court would reasonably convict on the strength of that evidence.

He further submitted that the second count ceased to be an offence with the F introduction of the multicurrency regime under the Finance Act (No 2) 2009 (Act No. 5 of 2009). He further contended that s 70(1)(l) of the Constitution has decriminalised what used to be a contravention of the Exchange Control Act because, with the advent of the Finance Act, 2009, all funds are now free funds. Guidelines to authorised dealers also issued by the Reserve Bank G were said to support the proposition.

Submissions by the State

The State took a robust approach in prosecuting the matter. Whilst Mr *Mavuto* led evidence, Mr *Reza* addressed the court on the first count with Mr *Chingarande* addressing on the second count. H

Chatukuta J

A Mr *Reza* initially submitted that the State had led adequate evidence to prove that the accused had misrepresented that the money advanced to him was intended for mining operations in the DRC, yet evidence had been led that he used it for other purposes. He abandoned the submissions after being directed to the misrepresentation stated in the charge. He, however, maintained that the State had established that the accused had not repaid the advance upon B selling his mine KMC in the DRC. He submitted that the payment of the US$400 000 was part of the accused's chicanery, in that the accused sought to lull the complainant into a false sense of security that he was going to repay the advance when he did not intend to do so. The US$3.5million was also an attempt to deceive the accused as the payment was disowned by C KMC trustees in 2008.

Mr *Chingarande* submitted that it was not in dispute that the accused admitted borrowing money from the complainant. The admission would be established from exhibit II, which is the accused's warned and cautioned statement to the second charge. Exhibit II should be viewed together with the evidence of Collin Richard Blythe-Wood and Gary Neil Webster that the accused used D the money for his personal needs. The admission is said to be supported by the communication from Eddie Cassell to the effect that the accused was personally liable for the loan and not KMC.

It was submitted that the Constitution did not decriminalise a person securing a loan without authorization. Mr *Chingarande* submitted that the relevant E provision in the Exchange Control Act was not amended or repealed and therefore the offence still stands. It was further submitted that the guidelines referred to by the defence are guidelines for authorized dealers and do not therefore amend the Exchange Control Act.

I have made a concerted effort in the presentation of the complainant's F evidence not to refer to the total payments purportedly made to the accused as an "advance" as opposed to a loan. This has been so because the complainant insisted that the payment was an advance and not a loan. However, the State papers use the words interchangeably. Without professing to be financially astute, to advance money is defined in the *Collins Dictionary* to mean to lend money. It appears that the complainant wanted to conceal that the G payment was a loan for reasons better known to him. However, I believe it is semantics to refer the payments as an advance or a loan and at this stage I am at liberty to refer to it as a loan which it was.

Regarding the first count, as rightly submitted by Mr *Matinenga*, the State's evidence bears no resemblance to the charge in a number of respects. Firstly, H the identity of the borrower and lender has been elusive. Mr Mohammed

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Chatukuta J

conceded that he intended to advance money to the accused for mining A operations at KMC mine in the DRC and not for feeding the Zimbabwean army. He was convinced as evidenced by his communication with Eddie Cassell that he was advancing money to KMC in the DRC. He demanded payment from trustees administering the affairs of KMC because he was of the belief that he had advanced money to KMC. His quest to recover his money B was directed at persons associated with

KMC. According to his evidence, he approached the late Raj Patel, the late Rob Evans, and Eddie Cassell, all associated with KMC. He did not identify any other persons associated with any other company other than KMC. Whilst Mr Blythe-Wood and Mr Webster testified that there was no record that KMC borrowed money from the complainant, none of them refuted that the money they received C for KMC operations was borrowed for KMC. The evidence adduced by the State and in particular from the complainant clearly reflects KMC as having been the borrower.

Mr *Chingarande* sought to persuade the court to pierce the corporate veil on the basis that the accused was the owner of KMC. No such evidence was D adduced that the accused was the owner of KMC. The attempt to invoke the provisions of s 357 of the Criminal Procedure and Evidence Act cannot be sustained either. Section 357 makes a director of a company personally responsible for the company's transgression in certain circumstances. See *A-G v Paweni Trade Corp (Pvt) Ltd & Ors* 1990 (1) ZLR 24 (S). However, no evidence was adduced before the court as to the relationship between E the accused and KMC and more particularly that he is a director. The only evidence adduced is that he had interests in the company. The capacity of the accused in KMC has been left to the imagination of the court. The charge and the summary of the state case do not even state that the accused is being charged in his capacity as a director or owner of KMC. It is clear that he is F being charged in his individual capacity.

The identity of the complainant has also been questioned. The complainant gives the impression that he personally advanced the loan. However, the evidence adduced seem to imply that the complainant is Sahiwa. This is apparent from the civil proceedings where the complainant jointly with Sahawi, and in his capacity as a director, sued for repayment of the loan. In G fact, as alluded to earlier, a notice of amendment to remove the complainant as the second plaintiff is on record in the civil proceedings (although the complainant denies authorizing the issuance of the notice). The evidence of the complainant is that the cigarettes that generated the funds lent to KMC were owned by the South African company. When the accused failed to repay the loan making it difficult for the complainant to repatriate the proceeds of H

A the sales to South Africa, he transferred money from his own personal funds so as to acquit the company's obligations to the South African Government.

Whilst in terms of s 157 of the Criminal Procedure and Evidence Act it is not necessary to identify the particular person alleged to have been defrauded, the charge in the present case does identify that person. Any evidence to the B contrary therefore puts into issue the reliability of that evidence.

The reliability of the State's evidence also arises in relation to the exact amount and currency of prejudice. The charge states that the prejudice is US$4.2 million. However, the complainant conceded that the amount includes advances in Zimbabwean dollars which he unilaterally converted into US dollars. The rate of exchange is not known and it has not been disclosed C in the State papers or in the complainant's evidence. The court can indeed convict where fraud is established for a lessor amount. However, as per the observations above regarding the question of the identity of the accused, the evidence of the complainant is rendered unreliable by the non-disclosure of the fact that part of the US$4.2 million is supposed to be in Zimbabwean D dollars. It appears the intention of the complainant was to mislead the court as to the exact amount and the currency of the money advanced to KMC.

The main inadequacy of the State's evidence relates to the nature of the misrepresentation. The charge states that the misrepresentation is that the accused induced the complainant to part with his money with an assurance that the accused would repay the loan upon selling his mine in the DRC. On E the other hand, the complainant testified that the misrepresentation was that the money was to be used for mining operations at KMC and not for feeding programmes and accused's personal use. The two are totally inconsistent. Mr *Reza* abandoned the misrepresentation advanced by the complainant in his testimony.

F Assuming that the charge was to remain intact despite the inconsistencies, the evidence adduced clearly indicate that the accused did what he promised to do. The complainant testified that KMC was sold in June 2006. By that time, the complainant had been paid US$400 000 in two instalments. The first instalment of US$200 000 was made in March 2001, within a month after the complainant had started advancing the loan. The second payment was made G in October of the same year. In October 2006, four months after the disposal of KMC, a sum of US$3.5 million was deposited into

the complainant's bank of choice. It is that bank that refused to credit the complainant's account. The accused did not have a say in it. No evidence was adduced that he did. The retraction of the offer to pay was made by Eddie Cassell, whom the H State decided not to call as a witness. The accused cannot be placed on

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his defence to explain why a person not called as a witness made a certain A communication. In any event, that communication was made in 2008, two years after the aborted payment.

The contention by the State that all the payments were made dishonestly with the intention to defraud the complainant is not supported by evidence. Had the complainant's bank accepted the payment of US$3.5 million, a total of B US$3.9 million would have been paid leaving a balance of US$300 000. It is inconceivable that the accused would put himself out of pocket to the tune of US$3.9 million in order to lull the complainant into a sense of false security.

The State has therefore failed to adduce evidence to support the first count.

Turning to the second count, exhibit II is an unequivocal denial of the charge. C In fact, as stated by Chief Supt Luckson Mukazhi, the accused said the allegations were nonsensical. How exhibit II can be said to be an admission eludes me. Blythe-Wood denied any knowledge of the transaction. Having been the managing director of KMC, he indeed would have been expected to have knowledge of the loan. However, he did not challenge that the money D he received from Harare for the benefit of KMC would have been from the complainant. He did not explain the source of the money.

Apart from his say so, Webster did not state how much the accused used for his personal needs and farming operations. He did not state how much was sent to KMC. He did not state on what basis he was of the view that the accused used some of the money for personal purposes other than to say he E was the accused's personal assistant.

The transaction indeed has undertones of irregularities, but I do not believe it is sufficient to warrant placing the accused on his defence, given the fact that I have already made a finding that the complainant's evidence establish that KMC was the borrower. F

The issue raised by the accused on decriminalization or otherwise of the offence the accused has been charged with is, in my view, a red herring. Section 70 of the Constitution provides that a person accused of an offence has the right "not to be convicted of an act or omission that is no longer an offence". As rightly submitted by Mr *Chingarande*, the Finance Act, G 2009, whilst introducing the multicurrency regime, does not amend s 5(1) of the Exchange Control Act. A piece of legislation can only be specifically amended or repealed by another Act. I am yet to come across an Act of Parliament that "globally" amends another Act without specifically stating so, as contented by Mr *Matinenga*. No such authority was advanced by the defence for that proposition. H

A Guidelines cannot also amend an Act of Parliament. They are made pursuant to an Act of Parliament and must be consistent with that Act. Further, the guidelines alluded to are guidelines to authorised dealers. The complainant was not an authorized dealer. The accused in his warned and cautioned statement alluded to that fact.

B I will now turn to the question whether or not the charges preferred against the accused are civil and intended to arm twist the accused to settle what he is alleged to owe. The history of the case leading to the prosecution has been presented by Chief Supt Mukazhi. This matter has been investigated twice. In the initial investigation the police closed the docket having concluded that the matter was of a civil nature. The matter was reopened and this time C the docket was submitted to the Attorney-General for a legal opinion. The Attorney-General declined to prosecute the matter. Whilst Chief Supt Mukazhi testified that he was told by the Attorney-General that that the matter was of national interest, the official explanation given by the Attorney-General, by way of a letter by C Mutangadura to the accused's legal practitioners of record, was that the matter revolved around a business relationship. That D can only mean that it was considered a civil matter. The Attorney-General went a step further to decline the complainant's request for certificate of *nolle prosequi*.

Mr *Reza* queried the decision of the police not to refer the matter to the Attorney-General after the initial investigations. He stated that the Police E were wrong in concluding that the matter was of a civil nature. They should have referred the docket for a second and presumably professional opinion. However, it appears they arrived at the same conclusion with the police after the second docket was submitted for a second opinion.

This matter is akin to a situation where a farmer approaches a bank for a loan F on the assurance that after harvesting his or her crops he or she will repay the loan. If he or she fails to repay the loan after having sold the crops, does that constitute a criminal offence? I do not believe so.

The matter was to be resuscitated after the initial investigations if there were developments warranting a relook at the complaint. Chief Supt Mukazhi testified that there were no changed circumstances. The only change of G circumstances is that the Attorney-General brokered a settlement that the accused was to pay the complainant by February 2013. There is no other explanation as to why the Attorney-General changed his mind and decided to prosecute the accused. The conclusion that can be arrived at is that the prosecuting authority is acting on pressure from the complainant. Whilst the H act of declining to prosecute a matter and refusing to grant a certificate of

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Chatukuta J

nolle prosequi does not bring a criminal matter to finality and the prosecuting A authority can reinstitute prosecution, that must be in cognisance of the rights of the accused, particularly when the Attorney-General has communicated its earlier decision not to prosecute the matter.

The conduct of the prosecuting authority to reinstitute prosecution in my view amounts to a dereliction of its duty under the Constitution. The authority B shied away from its responsibility to decline to prosecute a matter and burdened this court with the responsibility to discharge the accused. Section 260 of the Constitution provides for the independence of the Prosecutor-General. Subsection (2) provides that the Prosecutor-General is not subject to the direction or control of anyone and "must exercise his or her functions impartially and without fear, favour, prejudice or bias." As testified by Chief C Supt Mukazhi, the driving force behind the prosecution was the complainant. The prosecuting authority succumbed to the pressure from the complainant to prosecute an apparently civil matter. The authority therefore acted in complicity with the complainant to use a criminal court to put pressure on the accused in order to collect a civil debt.

In fact, the State counsel appeared to have been going through the motions D of a trial merely to satisfy a persistent complainant, even in the face of inherently inadequate and inconsistent State evidence. The noble thing that would have been expected of counsel was to withdraw the charge at the close of the State case. State counsel however appeared constrained not to do so. It should be noted that officers under the prosecuting authority, just like any E other officer of the court, owe a duty to the court to assess the strength of their case as the trial proceeds. Where it becomes apparent that they cannot sustain the charge, they should proceed to withdraw the charge instead of defending the indefensible and shift their responsibility onto the court as happened in the present case.

The provisions of s 260(2) are brought to the attention of the prosecuting F authority that it is now enjoined to formulate and publish the general principles upon which it decides whether or not to institute and conduct criminal proceedings. I believe the intention behind that provision is to ensure certainty and consistency in how matters are handled by the prosecuting authority. Neither certainty nor consistency has been exhibited in this case. G

It is my conclusion that the accused does not have a case to answer. The application for discharge at the close of the State case succeeds and accused is found not guilty and is discharged.

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

Atherstone and Cook, accused's legal practitioners H

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Document 29 of 79

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ZIMBABWE CONGRESS OF TRADE UNIONS v OC ZRP HARARE CENTRAL & ORS 2013 (2) ZLR 243 (H)

Citation	2013 (2) ZLR 243 (H)
Case No	Judgment No. HH- 297-13
Court	High Court, Harare
Judge	Mathonsi J
Heard	12 September 2013; CAV
Judgment	18 September 2013
Counsel	*J Bhanu,* for the applicant *M C Chimombe,* for the respondents
Case Type	Urgent chamber application
Annotations	No case annotations to date

Flynote

Police – *duties – duty to maintain law and order – duty to allow lawful activities to take place and to protect persons exercising their rights*

Statutes – *Public Order and Security Act [Chapter 11:17] – regulation of* D *public gatherings – notification to police of intended public gathering – exemption from requirement to notify police – registered trade union – gathering for bona fide trade union purposes – such gathering not required to be notified*

Headnote

E The applicant was a registered conglomeration of trade unions, engaged in the furtherance of its members' interests. In the normal conduct of its trade union activities, the applicant wrote a letter to the first respondent, the regulating authority for Harare Central in terms of the Public Order and Security Act [*Chapter 11:17*] notifying him of its intended commemoration activities due a month after the date of the letter. They F consisted of the clean-up of a particular bus stop area, followed by a march through the city via a specified route to the applicant's offices. About 150 people were expected to take part in the march.

The first respondent's initial reaction was to note the contents of the applicant's letter and ask it to confine the events to the venues and times outlined G and to co-operate with the police and Government agencies. He said that the police would monitor the event. About two weeks later, however, he wrote to the applicant, saying that the "permission" that had been granted had been withdrawn for "security reasons". He claimed that "the political situation [was] not yet conducive for such events" and that "intelligence at hand" indicated that there were some people who H were waiting to hijack any march or procession.

The applicant sought an order declaring that there was no lawful basis to A purport to deny authority for the holding of a procession planned by the applicant for any of its activities and perpetually interdicting the second respondent (the Commissioner-General of Police) from interfering with,

prohibiting or banning processions and gatherings held by the applicant. The applicant argued that, as a registered trade union, it did not require the B authority of the first respondent to hold the procession which was for *bona fide* trade union purposes and, as such, was exempted from the provisions of the Act requiring notice to be given to the police. For that reason the applicant should be protected from the first respondent's interference in the conduct of its trade union business. The first respondent stated that he had received intelligence (which he did not elaborate on) that there C were some unscrupulous elements waiting to hijack the situation and that, as the march would be conducted across greater Harare by a huge crowd, this would compromise security and disturb business and traffic.

Held, that regarding the disturbance of business and traffic, the claim could not be taken seriously, because it is the duty of the police to manage the D situation. The first respondent also appeared to be labouring under the misunderstanding that he had power and authority to grant "permission" to the applicant for the holding of a procession. The applicant is a genuine and registered trade union. The procession was for *bona fide* trade union business in the interests of its members and/or affiliates. For that reason it enjoyed an exemption from the provisions of the Act relating E to notification being given to the regulating authority. Clearly, therefore, the first respondent could not withdraw permission which he did not have authority to give in the first place. It is the constitutional duty of the police to maintain law and order as the citizens of this country go about the enjoyment of their rights, including the rights of trade unions F to engage in commemorations and processions which further their interests. The police should therefore protect the applicant's members as they go about their activities, as opposed to preventing and curtailing the enjoyment of their rights.

Cases cited G

ZCTU v OC Police, Kwekwe & Ors 2010 (2) ZLR 277 (H)

ZCTU v OC Harare District & Anor 2002 (1) ZLR 323 (H)

Legislation considered

Public Order and Security Act [*Chapter 11:7*], ss 23, 24, 25 & 26 H

Mathonsi J

Case information

A *J Bhanu,* for the applicant

M C Chimombe, for the respondents

Judgment

Mathonsi J: The applicant is a registered conglomeration of trade unions and is engaged in the furtherance of its members' interests. The first respondent is the regulating authority for Harare Central in terms of the Public Order B and Security Act [*Chapter 11:17*] (the Act), while the second and third respondents are the Commissioner General of Police and the Co-Ministers of Home Affairs under whose authority the first respondent falls.

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

C "TERMS OF THE FINAL DRAFT (*sic*)

IT IS HEREBY ORDERED THAT:

1. There is no lawful basis for the first and second respondents to purport to deny authority for the holding of a procession planned by the applicant for any of its activities.
2. The letter by the first respondent not authorising or approving applicant's D activities be declared to (be) null and void and of no legal consequence.
3. The second respondent be and is hereby perpetually interdicted from interfering with, prohibiting or banning processions and gatherings held by the applicant.
4. Respondents pay the costs of this application on a legal practitioner and client scale, jointly and severally, the one paying the other to be absolved.

TERMS OF THE INTERIM RELIEF GRANTED (*sic*)

1. That E the commemorations and procession on 14 September 2013 are to go ahead as planned with or without police escort.
2. The respondents or anyone acting on respondents' instructions be and is (sic) hereby interdicted from interfering with or stopping the commemorations and procession as planned by the applicant on 14 September (2013) in Harare."

F On 15 August 2013, in the normal conduct of its trade union activities, the applicant wrote a letter to the first respondent notifying him of its intended commemoration activities due on 14 September 2013. That letter reads in pertinent part thus:

"RE: SEPTEMBER 13TH COMMEMORATION

We refer to the above.

G We hereby notify you that the ZCTU will be hosting a commemoration of Trade Union Rights on Saturday 14 September 2013 at Globe House Jason Moyo Avenue, 2nd Floor.

As a build up to this event workers decided to offer their services to the community by way of cleaning Copacabana bus stop area. We also intend to start cleaning at 09:30 hours and finish at 13:00 hours. After cleaning there will be a march that H will start at 13:30 hours. Please see the attached diagram of route and direction.

Mathonsi J

We expect about 150 people to attend the event and the programme will start A from 09:30 hours to 13:30 hours and the rest of the programme will proceed at offices at 51 Globe House till 16:00 hours.

Your usual co-operation in this regard will be greatly appreciated."

The first respondent gave his "usual co-operation" in a letter dated 20 August 2013 which reads in part: B

"RE: SEPTEMBER 13TH COMMEMORATION

1. The above subject matter is pertinent.
2. Your notification letter to host a commemoration on Trade Union Rights on 14 September 2013 at Globe House Jason Moyo Avenue, 2ndfloor starting with a clean up at Copacabana and a march from 09:30 hours to 13:30 hours has been noted. C
3. Your march shall start from Chinhoyi Street into R. Mugabe, into First Street, then J Moyo to Globe House for the event.
4. Please confine your clean up, route and event to the above stated venues and times outlined. We will monitor.
5. You are expected to co-operate with the police and other government agents."

The first respondent's co-operation, however, quickly ran out for unexplained D reasons even before the date of the event arrived because on 3 September 2013 he made an about turn, writing to the applicant in the following terms:

"RE SEPTEMBER 13TH COMMEMORATION

1. The above subject matter is pertinent.
2. Please note that the permission that was since (*sic*) granted to your notification E letter to hold a clean up event and march on 14 September 2013 from 09:30 hours to 13:30 hours has been withdrawn due to security reasons:
   (i) The political situation is not yet conducive for such events as unscrupulous elements might take advantage and highjack the whole programme.
   (ii) Intelligence at hand indicates that there are some people who are F waiting to hijack any march or procession.
3. You can however go ahead with gathering at Globe House for your commemoration.
4. Any inconveniences caused are sincerely regretted."

It is these latest developments which have necessitated this approach to the G court by the applicant, which protests that it has organised the commemoration of Trade Union Rights on behalf of its affiliates. The event is central to the applicant and its members as it is an expression and celebration of not only the advancement of workers the world over, but also the enjoyment of their freedom of expression and association as well as the fight for the realisation of workers rights. The applicant maintains that the procession which the H

Mathonsi J

A first respondent is interfering with showcases the pride of workers with the communities they live in and for that reason it has expended a lot of time, money and other resources preparing for and co-ordinating the procession. After receiving the first respondent's initial letter allowing the procession, the applicant says it intensified preparations by inviting its members and B organising logistics.

It has been argued on behalf of the applicant that, as a registered trade union, it does not require the authority of the first respondent to hold the procession which is for *bona fide* trade union purposes and, as such, is exempted from the provisions of the Public Order and Security Act [*Chapter 11:7*] requiring notice to be given to the police. For that reason, the applicant should be C protected from the first respondent's interference in the conduct of its trade union business. The applicant fears that the police will interfere or disrupt its activities they have purported to impose a ban on the procession. It therefore seeks interim relief interdicting such interference afore said.

In his opposing affidavit, the first respondent states that he has received D intelligence that there are some unscrupulous elements waiting to hijack the situation and that, as the march will be conducted across greater Harare by a huge crowd, this will compromise security and disturb business and traffic. He goes on to say that, since the activities will not be confined to the applicant's offices, this brings them under his control and regulation by E virtue of the provisions of the Act.

The first respondent has not elaborated on the nature of the intelligence received, electing to remain vague. Regarding the disturbance of business and traffic, surely these claims cannot be taken seriously, because it is the duty of the police to manage the situation. In any event, it is not the first time F that processions have been conducted in the city. It would appear from the wording of the first respondent's letter of 3 September 2013 and the opposing affidavit that he is wallowing under the misunderstanding that he has power and authority to grant "permission" to the applicant for the holding of a procession. This misconception presumably arises out of a misreading of Part IV of the Act which sets out the procedure to be followed by an organiser of G a procession or public demonstration, including the giving of notice in terms of s25 to the regulating authority, of the procession or public demonstration.

I have already stated that the applicant is a genuine and registered trade union. The procession which it has organised is for *bona fide* trade union business which is in the interests of its members and or affiliates. For that reason it H enjoys an exemption from the provisions of the Act relating to notification

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Mathonsi J

being given to the regulating authority. This is by virtue of the provisions A of s 26A as read with the Schedule to the Act.

This court has, in the past, had occasion to state that ss 23, 24, 25 and 26 of the Act governing the holding of public gatherings have no application where a gathering or commemoration is organised for *bona fide* trade union business because they enjoy an exemption: *ZCTU v Police Kwekwe & Ors* B 2010 (2) ZLR 277 (H) at 280C-D. This court concluded at 280E-F:

> "Therefore by purporting to regulate the conduct of the workers' commemoration, the first respondent was engaging in an exercise in extreme futility as he possessed no such power. To the extent that the commemoration was organised by the applicant for *bona fide* trade union purposes, which it was, the applicant was not required to follow the procedure set out in ss 23, 24, 25 and 26 of the Act C as it enjoyed an exemption."

See also *ZCTU v Officer Commanding Harare District & Anor* 2002 (1) ZLR 323 (H) at 323G-H.

Clearly, therefore, the first respondent could not withdraw permission which it did not have authority to give in the first place. It is the constitutional duty D of the police to maintain law and order as the citizens of this country go about the enjoyment of their rights, including the rights of trade unions to engage in commemorations and processions which further their interests. The police should therefore protect the applicant's members as they go about their activities on 14 September 2013 as opposed to preventing and E curtailing the enjoyment of their rights.

Accordingly, I grant the provisional order as amended, the interim relief of which is as follows:

Pending determination of this matter the applicant is granted the following relief: F

1. The commemorations and procession organised by the applicant for 14 September 2013 are allowed to go ahead without hindrance from the respondents.
2. The respondents are directed to provide police escorts to ensure the security of the applicant's members during those activities.
3. The respondents or anyone acting on their instructions are hereby G interdicted from interfering or stopping the commemorations and procession as planned by the applicant.

Zimbabwe Lawyers for Human Rights, applicant's legal practitioners

Civil Division,Attorney-General's Office, respondents' legal practitioner H

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Document 30 of 79

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2013/Volume 2/RESERVE BANK OF ZIMBABWE v ZIMBABWE REVENUE AUTHORITY 2013 (2) ZLR 249 (S)

RESERVE BANK OF ZIMBABWE v ZIMBABWE REVENUE AUTHORITY 2013 (2) ZLR 249 (S)

Citation	2013 (2) ZLR 249 (S)
Case No	Judgment No. S-44-13
Court	Supreme Court, Harare
Judge	Malaba DCJ, Ziyambi JA and Omerjee AJA
Heard	17 September 2012; *CAV*
Judgment	20 September 2013
Counsel	*L Mazonde* for the appellant *U Sakhe* for the respondent
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Constitutional law – *Constitution of Zimbabwe 1980 – Consolidated Revenue Fund (ss 101, 102 and 103) – absolute terms of sections – revenues collected must be deposited in Fund – transfer of such revenue to anyone* D *else prohibited – transfer of funds collected by Revenue Authority to Reserve Bank – transfer unlawful*

Revenue and public finance – *Reserve Bank – duties and powers – directive by Reserve Bank to commercial banks to transfer funds to itself – such directive unlawful*

Headnote

E The appellant and the respondent were legal entities, established by statute for the achievement of specific purposes, with a right to sue and be sued. The respondent was established in terms of the Revenue Authority Act [*Chapter 23:11*] to act as an agent of the State in assessing, collecting and enforcing the payment of all revenues due to the state and the transfer F of that revenue to

the Consolidated Revenue Fund for appropriation by Government. It was authorised to open accounts with banks to receive deposits by individuals of the revenue due to the State. It was under an obligation, as an agent, to account for all the money deposited into the accounts and generally collected by it, by transferring the money into the Consolidated Revenue Fund. Under s 101 of the Constitution G of Zimbabwe 1980 and s 28(2) of the Act, the respondent was under an obligation not to transfer that money to any body, other than the Consolidated Revenue Fund. Under s 102(3) of the Constitution, no money can be withdrawn from the Consolidated Revenue Fund unless an act of Parliament authorizes such withdrawal and prescribes the exact H manner and form of such withdrawal.

The appellant was established under the Reserve Bank of Zimbabwe Act A [*Chapter 22:15*] for the purposes of managing the financial affairs of private banking institutions and those of the State in terms of the law. The powers which appellant exercised in the execution of its functions in respect of private banking institutions are set out in s 45 of the Banking Act [*Chapter 24:20*].

The appellant received into its own account from two commercial banks B money held by those banks on behalf of the respondent. This was pursuant to a directive issued to the banks to transfer the money from accounts held with them by the respondent. The directive was purportedly made in terms of s 6(1)(d) of the Reserve Bank of Zimbabwe Act (the paragraph was later repealed), which imposed on the respondent the C duty to advance the general economic policies of the Government by doing those things which are permitted by the law. Under s 8(1) of the Act, the respondent could be called upon to meet the settlement by Government of its obligations towards its debtors. In pursuance of this objective, the respondent's Governor issued, through a monetary policy D statement announcement, a directive to all commercial banks to transfer all foreign currency held by individuals and institutions with them, into appellant's own account.

The respondent demanded the refund of the money; the appellant did not respond to the demand, and proceedings were instituted by the respondent to recover the money. The appellant opposed the claim, on E three grounds: (a) that it had a right under ss 6(1)(d) and 8(1) of the Act, to issue the directive; (b) that the respondent should have sued the commercial banks, as opposed to itself, for the recovery of the money, there being no privity of contract between the two; and (3) that s 18 of the Act granted it immunity from proceedings of this nature.

Held, that the obligation imposed by the Constitution applies to all concerned, F including the respondent, the commercial banks, and the appellant. The obligation prohibits, in absolute terms, any transfer of revenue collected by the respondent to any other recipient except the Consolidated Revenue Fund. Any act which has the effect of transferring the money to any other recipient, prior to it getting into the Consolidated Revenue Fund, would G be unlawful under the Constitution, regardless of who authorized that transfer. It would not be a valid defence to say that the money was used by government or that the directive came from Government because the Constitution is binding on the Government.

Held, further, that the appellant overshot the scope of its powers under ss 6(1)(d) and 8(1) of the Act. The sections placed on the appellant an obligation, H

A limited to the exercise of the powers of monitoring financial systems. The obligation to advance the economic policies of the Government by making funds available to it is limited to the appellant having monies in its own accounts. The obligation does not authorize the appellant to force transfers of money from other people's accounts.

Held, further, that the immunity the appellant claimed was limited to a B situation where the appellant has acted within the confines of the statute. If the appellant were to be sued for a debt, the defence of immunity would only be available to it if the action complained of, or the debt was incurred, in the proper exercise of the powers conferred upon it by the statute. At the time the directive was issued, the immunity provision had not yet come into force.

C *Held*, further, that the unlawful directive issued by the appellant to the commercial banks was the *causa sine qua non* of the respondent's loss and the appellant was therefore liable to make good the loss. Under s 17 of the Banking Act a commercial bank is under an obligation to comply with any directions given to it by the Reserve Bank in terms of the Act. D Whilst the commercial banks

were not obliged to obey the directive because it was unlawful, the fact that they acted in accordance with its demands did not absolve the appellant from liability for the consequences of its unlawful conduct.

Editor's notes:

(1) the E judgment of Gowora J (as she then was) in *ZRA v RBZ* 2011 (1) ZLR 539 (H) upheld

(2) The equivalent provisions in the 2013 Constitution relating to the Consolidated Revenue Fund are ss 303 and 304.

Cases referred to F

Foroma v Minister of Public Construction & National Housing & Anor 1997 (1) ZLR 447 (H)

Intl Shipping Co (Pty) Ltd v Bentley 1990 (1) SA 680 (A)

Legislation considered

G Banking Act [*Chapter 24:20*], ss 17 and 45

Constitution of Zimbabwe 1980, ss 101, 102, & 103

Reserve Bank of Zimbabwe Act [*Chapter 22:15*], ss 6 & 8 (1)

Case information

L Mazonde for the appellant

H *U Sakhe* for the respondent

2013 (2) ZLR p252

Malaba DCJ

Judgment

Malaba DCJ: This is an appeal against the judgment of the High Court A granting an order for payment to the respondent of USD4 960 305-70 which the appellant received into its own account from Standard Chartered Bank, and Commercial Bank of Zimbabwe, pursuant to a directive issued to the banks to transfer the money from accounts held with them by the respondent.

After hearing argument from counsel for both parties, the appeal was B dismissed with costs. It was indicated that reasons for the decision would follow in due course. These are they.

The appellant and the respondent are bodies established in terms of the respective statutes for the achievement of specific purposes. They are legal entities with a right to sue and be sued. The respondent is established in terms C of the Revenue Authority Act [*Chapter 23:11*] ("the RA Act"]. The purpose for which the respondent was established is to act as an agent of the State in assessing, collecting and enforcing the payment of all revenues due to the State and the transfer of that revenue to the Consolidated Revenue Fund for appropriation by Government.

The RA Act confers upon the respondent, the relevant powers, the exercise of D which is to ensure the achievement of the purposes for which it is established. In this regard the respondent is authorised to open accounts with banks to receive deposits by individuals of the revenue due to the State. The respondent is under an obligation as an agent to account for all the money deposited into the accounts and generally collected by it, by transferring the money into the Consolidated Revenue Fund. Under s 101 of the Constitution of E Zimbabwe, the respondent is under an obligation not to transfer that money to any body, other than the Consolidated Revenue Fund. Section 101 of the Constitution provides:

> **"101 Consolidated Revenue Fund**
>
> All fees, taxes and other revenues of Zimbabwe from whatever source arising, F not being moneys that –
>
> (a) are payable by or under an Act of Parliament into some other fund established for a specific purpose; or
>
> (b) may, by or under an Act of Parliament, be retained by the authority that received them for the purpose of defraying the expenses of that authority; G
>
> shall be paid into and form one Consolidated Revenue Fund."

Section 101 of the Constitution is given effect to by s 28(2) of the RA Act which requires that revenue collected by the respondent in terms of any enactment shall be paid into the Consolidated Revenue Fund. Section 102(3) of the RA Act provides, as is trite, that no money can be withdrawn from the Consolidated Revenue Fund unless an Act of Parliament authorizes such H

Malaba DCJ

A withdrawal and prescribes the exact manner and form of such withdrawal. Section 102(3) provides that:

> "(3) No moneys shall be withdrawn from any public fund, other than the Consolidated Revenue Fund, unless the issue of those moneys has been authorized by or under an Act of Parliament …"

Section 103 lays down the procedure by which authority may be sought B from Parliament through the Minister of Finance for withdrawal of money from the Consolidated Revenue Fund:

> **"103 Authorization of expenditure from Consolidated Revenue Fund**
>
> (1) The Minister for the time being responsible for finance shall cause to be prepared and laid before the House of Assembly, on a day on which the House C sits, before or not later than thirty days after the start of each financial year estimates of the revenue and expenditure of Zimbabwe for that financial year:
>
> Provided that if, by reason of the prorogation or dissolution of Parliament, the provisions of this subsection cannot be complied with, the estimates of the revenue and expenditure shall be laid before the House of Assembly, on a day on which the House sits not later than thirty days after the date on which the D House first meets after that prorogation or dissolution.
>
> (2) When the estimates of expenditure, other than expenditure charged upon the Consolidated Revenue Fund by this Constitution or an Act of Parliament, have been approved by the House of Assembly, a Bill, to be known as an Appropriation Bill, shall be introduced into the House providing for the issue from the Consolidated Revenue Fund of the sums necessary to meet that expenditure and the appropriation of those sums, under separate votes for the several heads E of expenditure approved, to the purposes specified therein…"

The appellant is established under the Reserve Bank of Zimbabwe Act [*Chapter 22:15*] ("the RBZ Act") for the purposes of managing the financial affairs of private banking institutions and those of the State in terms of the law. The powers which appellant exercises in the execution of its functions F are set out in s 45 of the Banking Act which provides:

> **"45 Responsibilities of Reserve Bank**
>
> (1) Subject to this Act, the Reserve Bank shall be responsible for
>
> (a) continuously monitoring and supervising banking institutions and associates of banking institutions to ensure that they comply with this Act; and
>
> (b) conducting G investigations into any particular banking institution or class of such institutions, where the Reserve Bank considers such an investigation necessary for the purpose of preventing, investigating or detecting a contravention of this Act or any other law."

Section 6(1)(d) of the RBZ Act imposed a duty on the appellant to discharge its functions with the view of advancing the general economic policies of H the Government. It was repealed by Act 1 of 2010. The appellant argued

Malaba DCJ

that the directive to the banks issued in 2009 was in terms of s 6(1)(d) of A the RBZ Act. Section 6 provides:

> **"6 Functions of Bank**
>
> (1) The functions of the Bank shall be –
>
> (a) to regulate Zimbabwe's monetary system; and
>
> (b) to achieve and maintain the stability of the Zimbabwe dollar; and B
>
> (c) to foster the liquidity, solvency, stability and proper functioning of Zimbabwe's financial system; and
>
> (d) …[Paragraph repealed by Act 1 of 2010]
>
> (e) to supervise banking institutions and to promote the smooth operation of the payment system; and C
>
> (f) subject to Part VII, to formulate and execute the monetary policy of Zimbabwe; and
>
> (g) to act as banker and financial adviser to, and fiscal agent of, the State; and

(h) whenever appropriate and subject to any written directions given to it by the Minister, to represent the interests of Zimbabwe in international or intergovernmental meetings, multilateral agencies and other organizations D in matters concerning monetary policy; and…"

The import of s 6(1)(d) was that the appellant was under a duty to advance the general economic policies of the Government of Zimbabwe by doing those things which are permitted by the law. That would be out of monies of the State held with the appellant as s 8(1) requires it to act as the banker to the State. E

Under s 8(1) of the Act the appellant may be called upon to meet the settlement by Government of its obligations towards its debtors. In January 2009, the appellant's Governor issued, through a monetary policy statement announcement, a directive to all commercial banks to transfer all foreign currency held by individuals and institutions with them, into the appellant's F own account.

The appellant contends that it issued the directive in terms of the authority granted to it under ss 6(1)(d) and 8(1) of the RBZ Act. As a result of the directive, Standard Chartered Bank and Commercial Bank of Zimbabwe transferred into appellant's account funds totalling USD$4 960 305.70, from G the respondent's accounts held with them. The directive was later suspended in respect of monies held in respondent's accounts.

The appellant did not refund the money. On 12 and 26 March and 17 April 2009, the respondent's Commissioner General, who is the accounting officer responsible for the discharge by the respondent of all of its functions in terms of RA Act, wrote to the appellant requesting that the monies be refunded. H

Malaba DCJ

A There was no response. The appellant did not accede to the proposal for a meeting between the parties, which are both Government institutions, to discuss the matter with a view of finding an amicable solution to the problem.

The Commissioner General with the approval of the respondent's Board of Directors was compelled to institute proceedings on 20 July 2009, in the B High Court for the respondent to recover the money.

In defending the claim, the appellant argued that it had a right under ss 6(1)(d) and 8(1) of the RBZ Act, to issue the directive in question. The appellant argued further, that the respondent should have sued the commercial banks, as opposed to itself, for the recovery of the money. The reason given was that there was no privity of contract between the two. The third argument C raised by the appellant was that s 18 of the RBZ Act granted it immunity from proceedings of this nature.

The court *a quo* dismissed the defence on the grounds of the obligations imposed on both parties by the provisions of ss 101, 102 and 103 of the Constitution. It did not consider the other grounds of opposition to the claim. D On appeal, the failure by the court *a quo* to consider the other grounds of opposition has been relied upon to support the contention that there is a misdirection justifying interference with the judgment appealed against.

In *Foroma v Minister of Public Construction and National Housing & Anor* 1997 (1) ZLR 447 (H) Smith J held that the Housing and Building Act [*Chapter* E *22:07*] does not contain any provision authorizing the disbursements of public money for the purpose of funding a (VIP) housing scheme. Withdrawal from the Consolidated Revenue Fund to support the scheme had therefore been unlawfully effected.

The obligation imposed by the Constitution applies to all concerned including F the respondent, the commercial banks, and the appellant. The obligation is clear in that it prohibits, in absolute terms, any transfer of revenue collected by respondent to any other recipient except the Consolidated Revenue Fund. Any Act which has the effect of transferring the money to any other recipient prior to it getting into the Consolidated Revenue Fund, would be unlawful under the Constitution, regardless of who authorizes that transfer. It would G not be a valid defence to say that the money was used by Government or that the directive came from Government because the Constitution is binding on the Government. Zimbabwe is a Constitutional democracy.

The attempt by the appellant to raise privity of contract between the respondent and the commercial banks is of no consequence. In any event it is clear that H the appellant exceeded the scope of its powers under ss 6(1)(d) and 8(1) of

Malaba DCJ

the RBZ Act. The sections placed on the appellant an obligation, limited to A the exercise of the powers of monitoring financial systems.

The obligation to advance economic policies of the Government by making funds available to it is limited to the appellant having monies in its own accounts. The obligation does not authorize the appellant to force transfers of money from other people's accounts. The immunity the appellant sought B to raise as a shield against the claim by the respondent, is only limited to a situation where the appellant has acted, within the confines of the Statute. If appellant were to be sued for a debt, the defence of immunity would only be available to it if the action complained of, or the debt was incurred in the proper exercise of the powers conferred upon it by the Statute. At the time the directive was issued, the immunity provision had not yet come into force. C

It is clear that the unlawful directive issued by the appellant to the commercial banks is the *causa sine qua non* of the respondent's loss. See *International Shipping Company (Pty) Ltd v Bentley* 1990 (1) SA 680 (A) at 100. The appellant is therefore liable to make good the loss. Under s 17 of the Banking Act [*Chapter 24:20*] a commercial bank is under an obligation to "comply D with the terms and conditions of its registration and with any directions given to it by the Reserve Bank or the Registrar in terms of this Act". Whilst noting that the commercial banks were not obliged to obey the directive because it was unlawful, the fact that they acted in accordance with its demands does not absolve the appellant from liability for the consequences of its unlawful conduct. E

ZIYAMBI JA and OMERJEE AJA concurred.

T H Chitapi & Associates, appellant's legal practitioners

Kantor & Immerman, respondent's legal practitioners F

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Document 31 of 79

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2013/Volume 2/GOVERE v ORDECO (PVT) LTD & ANOR 2013 (2) ZLR 257 (S)

GOVERE v ORDECO (PVT) LTD & ANOR 2013 (2) ZLR 257 (S)

Citation	2013 (2) ZLR 257 (S)
Case No	Judgment No. S-25-14
Court	Supreme Court, Harare
Judge	Ziyambi JA, Hlatshwayo JA & Patel JA
Heard	23 September 2013
Judgment	23 September 2013
Counsel	*T Magwaliba*, for the appellant *E T Moyo*, for the respondent
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

C **Company** – *director – who is – person holding himself out to be a director even if not registered as such – third parties entitled to rely on such representation – liable for acts of company – person who was a party to carrying out of company's business recklessly or with intent to defraud – liability of such person even if not a director*

D **Practice and procedure** – *execution – attachment – judgment debtor's immovables – entitlement of judgment creditor to attach immovables – no distinction between secured and unsecured creditor – sheriff not entitled to attach immovables unless satisfied that judgment debtor has no or insufficient movable property to satisfy debt*

Headnote

E Proceedings had been brought against a company by the first respondent to recover outstanding rentals and other costs. When the company failed to pay, the first respondent applied to the High Court for an order, in terms of s 318 of the Companies Act [*Chapter 24:03*], declaring the appellant personally liable for the judgment debt of the company. The F appellant had admitted that he was a director of the company, though, as he put it, "unofficially". There was no return from the companies registry confirming his position as a director the company, but a letter from the company and a company resolution both clearly identified him as a company director. The High Court upheld the application. The appellant was accordingly ordered to pay the claimed amount together G with interest and costs on a legal practitioner and client scale. In the event of the appellant's failure to pay, the first respondent was entitled to execute the order for payment against his two immovable properties. On appeal, the appellant argued that he should not have been found liable. It was also argued that an order for special execution against immovables H is normally only granted for preferential or secured creditors, such as

mortgage bond holders, and that in terms of r 326 of the High Court A Rules execution must first be applied against the judgment debtor's movables before it can be effected against his immovables. The first respondent contended that the order of the court *a quo* entitled it, without any qualification, to execute against the appellant's immovables.

Held, that there could be no doubt that the appellant represented or held B himself out as a director of the company and its trading subsidiaries at the relevant time. Consequently, third parties dealing with him were entitled to rely upon that representation for the purposes of legal liability in terms of s 12 of the Companies Act. Even if it were to be accepted that the appellant was not a director of the company, this would not absolve him from personal responsibility for the company's debts and liabilities C under s 318(1) of the Act, because that provision extends personal liability not only to "the past or present directors of the company" but also to "any other persons who were knowingly parties to the carrying on of [the company's] business" recklessly or with gross negligence or with intent to defraud.

Held, further, that the order for execution granted by the court *a quo* would D only come into operation if the appellant failed to pay the judgment debt. The order was clearly conditional and contingent upon such failure. Therefore, the appellant was perfectly at large to tender his movables in satisfaction of the judgment before any process for the execution of his immovables was initiated. E

Held, further, that r 326 patently did not differentiate between secured and unsecured creditors. It applied to both without distinction. The plain meaning of this rule was that the judgment creditor has the option to sue out a separate writ of execution for the attachment of immovable property or a single writ for the attachment of both movable and immovable property. In either event, before proceeding to attach immovable property, F the sheriff or his deputy is enjoined to satisfy himself that the judgment creditor does not own any or has insufficient movable property to satisfy the judgment debt.

Held, further, that there were no grounds for ordering costs against the appellant on the higher scale. G

Editor's notes:

(1) The judgment appealed against was that of Chigumba J in *Ordeco (Pvt) Ltd v Govere & Anor* 2013 (1) ZLR 532 (H).

(2) The date given for the Supreme Court's judgment is the date on which the court's decision was announced. The full reasons for the decision were made available in 2014, hence the 2014 judgment number.

Patel JA

Legislation considered A

Companies Act [*Chapter 24:03*], ss 12, 188(1) & 318

High Court Rules 1971 (RGN 1047 of1971), r 326

Case information

T Magwaliba, for the appellant

B *E T Moyo*, for the respondent

Judgment

Patel JA: At the beginning of the hearing of this matter, counsel for the appellant sought to introduce a point of law pertaining to the validity of the proceedings in the court below, as a new ground of appeal. For the reasons given at the hearing, we declined the application.

C Thereafter, following argument on the merits of the appeal, the court unanimously dismissed the appeal with costs, except in relation to the fifth ground of appeal. The reasons for our decision are as follows.

Background

This is an appeal against the whole judgment of the High Court in Case D No. HC 9257/12 handed down on 5 June 2013. Prior to that judgment, on 8 November 2011, the High Court granted an order by consent in Case No. HC 3159/11. In terms of that order, the company known as Coldrac (Pvt) Ltd t/a Tacoola Beverages (hereinafter referred to as "Coldrac") was required to pay the first respondent its outstanding rentals, operating charges and wasted costs, totalling US$112 000, in 13 monthly instalments commencing E in December 2011. The appellant, who was a party to those proceedings, was absolved from the instance.

Following the failure by Coldrac to meet its payment obligations, the first respondent applied to the High Court for an order, in terms of s 318 of the Companies Act [*Chapter 24:03*], declaring the appellant personally liable for F the judgment debt of Coldrac. The appellant admitted that he was a director of Coldrac between 2003 and 2007, in what he described as an unofficial capacity, and that he had acquired 80 percent of the shareholding in Coldrac. However, the relevant CR 14 forms filed with the Registrar of Companies did not reflect his directorship in Coldrac.

The court *a quo* found that the appellant held himself out as a director of G Coldrac both through the earlier consent order and by virtue of the continuing tenancy with the first respondent. He was therefore estopped from relying on the failure to comply with the relevant statutory requirements to furnish proper updated records and returns. Moreover, he had failed to notify the Registrar of Companies and Coldrac itself of any resignation as a director H and was therefore still bound by his duties as director in terms of s 187(7)

Patel JA

of the Companies Act. Consequently, because he carried on the business of A Coldrac recklessly and with intent to defraud, the court held that he was not protected by limited liability and was liable for the company's debts under s 318(1) of the Act. He was accordingly ordered to pay the claimed amount of US$112 000 together with interest and costs on a legal practitioner and client scale. In the event of his failure to pay, the first respondent was entitled B to execute the order for payment against his two immovable properties.

Issues for determination

The notice of appeal filed of record contains five grounds of appeal. At the hearing of the matter, counsel for the appellant conceded that the second ground of appeal referred to the wrong section of the Companies Act and that the third ground, as it was framed, was utterly nonsensical. Therefore, C he quite properly abandoned both grounds of appeal.

In the event, the principal issue for determination is whether the court *a quo* misdirected itself by finding that the appellant was a director of Coldrac at the material time. The remaining two issues relate to the propriety of the order for special execution of the appellant's properties and the award of D costs on a higher scale.

Directorship of company

In para 6 of his opposing affidavit, the appellant admits that he was a director of Coldrac between 2003 and 2007 "although unofficially". The import of this qualification is not at all clear for the simple reason that it is not recognised E in company law or corporate parlance. Be that as it may, it is common cause that there is no CR14 return confirming the appellant's position as a director of Coldrac. However, the relevance of that omission appears to be outweighed by the documentary evidence adduced in the court below. Firstly, there is a letter dated 17 May 2010 from Tacoola Beverages to the first respondent's estate agent, setting out a payment plan for the repayment of its outstanding F debt. Secondly, there is a company resolution dated 10 June 2011 made by Coldrac (Pvt) Ltd t/a Glendale Springs. Both documents clearly identify the appellant as a company director. This accords with the requirements of s 188(1) of the Companies Act with respect to the details of directors names to be included on all corporate business letters. G

On the available evidence, therefore, there can be no doubt that the appellant represented or held himself out as a director of Coldrac and its trading subsidiaries at the relevant time. Consequently, third parties dealing with him were entitled to rely upon that representation for the purposes of legal liability in terms of s 12 of the Companies Act (which codifies the long established *Turquand* rule). H

Patel JA

A In any event, even if it were to be accepted that the appellant was not a director of Coldrac, this would not absolve him from personal responsibility for the company's debts and liabilities under s 318(1) of the Companies Act. This is because that provision extends personal liability not only to "the past or present directors of the company" but also to "any other persons who were knowingly parties to the carrying on of [its] business" recklessly or with B gross negligence or with intent to defraud.

It follows from all of the foregoing that the principal ground of appeal is utterly devoid of merit and cannot be upheld.

Executability of immovables

As I have already indicated, the court *a quo* granted an order entitling the C first respondent to execute the order for payment in the sum of US$112 000 against the appellant's immovable properties, in the event that he failed to pay that sum. For the appellant, Mr *Magwaliba* argues that an order for special execution against immovables is normally only granted for preferential or secured creditors, such as mortgage bond holders. His further submission in that regard is that execution must first be applied against the judgment D debtor's movables before it can be effected against his immovables. He relies for this proposition on r 326 of the High Court Rules.

In the present matter, it is common cause that there was no *nulla bona* return in respect of the assets of Coldrac and no attempted attachment of the appellant's movables. The order of the court *a quo*, so it is contended, E entitles the first respondent, without any qualification, to execute against the appellant's immovables, thereby circumventing the requirements of r 326.

I am unable to agree with that contention, for the simple reason that the order for execution granted by the court *a quo* only comes into operation in the event that the appellant fails to pay the judgment debt. The order is F clearly conditional and contingent upon such failure. Therefore, the

appellant is perfectly at large to tender his movables in satisfaction of the judgment before any process for the execution of his immovables is initiated.

In any event, the interpretation of r 326 propounded by Mr. *Magwaliba* is clearly not supported by the wording of that rule. It deals with the attachment of immovable property in the following terms:

> G "It shall not be necessary to obtain an order of court declaring a judgment debtor's immovable property executable or to sue out a separate writ of execution in order to attach and take in execution the immovable property of any judgment debtor, but where so desired the judgment creditor may sue out one writ of execution for the attachment of both movable and immovable property:
>
> Provided that the sheriff or his deputy shall not proceed to attach in execution H the immovable property of the judgment debtor unless and until he has by

Patel JA

> due inquiry and diligent search satisfied himself that there is no or insufficient A movable property belonging to the judgment debtor to satisfy the amount due under the writ."

First and foremost, the rule patently does not, as is contended for the appellant, differentiate as between secured and unsecured creditors. It applies to both without distinction. Secondly, the plain meaning of this rule is that the B judgment creditor has the option to sue out a separate writ of execution for the attachment of immovable property or a single writ for the attachment of both movable and immovable property. In either event, before proceeding to attach immovable property, the sheriff or his deputy is enjoined to satisfy himself that the judgment creditor does not own any or has insufficient movable property to satisfy the judgment debt. C

For the above reasons, the fourth ground of appeal cannot be sustained and must be dismissed.

Scale of costs

The fifth and final ground of appeal is that the court below erred in ordering the first respondent to pay the costs of suit on a legal practitioner and client D scale. In this regard, the court relied upon the fact that the parties had already agreed to an award of costs on a higher scale as against the first respondent in the earlier order by consent.

That order, granted in Case No. HC 3159/11 on 8 November 2011, clearly cannot be applied in respect of any subsequent costs incurred by the first E respondent in later proceedings. More pertinently, the award of costs is imposed as against Coldrac *per se* and does not extend to the appellant himself. In the premises, as was properly conceded by Mr *Moyo* for the first respondent, the punitive award of costs made by the court below was improper and cannot be sustained. It must therefore be set aside.

For all of the above reasons, the appeal was dismissed with costs, except in F relation to the fifth ground of appeal. Accordingly, the decision of the court *a quo* is upheld in its entirety, save for para 3 of the court order, which is set aside and substituted as follows:

> "3. The first respondent shall pay the costs of this application on the ordinary scale." G

ZIYAMBI JA and HLATSHWAYO JA concurred

Bvekwa Legal Practice, appellant's legal practitioners

Scanlen & Holderness, first respondent's legal practitioners H

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Document 32 of 79

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2013/Volume 2/MATEWA v ZETDC 2013 (2) ZLR 263 (H)

MATEWA v ZETDC 2013 (2) ZLR 263 (H)

Citation	2013 (2) ZLR 263 (H)
Case No	Judgment No. HH-304-13
Court	High Court, Harare
Judge	Mathonsi J
Heard	10 September 2013; *CAV*
Judgment	25 September 2013
Counsel	*C McGown*, for the plaintiff (respondent) Ms *R P Shava*, for the defendant (excipient)
Case Type	Exception
Annotations	No case annotations to date

Flynote

Practice and procedure – *exception – when pleading may be excipiable so as to lead to dismissal of action – impropriety of seeking dismissal of action when proper remedy is for plaintiff to amend pleadings*

Headnote

D The defendant excepted to the plaintiff's summons on the grounds that it did not disclose a cause of action, as it did not specify whether the claim arose from a contractual obligation or a delictual one. It argued that the averment in the summons that the defendant's actions were wrongful and unlawful was not enough to found a cause of action and that in order E to succeed in a suit for patrimonial loss under the Aquilian action the plaintiff must plead and prove that the defendant committed a wrongful act which resulted in actual loss.

Held, that the determination of whether a claim is excipiable or not cannot be premised on proof of an averment. Proof relates to evidence which is the province of a trial and not an exception. The essence of any claim F is located in the pleadings, whose function is to inform the parties of the points of issue between them, to enable them to know in advance what case they have to meet, to assist the court define the limits of the action and to place the issues on record. To that extent pleadings are required to be drawn in summary form, must be brief and concise and must state only relevant facts and not evidence. It is the duty of the court, when an G exception is taken to a pleading, first to see if there is a point of law to be decided which will dispose of the case in the whole or in part. If there is not, then it must see if there is any embarrassment, which is real and cannot be met by the supply of particulars. Unless the excipient can satisfy the court that there is such a point of law or such real embarrassment, H then the exception should be dismissed. A pleading is only excipiable

on the ground that it does not disclose a cause of action if no possible A evidence led on the pleading can disclose such cause of action.

Held, further, that the courts are increasingly being called upon to adjudicate over exceptions which are devoid of merit and appear intended to delay proceedings. Invariably excipients are approaching the court, frequently praying for a dismissal of claims, as *in casu*, when the proper remedy B would be for the plaintiff to be directed to amend the impugned pleading. Where an exception of this nature is upheld, the plaintiff should be allowed to amend the pleading.

Cases referred to

Kahn v Stuart & Ors 1942 CPD 386 C

Levitan v Newhaven Holiday Entprs CC 1991 (2) SA 297 (C)

McKelvey v Cowan NO 1980 ZLR 235 (G); 1980 (4) SA 525 (Z)

Marney v Watson & Anor 1978 (4) SA 140 (C)

Mnangagwa v Alpha Media Hldgs (Pvt) Ltd & Anor HH-225-13 *

Case information

C McGown, for the plaintiff (respondent) D

Ms *R P Shava*, for the defendant (excipient)

Judgment

Mathonsi J: The defendant, who is the excipient in this matter, is an E incorporation, charged with the transmission and distribution of electricity in this country it being a subsidiary of ZESA Holdings Ltd. The plaintiff is a commercial farmer performing her trade at subdivision 1 of Dagbreek farm in Nyazura, where she is engaged in the growing of tobacco and sugar beans.

The plaintiff sued out a summons out of this court against the defendant F for payment of US$500 000 for loss of 30 hectares of tobacco crop and 20 hectares of sugar beans crop as well as US$200 000, being damages for consequential loss together with interest thereon and costs of suit.

In her declaration, the plaintiff averred that about October 2009 the defendant wrongfully and unlawfully confiscated electrical equipment at her farm in G the form of meter boxes, cables, MCBs and other electrical gadgets. She averred further that in January 2010 and following an investigation into the circumstances of the removal of the electrical equipment, the defendant undertook to reinstate electricity at the plaintiff's farm upon a realisation that the plaintiff required it to irrigate her 30 hectares of tobacco and 20 hectares of sugar beans. The plaintiff averred that the defendant advised her H

A to continue with her activities as an instant installation of power was being undertaken. However, the defendant disregarded its obligation to install electricity, which was wrongful and as a result of which her tobacco and sugar beans crops wilted due to moisture stress resulting in loss. In para 9 of the declaration the plaintiff specifically averred that:

B "Defendant's conduct was wrongful and unlawful and resulted in serious loss to the plaintiff."

She therefore craved for compensation aforesaid.

The defendant excepted to the plaintiff's summons a follows:

"The defendant enters an exception to the plaintiff's summons based on the following grounds:

1. The C summons and declaration served on it does (*sic*) not state a true and concise statement of the nature, extent and grounds of the cause of action more specifically in that it omits an essential element of the cause of action. The summons does not specify whether the claim arises from a contractual obligation or delictual or any other basis on the part of [the] defendant.
2. [The] defendant therefore prays for a dismissal of the plaintiff's claim on D the basis that the summons does not disclose a cause of action."

Ms *Shava* for the defendant submitted that the plaintiff's summons does not disclose a cause of action as it does not specify whether the claim arises from a contractual obligation or a delictual one. The averment that the defendant's actions were wrongful and unlawful was not enough to found a cause of action. In her view, in order to succeed in a suit for patrimonial loss under E the Aquilian action "the party must plead and prove" that the defendant committed a wrongful act which resulted in actual loss.

Therein lies the defendant's problem. The determination of whether a claim is excipiable or not cannot be premised on proof of an averment. Proof relates to evidence which is the province of trial and not an exception.

F The essence of any claim is located in the pleadings whose function is to inform the parties of the points of issue between them to enable them to know in advance what case they have to meet, to assist the court define the limits of the action and to place the issues on record. See *Beck's Theory and Principles of Civil Actions* 5 ed p 32. To that extent pleadings are required to be drawn in summary form, must be brief and concise and must state only G relevant facts and not evidence.

The seminal judgement of Davis J in *Kahn v Stuart & Ors* 1942 CPD 386 at 391 sets out clearly how the court should approach the pleadings;

> ". . . the court should not look at a pleading with a magnifying glass of too high power. If it does so, it (is) almost bound to find flaws in most pleadings … It is H so easy, especially for busy counsel to make mistakes here or there, to say too

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Mathonsi J

> much or too little, or to express something imperfectly. In my view, it is the duty A of the court, when an exception is taken to a pleading, first to see if there is a point of law to be decided which will dispose of the case in the whole or in part. If there is not, then it must see if there is any embarrassment, which is real and such as cannot be met by the asking of particulars … And unless the excipient can satisfy the court that there is such point of law or such real embarrassment, then the exception should de dismissed." B

It is crucial to note that a pleading is excipiable on the ground that it does not disclose a cause of action if no possible evidence led on the pleading can disclose such cause of action. As stated by Beadle AJ (as he had then become) in *McKelvey v Cowan NO* 1980 ZLR 235 (G); 1980 (4) SA 525 (Z):

> "It is a first principle in dealing with matters of exception that if evidence can be C led which can disclose a cause of action alleged in the pleading, that particular pleading is only excipiable on the basis that no possible evidence led on the pleading can disclose a cause of action. That is the manner in which I approach this case."

The plaintiff makes the statement in her declaration that the defendant removed electrical equipment from her farm wrongfully and unlawfully. She also D states that at some stage, after some engagement, the defendant undertook to restore electrical power, realising that she needed it for cropping purposes. It further advised her to continue with her farming activities on the promise that electricity would be restored without delay. Notwithstanding all this, the defendant wrongfully failed to provide power resulting in loss of crops.

There is no doubt that the plaintiff's averments contain a lot of prolixity, are E lengthy and tedious and that the pleading is unnecessarily wordy. Indeed the declaration could have been couched in more elegant terms than it is. That however does not detract from the fact that the pleading contains all the necessary averments. If evidence can be led to prove the wrongfulness and unlawfulness of the defendants' conduct and to prove the existence of F an undertaking made by the defendant to restore electricity at the plaintiff's farm and the attendant knowledge that such was needed for irrigating crops, then a cause of action would be established. For that reason, the pleading cannot be said to be excipiable: *McKelvey v Cowan (supra*)

I am not persuaded that the exception taken by the defendant has the object G of settling the case or part of it in a cheap and easy manner or that it has the object of protecting the defendant against an embarrassment so serious as to merit the costs of an exception: *Keeley v Heller* 1903 TS 101. If anything, the exception appears designed to confound the plaintiff. It is without merit.

Having come to that conclusion, I find it unnecessary to deal with the objection taken by Mr *McGown* for the plaintiff that the exception was not taken in H

Mathonsi J

A accordance with r 140(1) (b) of the High Court Rules 1971, in that no letter of complaint was written to the plaintiff to address the source of complaint about the pleading. See also Herbstein and van Winsen *The Civil Practice of the Superior Courts in South Africa* 3 ed p 338.

The pleading is simply not excipiable on the basis relied upon the defendant. B There would have been nothing to amend or rectify as envisaged by r 140(1)(b).

While it is not the intention of the law to discourage parties from taking exceptions if such exceptions may result in the reduction of costs and the shortening of proceedings (*McKelvey v*

Cowan NO (supra); Mnangagwa v Alpha Media Holdings (Pvt) Ltd & Anor HH-225-13 [**]), I am of the view that this exception is thoroughly without merit and should not have been C taken at all.

It is remarkable that this court is now increasingly being called upon to adjudicate over so many of these exceptions which are devoid of merit and appear intended to delay proceedings. Invariably excipients are approaching the court frequently praying for a dismissal of claims, as has been requested D by the defendant *in casu*, when the proper remedy would be for the plaintiff to be directed to amend the impugned pleading. Where an exception of this nature is upheld, the plaintiff would be allowed to amend the pleading: *Levitan v Newhaven Holiday Enterprises CC* 1991 (2) SA 297 (C); *Marney v Watson and Anor* 1978 (4) SA 140 (C); Herbstein & van Winsen *op cit* E p 341. I therefore take the view that the defendant must face the consequences of its ill-conceived exception which has unnecessarily put the plaintiff out of pocket.

Accordingly the exception is hereby dismissed with costs.

F *Venturas & Samukange*, plaintiff's legal practitioners

Muza & Nyapadi, defendant's legal practitioners

* See above, at p 116 of this volume. – *Editor*
** See above, at p 116 of this volume. – *Editor*

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Document 33 of 79

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2013/Volume 2/S v NCUBE 2013 (2) ZLR 268 (H)

S v NCUBE 2013 (2) ZLR 268 (H)

Citation	2013 (2) ZLR 268 (H)
Case No	Judgment HH- 335-13
Court	High Court, Harare
Judge	Tsanga J
Heard	25 September 2013
Judgment	25 September 2013
Counsel	Details not supplied
Case Type	Criminal review
Annotations	No case annotations to date

Flynote

Criminal procedure (sentence) – *general principles – suspended sentence – conditions – person charged with having sexual relations with a young person – portion of sentence suspended on condition that he marries the*

complainant – not a competent sentence

Criminal procedure (sentence) – *offences under Criminal Law Code – extra-marital sexual intercourse with young person – age difference – offence* D *aggravated when age difference considerable – complainant pledged in marriage to accused – such pledge a criminal offence and not mitigating*

Headnote

The accused pleaded guilty to a charge of having sexual intercourse with a young person in contravention of s 70(1)(a) of the Criminal Law E (Codification and Reform) Act [*Chapter 9:23*]. He was sentenced to a term of imprisonment, of which most was suspended on conditions relating to future good conduct and the rest on condition that he marries the complainant. He was 30 years old at the time of the offence and the complainant, his wife's younger sister, was just under 15 years old. She had come to stay with them. On the night the offence initially occurred F he had gone to the hut where she was sleeping and had attempted to have intercourse with her and she had refused. Undeterred in his resolve by her refusal, he had gone back again that night with the same demand, which had then been acceded to. Sexual intercourse had taken place four times that night. About a month later, she went back to her rural area G and shortly afterwards discovered that she was pregnant. The matter was reported to the police.

The mitigating factors put forward by the accused included the fact that he had been given the complainant as a wife by her parents when she became of age. His wife was asthmatic. Furthermore, he was the one who had educated the complainant. The trial magistrate also noted in H

A his reasons for sentence that there was a smack of a love affair between the complainant and the accused, which he deemed a strong indicator of the consensual nature of their relationship.

Held, that pledging a female under the age of 18 years is an offence under s 94(1)(b) of the Criminal Law (Codification and Reform) Act and no regard could be had to such a pledge. This provision also indicates the B State's seriousness in complying with the requirements of art 19(1) of the UN Convention on the Rights of the Child, to which Zimbabwe is a party, that the State should take measures to "protect the child from all forms of physical abuse or mental violence, … maltreatment or exploitation, including sexual abuse". Whilst not automatically incorporated into our C law unless done so by an Act of Parliament, international instruments such as this nonetheless provide significant guidelines and permissible prisms for examining local legislation against international standards. Ordering marriage to the complainant amounted to sanctioning a violation of what the law clearly forbids. Furthermore, in sanctioning an impermissible marriage, the magistrate effectively cast aside the protective function D of the law on sexual intercourse with young persons.

Held, further, that the offence is aggravated where, among other factors, the accused is much older than the complainant. Here, the accused is twice the complainant's age. The magistrate's allusion to a consensual relationship neglected the effects of such a vast age discrepancy on the E complainant's ability to withstand the lecherous advances and persuasions of the accused. The age discrepancy and its attendant power dynamics should have been central in interrogating the unlikelihood of a truly consensual relationship. The two persons are at different levels in terms of emotional maturity. Her ability to stave off his persistent advances would undoubtedly have been weaker. To accept love as a mitigatory F factor when the disparity in ages is great and the girl's age is known to the accused is to break the ring of protection accorded the complainant by the law. Frequency of intercourse is not an indicator of genuineness of affection, but more likely shows lasciviousness on the part of the man.

Held, further, that in our cultural context, where some married men believe the wife's unmarried sister is equally for the taking, ordering marriage G gives a very unhealthy nod to predatory behaviour and does little to foster attitudes of respect and dignity towards females in what should be a safe family environment. Ordering marriage under such circumstances also does nothing towards sending a strong message of disapproval to such adult males who, behind a cloak of negative cultural practice, coerce a H relative who is a minor into having sexual intercourse. The fact that the

family reported the criminal conduct was indicative of the fact that they A regarded him as having crossed the boundaries of what they regarded as acceptable behaviour. He was already married to her sister and had five children. It could not have made for a healthy sibling relationship.

Held, further, that there was no indication that the complainant's views had been ascertained. If a marriage had taken place, it remained critical for B the magistrate to ascertain that she was not in it because she was pledged or because the court wrongly ordered the accused to marry her.

Cases cited

S v Chuma 1983 (2) ZLR 372 (H)

S v Nare 1983 (2) ZLR 135 (H) C

Legislation considered

Criminal Law (Codification and Reform) Act [*Chapter 9:23*], ss 70 & 94

Judgment

Tsanga J: The accused was charged with having sexual intercourse with a young person in contravention of s 70(1) (a) of the Criminal Law (Codification D and Reform) Act [*Chapter 9:23*] ("the Criminal Code"). He pleaded guilty to all the essential elements of the charge put before him. He received the following sentence as worded by the magistrate:

> "24 months' imprisonment of which 16 months are suspended for 5 years on condition that the accused does not, within that period, commit any offence E involving contravention of s3 of the Sexual Offences Act [*Chapter 9: 21*] and for which, upon conviction, the accused is sentenced to a term of imprisonment without the option of a fine. *The remaining 8 months are further suspended on condition that the accused marries the complainant*." (My emphasis)

There are three issues arising from the above paragraph. The first is a point of correction in that the offence was committed in January 2010 at a time when F the Sexual Offences Act had already been incorporated into the Criminal Code. Therefore what should have been cited in the sentence is s 70(1)(a) of the Criminal Code as had been correctly stated in the charge sheet.

The second issue relates to the scope and framing of the nature of prohibited behaviour that would bring the suspended 16 months into action. This I will G deal with at the conclusion of this judgement.

The third issue, which goes to the root of this judgment, centres on the suspension of a further eight months on condition that the accused married the complainant. The magistrate was requested by Bhunu J to respond to several issues, namely: the competency of compelling the accused to marry the complainant; if any enquiry had been made into whether the accused's H

A marriage permitted polygamy; whether the order to marry had been complied with; and to investigate the possibility of community service. The response received from the provincial magistrate was that the magistrate who had passed the sentence had since left service. However, the provincial magistrate agreed that the sentence was improper with respect to the marriage aspect and sought the court's guidance on corrective measures, given that the parties B were yet to be summonsed and the issue of community service examined.

This judgment seeks to elaborate on the impropriety of ordering marriage and to give the necessary guidance requested.

The brief facts are that sometime in January 2010 the accused, an adult male aged 30 living in Svonge Village in Mberengwa, had unlawful intercourse C with the complainant, his wife's sister, then aged 15 years, who had come to stay with them. On the night the offence initially occurred, he had gone to the hut where she was sleeping and had attempted to have intercourse with her and she had refused. Undeterred in his resolve by her refusal, and as persistent as a mosquito, he had gone back again that night with the same D demand, which had then been acceded to. Sexual intercourse had taken place four times that night. Sometime in February 2010 the complainant had gone back to her rural area and, on missing her period, had revealed to her aunt that she was pregnant and that the accused was responsible. The matter had then been reported to the police.

E The mitigating factors put forward by the accused to the court included the fact that he had been given the 15-year-old complainant as a wife by her parents, when she became of age. His wife was asthmatic. Furthermore, he was the one who had educated her. The magistrate also noted in his reasons for sentence that there was a smack of a love affair between the complainant F and the accused, which he deemed a strong indicator of the consensual nature of their relationship.

The critical issue is whether the magistrate misdirected himself in ordering eight months of the sentence to be set aside if the accused married the complainant. Pledging, as can be inferred from the circumstances described by the accused to the court, is in strict violation of s 94(1)(b) of the Criminal G Code. Whilst this was not the issue before the court, it was in the very least the duty of the magistrate to point out to the accused that no regard could be had to the parents' pledge of the complainant as a wife, as it was in fact in violation of the law. The relevant section states as follows:

"(1) A lawful custodian of a female person who –

(a) . . . H

Tsanga J

(b) at a time when the female person is under the age of eighteen years, or A without her consent, enters into an arrangement whereby the female person is promised in marriage to any man whether for any consideration or not …

shall be guilty of pledging a female person and liable to a fine up to or exceeding level fourteen or imprisonment for a period not exceeding two years or both."

Indeed this provision in the law is also significant from the point of view B of the State's seriousness in complying with the requirement of art 19(1) of the UN Convention on the Rights of the Child, to which Zimbabwe is a party, that the State should take measures to "protect the child from all forms of physical abuse or mental violence … maltreatment or exploitation, including sexual abuse". Whilst not automatically incorporated into our law unless done so by an Act of Parliament, international instruments such as C this nonetheless provide significant guidelines and permissible prisms for examining local legislation against international standards.

Based on what had been disclosed to the magistrate, ordering marriage to the complainant amounted to sanctioning a violation of what the law clearly forbids. Furthermore, in sanctioning an impermissible marriage, the magistrate effectively cast aside the protective function of the law on sexual D intercourse with young persons.

While he indeed cited several case law to illustrate the factors that the courts take into account in assessing sentence in such matters, these do not appear to have weighed heavily in the ultimate decision. In *S v Nare* 1983 (2) ZLR 135 (H) Gubbay CJ stated that the offence is aggravated where, among other E factors, the accused is much older. At 30 years of age the accused was twice the complainant's age. The magistrate's allusion to a consensual relationship neglects the effects of such a vast age discrepancy on the complainant's ability to withstand the lecherous advances and persuasions of the accused. While the closeness to the age of consent of the complaint is also taken into account, having been born in June 1995, she was just fourteen and a half F when the crime took place. The age discrepancy and its attendant power dynamics should have been central in determining the unlikelihood of a truly consensual relationship. The two were at different levels in terms of emotional maturity. Her ability to stave off his persistent advances would undoubtedly have been weaker.

Indeed, in *S v Chuma* 1983 (2) ZLR 372 (H), it was emphasised that to accept G love as a mitigatory factor when the disparity in ages is great and the girl's age is known to the accused is "to break the ring of protection accorded complainants by the law". Frequency of intercourse was held by Korsah J in that case, not to be an indicator of genuineness of affection, but was more likely that of lasciviousness on the part of the man. H

Tsanga J

A Besides age as a weighty consideration, there is also the critical issue of the relationship between the accused and the complainant. Indeed, the magistrate pointed out in his reasons for sentence that the accused was *in loco parentis* to the complainant. As he put it:

"The complainant regarded him not as a brother but a father. "

B With this critical observation, how then did he purport to find marriage suitable under these circumstances, when a breach of a relationship of that nature should require a more stern approach in punishment? In our cultural context, where some married men believe the wife's unmarried sister is equally for the taking, ordering marriage gives a very unhealthy nod to predatory behaviour, and does little to foster attitudes of respect and dignity towards C females in what should be a safe family environment. Ordering marriage under such circumstances also does nothing towards sending a strong message of disapproval to such adult males who, behind a cloak of negative cultural practice, coerce a relative who is a minor into having sexual intercourse. The fact that the family reported the criminal conduct is indicative of the fact that they regarded him as having crossed the boundaries of what they D regarded as acceptable behaviour. He is already married to her sister and has five children. It could not have made for a healthy sibling relationship.

Finally, another critical consideration of relevance in such cases involving minors is whether pregnancy resulted. In this case, the complainant fell pregnant, a factor which added to the seriousness of his conduct. The accused's E coercive actions, stemming from the advantage he had over her, catapulted the complainant into adulthood by thrusting her into motherhood with all the attendant risks of doing so at a young age. Her education was interfered with. His actions further deprived her of the opportunity to develop her sexuality progressively on her own terms.

Given that surrounding circumstances are indeed of paramount importance in F arriving at any decision, if the magistrate was swayed in ordering marriage and setting aside part of the sentence, by the stark reality that the complainant had fallen pregnant, and had little capacity and no resources to fend for herself, there is no indication that her views were heard on this matter. His decision appears not to have been determined by any articulation on her part G of what would be in her best interests, but by averments which highlighted the complainant's father's interests, in that he had effectively pledged her, and the accused's own interests, in that he had an asthmatic wife and presumably needed a healthier one. His marriage offer might also have been influenced by his need to avoid a custodial sentence. There is nothing in the record that suggest that her views were ever factored into this unbalanced equation in H terms of whose interests were being served.

2013 (2) ZLR p274

Tsanga J

Giving a voice to the complainant in this matter remains vital. If a marriage A has taken place, it remains critical for the incumbent magistrate to ascertain that she is not in it because she was pledged or because the court wrongly ordered the accused to marry her. As she is by now a major, it is also necessary to ascertain, assuming a mutually consensual relationship, that the accused's marriage permits polygamy so that no law is being broken.

As regards the accused, while it would not be competent to order incarceration B in light of the sentence he had received, it is still necessary to send a strong disapproving message about this prevalent conduct where, as in this case, an adult family man uses his power to take advantage of his wife's minor sibling or where in general, adult men take undue sexual advantage of minors with their seeming consent. The magistrate is ordered to effectively look into the C issue of appropriate community service to substitute the incompetent order to marry. Given the sexual nature of the offence the accused was charged with, care should be exercised to ensure that any community service ordered does not expose vulnerable groups to risk such as would be the case by ordering him to work in a school environment for example.

Since the accused was found guilty of committing a sexual offence, in order D to ensure that the conditions of the suspended sentence take into the broad spectrum of sexual offences, the sentence is corrected to read as follows:

> "24 months' imprisonment, of which 16 months are suspended for five years on condition that the accused does not, within that period, commit any offence of a sexual nature in contravention of relevant provisions E of Criminal Law (Codification and Reform) Act [*Chapter 9:23*] and for which, upon conviction, the accused is sentenced to a term of imprisonment without the option of a fine. The remaining eight months are further suspended on condition that the accused performs appropriate community service at a place and for a duration to be determined by the magistrate." F

The matter is remitted to the magistrate for him to determine the appropriate community service consistent with the above amended sentence.

Bhunu J agrees. G

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Document 34 of 79

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2013/Volume 2/RUSHESHA NO & ANOR v DERA & ORS 2013 (2) ZLR 275 (H)

RUSHESHA NO & ANOR v DERA & ORS 2013 (2) ZLR 275 (H)

Citation	2013 (2) ZLR 275 (H)
Case No	Judgment No. HH-385-13
Court	High Court, Harare
Judge	Zhou J
Heard	6 August 2013; 7 August 2013; 9 August 2013; 15 August 2013; 16 August 2013; 17 August 2013; 4 December 2012, 24 January 2013; 1 February 2013,7 February 2013; *CAV*
Judgment	25 September 2013
Counsel	*T Mpofu*, for the plaintiffs *P Nyeperayi*, for the second defendant *N M Masunda*, for the fourth and fifth defendants No appearance for the first and third defendants
Case Type	Civil trial
Annotations	No case annotations to date

Flynote

Contract – *nature of – disguised transaction – property given as security for a debt – transaction disguised as a sale – approach of court thereto – court looks at substance and not form of transaction*

D **Contract** – *pactum commissorium – such contract illegal and unenforceable – any proceeding founded thereon a nullity*

Costs – *de bonis propriis – legal practitioner – misconceived application for recusal – application made respectfully and without scandalizing court – order of costs not warranted*

E **Court** – *judicial officer – recusal – grounds for – bias – judicial officer having, when acting as counsel in an earlier and unrelated case, made submissions indicating disapproval of party's manner of conducting business – not a ground for recusal*

Headnote

F "It would be perfectly impossible to conduct the administration of justice in the proper way if judges and magistrates were to be recused because at some time they had expressed unfavourable opinions as regards persons who subsequently come before them. that cannot be a ground of recusation and…..it is not one of the proper grounds on which a person should be recused" (*dicta per* Mason J in *R v Heilbron* 1922 TPD 99 G at 100 followed.)

Counsel for the fourth defendant in a trial applied for the judge to recuse himself. The grounds given for the request were that, before he was appointed as a judge, he was counsel in an action

against the fourth defendant and in that capacity had, during argument, expressed a H "severe opinion" on the manner in which the defendant conducted its

business. Accordingly, the fourth defendant was wary that the judge A might still hold such an opinion about it. The content of the opinion was not disclosed, other than that the opinion was expressed in an urgent chamber application.

Counsel for the plaintiff argued that the court should order the fourth defendant's counsel to pay the costs of the application *de bonis propriis*, B on the ground that the application scandalised the court.

Held, that where a judicial officer is disqualified from hearing a case, a party to that case is entitled to apply for the recusal of the judicial officer concerned. Such an application, known as an *exceptio recusationis,* must be founded upon reasonable cause – *justa causa recusationis* – which the applicant must prove. Trivial grounds cannot found a recusal. C

Held, further, that enmity or hostility towards a party or expression of opinions indicative of bias are grounds for seeking recusal. Here, recusal was sought on the basis of an alleged opinion expressed in a matter in which the fourth respondent was a party and the judge represented the other parties therein as an advocate. The so-called opinion could only have been a submission made in court based on the facts before it, as D counsel is expected to make submissions and not expressions of opinion. The relevance of that opinion to the instant matter was neither alleged nor disclosed. The opinion was not made in connection with the instant matter. Above all, it was not made by the judge in his capacity as a judge; but even if that were the case, the law is clear that it is no ground for E recusal that a judicial officer expressed an opinion at a previous stage in another case. It would be impossible to conduct the administration of justice in the proper way if judges and magistrates were to be recused because at some prior time they had expressed unfavourable opinions as regards persons who subsequently come before them. Sometimes lay persons do entertain the mere possibility of bias on the part of a judicial F officer, but that is insufficient to ground an application for recusal in the absence of an extrajudicial expression of opinion in relation to the case or in the absence of the other recognised grounds.

Held, further, that the application was indubitably vexatious and in the ordinary course would have readily attracted a punitive order of costs. However, G an application for recusal necessarily places a legal practitioner who is making it in an unenviable position and should not be looked at as any other application. A *bona fide* application for recusal, presented in proper language, should not readily trigger an enquiry into the motives or propriety of the legal practitioner's conduct. A court should not exhibit unnecessary sensitivity in dealing with an application for recusal. H

A Although this application was misconceived, it was made respectfully without scandalising the court and the lawyer should not be penalised.

Held, further, that it is not uncommon for parties to enter into disguised transactions where property which is give as security is disguised as the subject of a sale. In such circumstances the approach of the court is settled. The court looks at the substance and not the form of the transaction.

B *Held*, further, that a *pactum commissorium* is "a pact by which the parties agree that if the debtor does not within a certain time, after the lapse of time fixed, the full property in the thing will necessarily pass to the creditor in payment of the debt" (*dicta per* Ward J in *van Rensburg v Weiblen* 1916 OPD 247 at 252 followed). The simple position at law C is that *a pactum commissorium* is illegal, unenforceable and a nullity. Every proceeding founded thereon is also a nullity.

Cases cited

Chimutanda Motor Spares (Pvt) Ltd v Musare and Anor 1994 (1) ZLR 310 (H)

D *Hofmeyer v Gous* (1893) 10 SC 115

Kufandirori v Chipuriro & Ors 2004 (1) ZLR 74 (H)

MacAdams v Fiander's Trustee & Anor 1919 AD 207

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

Mapenduka v Ashington 1919 AD 343

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

Nexbak Invstms (Pvt) Ltd & Anor v Global Electrical Mfrs (Pvt) Ltd & Anor 2009 (2) ZLR 270 (S)

Oceaner (Pvt) Ltd & Anor v Upperclass Enterprises (Pvt) Ltd 2001 (2) ZLR 130 (H)

President of the Republic of SA v SA Rugby Football Union 1999 (4) SA 147 (CC)

R v Heilbron 1922 T P D 99

S v Radebe 1973 (1) SA 796 (A)

R v T 1953 (2) SA 479 (A)

Sun Life Assurance Co of Canada v Kuranda 1924 AD 20

Upper Class Enterprises (Pvt) Ltd v Oceaner (Pvt) Ltd & Ors 2002 (2) ZLR 603 (S)

van Rensburg v Weiblen 1916 OPD 247

Vasco Dry Cleaners v Twycross 1979 (1) SA 603 (A)

Zandberg v van Zyl 1910 AD 302

Case information

T Mpofu, for the plaintiffs

P Nyeperayi, for the second defendant

Zhou J

N M Masunda, for the fourth and fifth defendants

No appearance for the first and third defendants

Judgment

Zhou J: This is an action instituted by the plaintiff claiming the following relief which is set out in the summons:

"1. An order declaring that:

(a) The purported sale between first and second defendants for the sale of 100% shareholding in second plaintiff on or about 12 February 2009 and all actions flowing therefrom, including but not limited to,

(i) the removal of directors and appointment of new directors; and

(ii) the sale and transfer of Stand 671 Mount Pleasant Township 20 of Lot 57 of Mount Pleasant, commonly known as 3 Justice McNally Close, Mount Pleasant, Harare to fifth defendant represented by fourth defendant, are null and void;

(b) The minor children Panashe Ralph Rushesha and Tivonge Sacha Rushesha remain the sole shareholders in second plaintiff; and

(c) The directors of second plaintiff as at 12 February 2009 remain directors unless lawfully removed or through resignation (*sic*).

2. An order that:

(a) fourth defendant, or failing it the Deputy Sheriff, takes all necessary steps to transfer Stand 671 Mount Pleasant Township 20 of Lot 57 of Mount Pleasant, commonly known as 3 Justice McNally Close, Mount Pleasant, Harare, back into the name of the secnd plaintiff;

(b) fourth defendant and all those claiming occupation through it vacate 3 Justice McNally Close, Mount Pleasant, Harare within fourteen days from the date of judgment; and

(c) second to fifth defendants jointly and severally, the one paying the others to be absolved:

(i) pay for an assessment and report within fourteen days of such report, by an independent property expert appointed by the High Court, of 3 Justice McNally Close, Mount Pleasant, Harare of any structural changes or damage other than fair wear and tear caused to 3 Justice

McNally Close, Mount Pleasant, Harare since 12 February 2009 and the costs of repairs or reconstruction; and G

(ii) pay second plaintiff the amount recommended within thirty days of such assessment.

3. An order barring sixth defendant from transferring the property referred to in 6 (*sic*) above to any third party until transfer to second plaintiff is concluded.

4. In any event, costs of suit on an attorney and client scale to be paid by first to fifth defendants, the one paying the others to be absolved." H

2013 (2) ZLR p279

Zhou J

A At the commencement of the trial, Ms *Masunda*, on behalf of the fourth and fifth defendants, moved an application for my recusal from presiding over the case. Having heard argument I dismissed the application with costs and gave brief reasons. I did indicate that my reasons would be contained in the judgment. These are they.

B The grounds of the application were contained in a letter dated 30 July 2012 addressed to "The Office of the Honourable Justice Zhou" and marked to the attention of "(the) Clerk to Justice Zhou". The full text of the letter is as follows:

"RE: WEBSTER TONGOONA RUSHESHA & ANOTHER v ALEXIOUS MASHINGAIDZE DERA & 5 OTHERS CASE NO. HC 6829/10.

1. We C refer to the above matter and confirm that we act for the fourth and fifth Defendants.
2. We have noticed that before his elevation to the bench, his Lordship acted against our clients the 5th Respondent, in the matter of Thirdline Trading Private Limited and Onclass Investments v Boka Investments Private Limited and Tobacco Industry Marketing Board case number HC7324/10. In that case, his Lordship in his capacity as the erstwhile legal representative of Third D Line Trading and Onclass Investments, expressed a severe opinion on the manner in which our client conducts its business during the course of his argument.
3. Our clients are weary (*sic*) that his Lordship may still hold such opinion about them and we request that his Lordship recuses himself in the matter E at hand and the matter be set (*sic*) for trial before another Judge.
4. Kindly place the matter before the Honourable Judge for consideration."

For the record, I do not have a recollection of the case referred to in the letter quoted above or the facts thereof.

Where a judge or any other judicial officer is disqualified from hearing a case, a party to that case is entitled to apply for the recusal of the judge or F judicial officer concerned. Such an application which in our law is known by the Latin term as an *exception recusationis* must be founded upon reasonable cause – *justa causa recusationis* – which the applicant must prove. Trivial grounds cannot found a recusation. See *President of the Republic of South Africa v South African Rugby Football Union* 1999 (4) SA 147 (CC) at G 172D-173C; *S v Radebe* 1973 (1) SA 796 (A) at 812F-G.

The grounds upon which the recusation of a judge may be sought include the following:

(a) interest in the cause, whether that interest is direct or indirect;

(b) close relationship or friendship to one of the parties;

(c) where H the case involves a colleague attached to the same bench;

2013 (2) ZLR p280

Zhou J

(d) enmity or hostility towards a party; A

(e) prior professional interest of the judge;

(f) expression of opinions indicative of bias.

See Erasmus *Superior Court Practice* pp A1-14B to A1-14C.

In the instant case, recusal was sought on the basis of an alleged opinion B expressed in a matter in which the fourth respondent was a party and I represented the other parties therein as an advocate then. The so-called opinion could only have been a submission made in court based on the facts before it, as counsel is expected to make submissions and not expressions of opinion. The content of the submission was not disclosed. Even after being challenged by counsel for the plaintiff to state

its content, Ms *Masunda* could C only say that the "opinion" was expressed in an urgent chamber application which was being argued before Uchena J. The relevance of that opinion to the instant matter was neither alleged nor disclosed. The opinion was not made in connection with the instant matter. Above all, it was not made by me as a judge; but even if that were the case, the law is clear that it is no ground for recusal that a judicial officer expressed an opinion at a previous D stage in another case. In *R v Heilbron* 1922 TPD 99 at 100 the court said:

> "It would be perfectly impossible to conduct the administration of justice in the proper way if judges and magistrates were to be recused because at some prior time they had expressed unfavourable opinions as regards persons who subsequently come before them; that cannot be a ground of recusation, and in my E belief it is not one of the proper grounds on which a person should be recused."

The law recognises that sometimes lay persons do entertain the mere possibility of bias on the part of a judicial officer. But that is insufficient to ground an application for recusation in the absence of an extrajudicial expression of opinion in relation to the case or in the absence of the other recognised grounds. See *R v T* 1953 (2) SA 479 (A) at 483C. I am therefore F satisfied that the application was without merit.

Mr *Mpofu* submitted that the court should order Ms *Masunda* to pay the costs of the application for recusation *de bonis propriis*, on the ground that the application scandalised the court. The application was indubitably vexatious and in the ordinary course would have readily attracted a punitive order G of costs. However, an application for recusation necessarily places a legal practitioner who is making it in an unenviable position and, in my view, should not be looked at as any other application. A *bona fide* application for recusation presented in proper language should not readily trigger an enquiry into the motives or propriety of the legal practitioner's conduct. Authorities show that a court should not exhibit unnecessary sensitivity in dealing with H

Zhou J

A an application for recusal: Erasmus *op cit* p A1-14C. In the instant case the application was misconceived as it was not based on any facts which were presented to the court other than a mere reference to an opinion. But it was made respectfully without scandalising the court. I am accordingly persuaded that the lawyer should not be penalised for making the application.

Turning to the merits of the claim, the background to the dispute may B be summarised as follows: The first plaintiff is a medical practitioner of Zimbabwean origin. He is presently resident in the United Kingdom together with his wife and children. He is married to the second witness, Aquilina Rudo Rushesha. They had two sons together before they moved to the United Kingdom, namely, Panashe Ralph Rushesha (hereinafter referred C to as "Panashe") and Tivonge Sacha Rushesha (hereinafter referred to as "Tivonge"). The first defendant, Alexious Mashingaidze Dera, is his brotherin- law, being a brother to his wife. When the trial commenced Panashe Ralph Rushesha had attained majority age, and was by consent substituted as the third plaintiff.

The first plaintiff's evidence was that before he went to the United Kingdom D he acquired an immovable property known as Stand 671 Mount Pleasant Township 20 of Lot 57 of Mount Pleasant, also known as 3 Justice McNally Close, Mount Pleasant, Harare (hereinafter referred to as "the property"). He asked the first defendant, who is an accountant by profession, to help him form a company in which the shareholders would be the two children E mentioned above. The second plaintiff is the company which was then established for the benefit of the children. The reason for incorporating the company, according to the first plaintiff, was to have the immovable property registered in the name of the company. The directors of the company were to be Acquilina Rudo Rushesha and the first defendant. The property was duly registered in the name of the second plaintiff and was its only asset. He F stated that the name of the second plaintiff derives from the middle names of his two children. "Ra" is from the name "Ralph", "Sa" is from the name "Sacha", while the "R" comes from their surname, Rushesha. At the time that the property was acquired Panashe was ten years old while Tivonge was about a year old. The witness paid the purchase price for the property using his own resources.

G When the first plaintiff and his family moved to the United Kingdom in 2003 they leased the property to the South African Embassy. The first defendant was their contact person on some matters relating to the property but the rentals were paid directly into his account. Thus the first defendant did not receive any rentals in respect of the property; neither did he spend any H money on the property.

Zhou J

In or about June 2010 the first plaintiff and his family discovered that the A first defendant had sold shares in the second plaintiff to the second defendant represented by the third defendant. That discovery was only made when the first plaintiff's wife came to Zimbabwe from the United Kingdom. They discovered that the shares had been sold for a sum of US$36 350. Subsequent to the sale of the shares in the second plaintiff the immovable property was B then sold to the fourth defendant represented by the fifth defendant. The first plaintiff spoke to the fifth defendant by telephone. The fifth defendant advised him that he had purchased the property from the first defendant. In that conversation the fifth defendant admitted that he had known that the property belonged to the first plaintiff's wife. The first plaintiff stated that different amounts were given as to the price at which the immovable C property had been sold. Initially a sum of US$90 000 was mentioned. Later on a figure of US$125 000 was stated as having been paid for the immovable property. The first plaintiff denied that he authorised the sale of the shares in the second plaintiff or the sale of the immovable property. He, in fact, still holds the original deed of transfer for the property.

The first plaintiff described the improvements on the property. There is D a house with three bedrooms. All three bedrooms have bathrooms and toilets. It has three lounges, a kitchen and a garage on top of which is a tiled entertainment area. There are two rooms next to the garage which the witness stated that he intended to use as offices. The house is fully alarmed. There is a borehole on the property. The other amenities at the property include a E gazebo, a swimming pool, a 75 metre drive-way with lights, and car shades which can accommodate three motor vehicles.

The second witness for the plaintiff was Aquilina Rudo Rushesha, wife of the first plaintiff. She is the mother of the two children, Panashe and Tivonge. She was one of the directors of the second plaintiff company at the time that it was incorporated. She never resigned her directorship. She came to F Zimbabwe from the United Kingdom in June 2010. That was when she discovered that the immovable property had been alienated by her brother, the first defendant. She approached the police to help her access the property. She also approached Gerald Mlotshwa, a legal practitioner. A meeting was held which culminated in an affidavit being prepared and sworn to by the G first defendant.

The plaintiffs also called Fortune Tapiwa Chasi who is a relative of the first plaintiff's family. He testified that he knew both the third and fifth defendants at a personal level. The witness was notified of the sale of the property to the Boka company by the first plaintiff. He spoke to the fifth respondent about the matter. From his conversation with the fifth defendant the latter knew H

Zhou J

A that the first defendant had borrowed money from the second plaintiff and used the immovable property as security for the loan. The fifth defendant also stated to him that he was aware that the property did not belong to the first defendant but to the first plaintiff. He also communicated to the third defendant by telephone and e-mail about the transactions relating to the immovable property. The third defendant stated to him that matters related to B that were to be directed to his legal practitioners, and that his affairs should be separated from those of the second defendant.

The last witness called to testify for the plaintiffs was the first defendant, Alexious Mashingaidze Dera. He was at all material times a director of the second plaintiff. As stated above, he is a brother to Aquilina Rudo Rushesha C and a brother-in-law to the first plaintiff. Although he was cited as the first defendant he did not enter appearance to defend the matter. He only came as a witness at the instance of the plaintiffs after being subpoenaed to attend. His testimony was that in February 2009 he obtained a loan in the sum of US$36 350 from the third defendant in order to finance his business of purchasing sugar from Triangle for resale. As security for the loan the witness D then entered into an agreement for the sale of the shares in the first plaintiff to the second respondent, a company in which the third defendant has an interest. The agreement of sale was reduced to writing. His name is recorded as the seller and beneficial owner of "the 2 issued shares in the company", the second plaintiff. The memorandum acknowledges that the second plaintiff E is the registered owner of the immovable property in dispute. He stated that he repaid to the second and third defendants an amount of money between US$7 000 and US$10 000 in an attempt to liquidate the debt, but could not catch up with the increasing interest which was being charged on the amount

loaned. He stated that he had known the fifth respondent as a friend prior to meeting the third defendant. He was introduced to the third defendant F by the fifth defendant. He then approached the third respondent for a loan which he was duly given as stated above. When he was having problems in repaying the loan the third defendant approached the fifth defendant to inquire as to whether the witness had property which could be sold to raise money to repay the balance outstanding on the loan which had gone up to US$70 000. Interest was being charged on the outstanding amount every G month. In his evidence the fifth respondent then went and paid to the third respondent the amount outstanding. At the time that the fifth respondent paid off the amount it had gone up to about US$90 000. The witness stated that the fifth defendant wanted to be paid US$100 000 for having settled the debt owed to the second and third defendants. He deposed to an affidavit H prepared by Mr *Mlotshwa*, a legal practitioner who had been instructed by

the first plaintiff's wife, on 24 June 2010. The affidavit was produced as part A of the plaintiff's documents.

The second defendant led evidence through one Simon Charehwa who is its public officer. His evidence was that the second defendant, represented by Frank Buyanga, the third defendant, purchased shares in the second plaintiff from Alexious Mashingaidze Dera, the first defendant. The witness stated that B the person who dealt directly with the plaintiff was the third defendant. He, the witness, was responsible for compilation of the information in the files of the second defendant. He stated that Dera handed over to Frank Buyanga share certificates relating to the shares as well as resolutions authorising the sale. The share certificate, according to the witness, was taken to the United Kingdom. The rest of the documents were kept in the file at the local office. C The witness identified a document at p 7 of Exhibit 2 as the resolution which was given by Alexious Dera to the third defendant. At the time that the transactions were conducted he was a clerk. In cross-examination he readily admitted that he was not involved when the agreement between the first defendant and the second defendant acting through the third defendant D was concluded. He stated that the shares in the first plaintiff were purchased for US$36 350. He stated that the house in dispute which was the only asset of the first plaintiff was sold by the second defendant to the fourth defendant for a sum of US$110 000 in September 2009. He stated that he knew the first defendant prior to the transaction relating to the shares of the first plaintiff as he used to render accounting services to the third defendant E on a part-time basis.

The fifth defendant gave evidence on his behalf as well as on behalf of the fourth defendant. He is a director of the fourth defendant which is a family company. He stated that he purchased the immovable property in dispute on 15 September 2009. At the time of the agreement he was shown a Form F CR14 and a Form CR6 and a resolution by one James Nqindi. According to him James Nqindi and Frank Buyanga were the directors of the second plaintiff at the time that he purchased the property. He stated that he first knew the first defendant in 2007. He denied that they were friends, but that he was just someone he knew. The witness stated that he had known the third defendant since 2004. He stated that the property was vacant at the G time that he purchased it. He indicated to the court that the fourth defendant was prepared to relinquish the property if it was paid back the money it had paid for the property. He stated that he purchased the property from the second plaintiff. The fourth defendant took transfer of the property in 2010. He described the main structure on the property as a four-bedroomed house, with four bathrooms, a kitchen, lounge, dining room and an additional lounge H

A or office. There is an outbuilding for employees, as well as a swimming pool and a gazebo. At the time of the purchase there was, according to him, a derelict tennis court. He removed the tennis court with the intention of resurfacing it. The property, which is about an acre, is walled and gated. The main house is partly a double storey, with a room upstairs. The main bedroom has a dressing area. There is a borehole.

B The issues which were referred to trial are set out in the joint pre-trial conference minute as follows:

1. Whether or not a valid agreement of sale of shares allegedly belonging to the minor children (herein represented by the first plaintiff) was entered into between first and second and third defendants.
2. Whether C or not the changes relating to second plaintiff's directors and shareholders effected as a result of any such agreement is valid. If not, whether or not such directors and shareholders should revert back (*sic*) to the period before 12 February 2009.
3. Whether or not second plaintiff validly entered into an agreement for D the sale of the immovable property being Stand Number 671 Mount Pleasant Township 20 of Lot 57 of Mount Pleasant with fourth and fifth defendants. If not, whether the registration of title into fourth defendant (*sic*) must be set aside and the original deed reinstated.
4. Whether or not plaintiffs have any claim for damages against second to E fifth defendants arising out of the structural alterations to the immovable property. If they have a claim, what the quantum of damages recoverable is.
5. Whether or not if plaintiffs succeed, fourth defendant should remain in possession of the immovable property on the basis of a lien and until F any such claim as it may have (has) been realised.

The question of the validity of the sale of shares to the second defendant must be considered in the context of the nature of the agreement between the first defendant, Alexious Dera, on the one hand and, on the other hand, the second and third defendants. If a finding is made that there was no sale then the legal consequences of that finding will ensue. On the other hand, if G the conclusion is that there was a sale the court will then consider whether such sale can be impeached on the grounds submitted by the plaintiffs. The plaintiffs' case is that the agreement was one of a loan in terms of which money was advanced to first defendant by the second and third defendants. The shares were, according to the plaintiffs, surrendered to the second and H third defendants as security for the repayment of the loan.

Zhou J

In determining the above issues, the court must look at the evidence in its A totality or as a whole and not piecemeal. All the parties agree that the second plaintiff's sole asset was the immovable property at 3 Justice McNally Close, Mount Pleasant, Harare. They are also agreed that the immovable property is just over an acre in extent. The developments on the property were described in evidence by both parties albeit with minor variations. There is a main house B and an outbuilding as described above. There is a borehole. The property is walled and has a gate. At the time of the sale there was a tennis court the condition of which was contested by the fifth defendant. The defendants relied on an agreement of sale of shares signed on 12 February 2009 as proof that the second defendant purchased the entire shareholding in the second plaintiff from the first defendant. In terms of that agreement the entire shareholding C was sold for a sum of US$36 350. A document was also produced signed by the first defendant to acknowledge receipt of a sum of US$36 350 "being the purchase price for the entire shareholding in Rasar Enterprises (*sic*) (Pvt) Ltd". The first defendant's testimony was that the agreement of sale was a disguised loan transaction. The third defendant who was the person who was D involved in the transactions on behalf of the first defendant did not testify. That leaves the testimony of the first defendant unchallenged. No explanation was given regarding the last minute default of the third defendant. The witness who testified for the second defendant, Simon Charehwa, was not privy to the discussions leading to the agreement. He was only a clerk at the material time. In any event, the second and third defendants' version does E not accord with the probabilities in this case. A purchase price of US$36 350 for the entire shareholding in the second plaintiff does not stand scrutiny, it being common cause that the transaction would in essence be a purchase of the immovable property which was the only asset of the company. Matthew Boka stated that a vacant piece of land within the area of Mount Pleasant would cost between US$30 000 and US$50 000. Simon Charehwa stated F that the immovable property was "sold" to the fourth and fifth respondents for a sum of US$110 000 some seven months after the second defendant acquired it for US$36 350. There is no conceivable explanation as to how the value would have trebled within such a short time. The only reasonable explanation is that the payment was meant to cover the debt owed by the first G defendant to the second and third defendants which escalated rapidly because of interest charged. The time that the multi-currency regime was introduced in the country would not, in my view, explain payment of a sum of US$36 350 for that property. No evidence was tendered in support of

that assertion. The first defendant stated in his evidence that by the time the shares were appropriated by the second defendant he had paid about US$7 000 towards H

Zhou J

A reduction of the debt. That assertion was not contested. Simon Charehwa did not know about that payment.

I have considered, too, that the parties involved were not strangers to one another. Frank Buyanga was known to the first defendant after being introduced by the fifth defendant. Simon Charehwa stated that he used to see the first defendant "a lot" at the offices of the second defendant where B he used to render accounting services to the third defendant on a part-time basis. Matthew Boka was also known to the first defendant prior to that transaction. When he proceeded with the registration of the immovable property in the name of the fourth defendant in July 2010 he had already become aware that the transactions were being disputed.

C It is not uncommon for parties to enter into disguised transactions where, as happened in the instant case, property which is given as security is disguised as the subject of a sale. In *Hofmeyer v Gous* (1893) 10 SC 115 at 117 the court remarked as follows: "There is not a more common device than that by which a pledge is disguised as a sale". In such transactions the approach of the court is settled. The court looks at the substance and not the form of D a transaction. See *Zandberg v van Zyl* 1910 AD 302 at 309; *MacAdams v Fiandies' Trustees* 1919 AD 207. The rationale for that approach is easy to fathom. Court proceedings are not a game of chess. They are a serious inquiry into and determination of the rights of the participants in the proceedings. On the facts of this case I have no difficulty in concluding that the agreement E between the first defendant and the second and third defendants was not a sale of shares. Instead, the shares were given to secure a loan given to the first defendant by the second and third defendants. The taking of ownership of the shares by the second defendant makes the transaction a *pactum commissorium*. See *Vasco Dry Cleaners v Twycross* 1979 (1) SA 603 (A). In *Chimutanda Motor Spares (Pvt) Ltd v Musare & Anor* 1994 (1) ZLR 310 (H) F at 314B-C this court, citing with approval a passage from *van Rensberg v Weiblen* 1916 OPD 247 at 252, embraced the following definition:

> "A *pactum commissorium* is defined as 'a pact by which the parties agree that if the debtor does not within a certain time release the thing given in pledge by paying the entire debt, after the lapse of the time fixed, the full property in the thing will irrevocably pass to the creditor in payment of the debt.'"

G See also *Kufandirori v Chipuriro & Ors* 2004 (1) ZLR 74 (H) at 75G-76A; *Upper Class Enterprises (Pvt) Ltd v Oceaner (Pvt) Ltd & Ors* 2002 (2) ZLR 603 (S) at 605A-B.

The simple position of the law is that a pactum commissorium is illegal and unenforceable: *Upper Class Enterprises (Pvt) Ltd v Oceaner (Pvt) Ltd & Ors (supra)* H at 605B-C; *Kufandirori v Chipuriro & Ors (supra)* at 76F-G; Chimutanda

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Zhou J

Motor Spares (Pvt) Ltd v Musare & Anor (supra) at 315B; *Sun Life Assurance* A *Co of Canada v Kuranda* 1924 AD 20 at 24. The jurisprudential principles which underpin the unenforceability of a *pactum commissorium* and the circumstances in which exceptions may be accepted have been the subject of academic and judicial discourse. See *Mapenduka v Ashington* 1919 AD 343 at 351; *Chimutanda Motor Spares (supra)* at 314C-F; B *Oceaner (Pvt) Ltd & Anor v Upperclass Enterprises (Pvt) Ltd* 2001 (2) ZLR 130 (H) at 132B-E; *Silberberg & Schoemann The Law of Property* 3 ed by Kleyn & Boraine; *Wille's Principles of South African Law* 8 ed pp 345-9. They need no further discussion *in casu*.

In the light of the settled position of the law, the sale and transfer of shares in the second plaintiff by the first defendant to the second defendant was C therefore illegal and, consequently, null and void *ab initio*. The illegality necessarily invalidates the Form No. CR 14 in terms of which Frank Buyanga, the third defendant, and one James Nqindi were appointed as directors of the second plaintiff.

The fate of the sale and transfer of the immovable property to the fourth D respondent in terms of a memorandum of agreement of sale dated 15 September 2009 is decidedly sealed in the words of

Lord Denn ing MR in the celebrated case of *MacFoy v United Africa Co Ltd* [1961] 3 All ER 1169 at 1172:

> "If an act is void, then it is in law a nullity. It is not only bad, but incurably bad … And every proceeding which is founded upon it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse." E

Accepting the above exposition of the law, the Supreme Court in *Muchakata v Netherburn Mine* 1996 (1) ZLR 153 (S) held that an act which is void *ab initio* is "void at all times and for all purposes. It does not matter when and by whom the issue of its (in) validity is raised; nothing can depend on it". In short, the sale of the immovable property to the fourth respondent is a F legal nullity.

The effect of my conclusion is to dispose of issues 1, 2 and 3 as set out in the joint pre-trial conference minute in favour of the plaintiffs and against the defendants.

As regards issue number 4, no evidence was placed before the court of the G full extent of the damage to the property arising out of structural alterations to the property or the quantum of the loss occasioned by such damage. Apart from the mention by the first plaintiff that the tennis court had been dug out, nothing more was said. In the premises, the second to fifth defendants are absolved from the instance on that claim. I do not believe, too, that this court should order assessment of damage caused by any structural alterations to H

Zhou J

A the property and/or payment of the amount assessed by such assessor as claimed in the plaintiffs' summons. What would happen if his assessment is contested by any of the other parties? The onus was on the plaintiffs to prove any loss occasioned by such alterations. They failed to discharge that onus. It cannot be left to a third party to determine the loss.

B The last issue to be determined is whether the fourth defendant has a lien over the immovable property pending compensation. A lien is a right of retention – *ius retentionis* – which a party has over the property of another person in respect of which he or she or it has incurred expenditure on. See *Nexbak Investments (Pvt) Ltd & Anor v Global Electrical Manufacturers (Pvt) Ltd & Anor* 2009 (2) ZLR 270 (S) at 273F-274C. Such *ius retentionis* C is pleaded in para 13 of the plea filed on behalf of the fourth and fifth defendants. However, no evidence was led of any improvements which were effected on the property by the fourth respondent. Indeed, neither the fourth nor fifth defendants indicated an intention to make any claim based on improvements during the course of the trial. There was also no mention D of a claim to retain possession of the property in order to secure payment of compensation by the fifth defendant when he gave his evidence. Even in the closing submissions the fourth defendant did not make any reference to the lien. In the circumstances, there is nothing to sustain *ius retentionis* over the property by the fourth defendant.

E The plaintiffs asked for costs on an attorney-client scale against all the defendants. I do not believe that there are any special grounds justifying a punitive order of costs against all the defendants. I am persuaded, though, that such a special award of costs is warranted against the first defendant. This whole dispute arose from his desire to make money using property which he knew did not belong to him. His conduct clearly, on his own admission, F amounts to fraud. He was not the holder of the shares in the second plaintiff. He went on to forge the signature of his sister who was one of the directors of the second plaintiff in order to sell the shares. In any event, by not opposing the claim he must be taken to have admitted liability to pay the plaintiffs' costs on the higher scale. G In the circumstances, judgment is given in favour of the plaintiffs against the defendants.

It is accordingly ordered as follows:

1. The purported sale and transfer of shares in Rasar Investments (Pvt) Ltd by the first defendant to the second defendant is hereby declared to be H illegal and null and void *ab initio*.

Zhou J

2. The Form No. CR 14 presented for filing with the Registrar of Companies A by Mutamangira & Associates on 11 February 2009 in terms of which the third defendant and James Nqindi were appointed as directors of the second plaintiff is hereby declared to be null and void *ab initio*

and the directors of the second defendant prior to the filing of that Form are hereby declared to be in office.

3. The sale and transfer to the fourth defendant of the immovable property B known as Stand 671 Mount Pleasant Township 20 of Lot 57 of Mount Pleasant, otherwise known as 3 Justice McNally Close, Mount Pleasant, Harare, is hereby declared to be null and void, and is set aside.
4. The Deed of Transfer in terms of which Stand 671 Mount Pleasant Township 20 of Lot 57 of Mount Pleasant is registered in the name of C the second plaintiff is hereby declared to be valid.
5. The Sheriff is hereby directed to sign all documents necessary to reinstate ownership of the immovable property described in para 4 hereof to the second plaintiff.
6. The fourth and fifth defendants and all persons claiming occupation D through them be and are hereby ordered to vacate Stand 671 Mount Pleasant Township 20 of Lot 57 of Mount Pleasant, otherwise known as 3 Justice McNally Close, Mount Pleasant, Harare, within fourteen days from the date of service of this order, failing which the Sheriff be and is hereby directed to take all steps necessary to eject them from the E property.
7. The first, second, third, fourth and fifth respondent shall pay the costs of suit jointly and severally the one paying the others to be absolved, provided that the first defendant's liability is to pay the costs of suit on an attorney-client scale.

Dube Manikai & Hwacha, plaintiffs' legal practitioners F

Costa & Madzonga, second defendant's legal practitioners

Scanlen & Holderness, fourth and fifth defendants' legal practitioners G

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Document 35 of 79

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2013/Volume 2/MUNYIMI v TAURO 2013 (2) ZLR 291 (S)

MUNYIMI v TAURO 2013 (2) ZLR 291 (S)

Citation	2013 (2) ZLR 291 (S)
Case No	Judgment No. S-41-13
Court	Supreme Court, Harare
Judge	Chidyausiku, CJ, Garwe JA & Omerjee AJA
Heard	3 September 2012; *CAV*
Judgment	26 September 2013
Counsel	*T Mpofu*, for the appellant Respondent in person
Case Type	Details not supplied
Annotations	No case annotations to date

Flynote

C **Practice and procedure** – *rescission – judgment granted in error – nature of error justifying setting aside of judgment – evidence – when court confined to error appearing on record – when other evidence may be considered*

Headnote

It is a general principle of our law that once a final order is made, correctly D reflecting the true intention of the court, that order cannot be altered by that court. Rule 449 of the High Court Rules 1971 is an exception to that principle and allows a court to revisit a decision it has previously made but only in a restricted sense. Where a court is empowered to revisit its previous decision, it is not, generally speaking, confined to the record of the proceedings in deciding whether a judgment was erroneously E granted. The specific reference in r 449 to a judgment or order granted "in the absence of any party affected thereby" envisages a situation where such a party may be able to place facts before the latter court, which facts would not have been before the court that granted the order in the first place. Once a court holds that a judgment or order was erroneously F granted in the absence of a party affected, it may correct, rescind or vary such judgment or order without further inquiry. There is no requirement that an applicant seeking relief under r 449 must show "good cause".

A distinction should be drawn between a case where a court *mero motu* decides to rescind or vary an order and one where such an order is sought on the basis of an application. In the former case, or where an G oral application is made from the bar, the error should appear on the record. In the latter, where a written application is made by a party whose rights are affected by an order granted in its absence, the court would have before it not only the record of the proceedings but also facts set out in the affidavits filed of record. Such facts cannot simply be ignored H and it is not irregular to adopt such a procedure in seeking rescission.

In fact, it might be necessary to do so in cases where no error could be A picked up ex facie the record itself.

As to what constitutes an "error", such an error would exist where the judge was unaware of facts which, if he had been aware of them, would have made it highly unlikely that he would have found it permissible or competent to make an order against a party. Examples include (a) a default B judgment being granted against an applicant who had filed an appearance to defend in court but which appearance had not been brought to the attention of the judge; and (b) a false return of service being filed by the Deputy Sheriff indicating that service had been effected personally, when in fact no such service had been effected. C

Cases referred to

Banda v Pitluk 1993 (2) ZLR 60 (H)

Grantully (Pvt) Ltd & Anor v UDC Ltd 2000 (1) ZLR 361 (S)

Mutebwa v Mutebwa & Anor 2001 (2) SA 193 (Tk)

Legislation considered D

High Court Rules 1971 (RGN 1047 of 1971), r 449(1)(a)

Case information

T Mpofu, for the appellant

Respondent in person

Judgment

Garwe JA: The appellant in this case applied before the High Court for an E order declaring one January Tauro, Elizabeth Tauro (the current respondent) and Fransisco Tauro to be in contempt of court and as a consequence that they be committed to prison until such time as they would have purged their contempt. The court *a quo* was of the view that the default judgment that formed the basis of the order for the ejectment of the respondents had been F made in error. Consequently the court determined that this was a proper case for the setting aside of the default judgment and the

order of ejectment issued consequent thereto. It is against that order that the appellant has now appealed to this court.

In October 1999, the appellant entered into an agreement of sale for the G purchase of Stand Number 2198 Chinamano/Maseko, Epworth for a specified sum of money. The agreement of sale read:

> "I, Francisco Tauro 63-649379 E63 have sold my stand 2198 B Epworth Maseko to Austin Munyimi (68-012753 E68) for $17 000."

The agreement was signed by both Fransico Tauro and the appellant. January Tauro and two other persons signed as witnesses to the sale transcation. H

Garwe JA

A On 8 November 2004, the appellant issued summons against January Tauro and the Epworth Local Board seeking an order compelling January Tauro to cede his rights and interest in the stand in question and for the Local Board to approve the cession. January Tauro did not defend the action. As a result, the appellant applied for a default judgment which was then granted on 13 July 2005. This is the default judgment that forms the subject of this B appeal. In November 2006, the stand was ceded to the appellant. Following the grant of the default judgment the appellant applied for the eviction of January Tauro and all those claiming rights through him. On 30 October 2008, January Tauro and other persons residing on the stand in question were evicted and vacant possession given to the appellant. However, almost immediately thereafter, the current respondent and others made their way C back into the house, as a result of which the appellant filed an application for an order declaring the respondents to be in contempt of court and for them to be sent to prison until they purged their contempt.

At the hearing of the application the court *a quo* noticed what appeared to be anomalies between the pleadings and the agreement of sale that formed D the basis of the action. In particular the court was concerned that although the seller was reflected in the agreement as Fransisco Tauro and that January Tauro had only signed as a witness, the declaration reflected the seller as January Tauro and no reference had been made at all to Franscisco Tauro who is reflected as the seller of the property in the agreement of sale. Consequently the court reached the conclusion that the default judgment granted by Omerjee E J had been granted in error and for that reason set aside both that judgment and the order of eviction in terms of r 449 of the High Court Rules. The appellant has attacked the determination on the basis that:

> "1. The learned judge *a quo* erred in making a finding that the judgment issued by the Honourable Justice Omarjee in Case No. HC 11920/04 was granted F in error and liable to be set aside, and on this basis consequently setting aside the order granted by the Honourable Justice Guvava in Case No. HC 2995/07 in that:
>
> 1.1 in both the summons and declaration and application for default judgment in case No. HC 11920/04 the full facts of the matter upon which the relief sought was founded were disclosed; and
>
> 1.2 the G Honourable Justice Omerjee granted the judgment in case No. HC. 11920/04 with the full knowledge of such facts.
>
> 2. Further and in the alternative, the court *a quo* erred in that the matter was not properly dealt with in terms of rule 449 of the rules of the High Court in that:
>
> 2.1 No application had been made by the respondent in terms of the H provisions of the rule; and

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Garwe JA

> 2.2 In any event it was inappropriate for the court *a quo* to act in terms A of rule 449 simply because it came to a different conclusion on the papers from the same court in Case No. HC 11920/04."

In his prayer the appellant seeks an order setting aside the order of the court *a quo* and substituting it with an order that the respondent be held to have been in contempt of court and that she be committed to prison.

It is apparent from the record that at the time Omerjee J granted the default B judgment the agreement of sale in question was attached to the request papers. Indeed in his heads of argument the appellant accepts that the agreement of sale was part of the papers placed before the judge.

That the agreement was attached to the papers placed before the judge is pertinent for reasons that follow shortly. C

In his submissions before the court the appellant has argued that no error was made at the time the default judgment was granted. The court *a quo* did not make a finding that before the default judgment was granted Omerjee J had been made aware of the interests of Franscisco Tauro but had nevertheless proceeded regardless of her interests in the matter. He further argued that the purpose of r 449 is not to introduce a vehicle through which new issues D and new parties are included in existing proceedings before a court. Rule 449 of the High Court Rules provides in relevant part:

> **"449. Correction, variation and rescission of judgments and orders**
>
> (1) The court or a judge may, in addition to any other power it or he may have, *mero motu* or upon the application of any party affected, correct, rescind, or E vary any judgment or order –
>
> (a) that was erroneously sought or erroneously granted in the absence of any party affected thereby …"

It is a general principle of our law that once a final order is made, correctly reflecting the true intention of the court, that order cannot be altered by that F court. Rule 449 is an exception to that principle and allows a court to revisit a decision it has previously made but only in a restricted sense. Where a court is empowered to revisit its previous decision, it is not, generally speaking, confined to the record of the proceedings in deciding whether a judgment was erroneously granted. The specific reference in r 449 to a judgment or order granted "in the absence of any party affected thereby" envisages a situation G where such a party may be able to place facts before the latter court, which facts would not have been before the court that granted the order in the first place – see *Grantully (Pvt) Ltd & Anor v UDC Ltd* 2000 (1) ZLR 361 (S) at 364H – 365 A-B. Further, it is also established that once a court holds that a judgment or order was erroneously granted in the absence of a party affected, it may correct, rescind or vary such without further inquiry. There H

Garwe JA

A is no requirement that an applicant seeking relief under r 449 must show "good cause": *Grantully (Pvt) Ltd & Anor v UDC Ltd supra* at 365, *Banda v Pitluk* 1993 (2) ZLR 60 (H) at 64F-H; *Mutebwa v Mutebwa & Anor* 2001 (2) SA 193 (Tk) at 199I-J and 200A-B.

The position may now be accepted as correct that a distinction should be B drawn between a case where a court *mero motu* decides to rescind or vary an order and one where such an order is sought on the basis of an application. In this connection I would agree with the remarks of Jafta J in *Mutebwa v Mutebwa & Anor supra* at 201A-H that:

> "… the error should appear on the record but only in cases where the court acts *mero motu* or on the basis of an oral application made from the bar for rescission C or variation of the order. For obvious reasons, in such cases the court would have before it the record of the proceedings only. The same interpretation cannot, in my respectful view, apply to cases where the court is called upon to act on the basis of a written application by a party whose rights are affected by an order granted in its absence. In the latter instance the court would have before it not only the record of the proceedings but also facts set out in the affidavits filed of record. Such facts cannot simply be ignored and it is not irregular to adopt D such a procedure in seeking rescission. In fact, it might be necessary to do so in cases such as the present, where no error could be picked up *ex facie* the record itself. In my view, the failure to show that the error appears on the record of the proceedings before Kruger AJ cannot constitute a bar to the applicant being successful under r 42(1)(a). It is not a requirement of the rule that the error appear on the record before rescission can be granted. Therefore, I do not, with respect, E agree with Erasmus J's conclusion that the rule requires the applicant to prove the existence of an error appearing on the record and that the court considering rescission is, like an appeal court, confined to the record of the proceedings.
>
> The rule reads as follows:
>
> > "42(1) The court may, in addition to any other powers it may have, *mero motu* or upon the application of any party affected, rescind or vary –
> >
> > (a) an F order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby…"
>
> There is nothing in the language used in the rule which indicates that the error must appear on the record of the proceedings before the power conferred could be exercised. The contention that the rule is confined to cases where the error appears on the record cannot, in my opinion, be correct. Such an interpretation G places an unwarranted limitation on the scope of the rule. Decided cases show that relief may be granted under this rule if: (i) the court which made the order lacked competence to do so; (ii) at the time the order

was made the court was unaware of facts which, if then known to it, would have precluded the granting of the order; or (iii) there was an irregularity in the proceedings. See *Promedia Drukkers & Uitgewers (Edms) Bpk v Kaimowitz and Others* 1996 (4) SA 411 H (C) at 417G-I and the authorities referred to therein."

2013 (2) ZLR p296

Garwe JA

In summary, therefore, the position would seem to be settled that where A a court or judge acts *mero motu* and decides to correct, rescind or vary any judgment or order, such court or judge is confined to the record of the proceedings and such error should appear *ex facie* such record. The court or judge cannot take into account other facts or circumstances that do not arise from the record itself or facts which become known later but which B would not have been placed before the court whose order is sought to be varied or rescinded.

What amounts to an error has also been the subject of a number of decisions. In *Banda v Pitluk (supra*) a default judgment granted against an applicant who had filed an appearance to defend but which appearance had not been brought to the attention of the judge entering the default judgment was held C to be an error on the part of the court. In *Mutebwa v Mutebwa (supra*), a false return of service was filed by the Deputy Sheriff indicating that service had been effected personally when in fact no such service had been effected resulting in an order being made. The court had no difficulty in coming to the conclusion that the order had been erroneously granted in the sense that had D the judge been aware that the summons had not been served on the applicant he would not have granted it. In *Banda v Pitluk (supra*), the possible failure on the part of the judge before whom the application for default judgment was placed "in failing to observe the notice of appearance to defend contained in the court rule" was held to constitute an error.

In the present matter, the papers placed before Omerjee J clearly pointed to E a discrepancy. The cause of action in the declaration was the agreement of sale between the appellant and one January Tauro. The agreement attached in support of that claim was an agreement signed between the appellant and Franscisco Tauro with January Tauro signing as a witness. Nowhere in the declaration is an attempt made to explain how this discrepancy had come F about or why Franscisco Tauro who had signed as a seller had not been cited or why January Tauro who had been cited as the seller in the paper had signed as a witness. Had Omerjee J been aware of these obvious discrepancies in the papers before him, he would not, in all probability, have granted a default judgment against January Tauro when the sale of agreement clearly indicated the seller to have been Fransisco Tauro. Had Omerjee J been aware G of these facts it is highly unlikely that he would have found it permissible or competent to make an order against a party that had signed the agreement simply as a witness. Indeed the court *a quo* correctly captured the difficulty when it remarked at p 4 of the judgment:

> "Turning to the first issue, it is my view that the cause of action in the main matter was a purported agreement between the applicant and the first respondent. H

2013 (2) ZLR p297

Garwe JA

> A This agreement was supported by a written agreement between the applicant and the third respondent. The agreement furnished does not disclose that the first respondent had any rights and interest in the property. Nowhere in the pleadings, either in the main action or in the application for default judgment did the applicant allude to any other legal basis why it contended that the first respondent had any interest or right in the property. The first respondent's interest that appears on the sale agreement between the applicant and the third B respondent is that of a person merely witnessing the conclusion of the agreement. I am of the view that reliance on the agreement between the applicant and the third respondent in support of a purported agreement between the applicant and the first respondent, in fact amounts to deceit not only by the applicant but also by his legal practitioners."

I agree with these remarks. The court *a quo* was correct in coming to the C conclusion that the default judgment had been granted in error and that it had to be set aside. In any event r 449 involves the exercise of a discretion. It has not been shown that the exercise of such discretion was in any way irrational. The appeal must therefore fail.

The appeal is accordingly dismissed with costs.

D CHIDYAUSIKU CJ and OMERJEE AJA concurred

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

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Document 36 of 79

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2013/Volume 2/DELTA BEVERAGES v RUTSITO 2013 (2) ZLR 298 (S)

DELTA BEVERAGES v RUTSITO 2013 (2) ZLR 298 (S)

Citation	2013 (2) ZLR 298 (S)
Case No	Judgment No. S-42-13
Court	Supreme Court, Harare
Judge	Ziyambi JA, Garwe JA & Omerjee AJA
Heard	24 September 2012; *CAV*
Judgment	26 September 2013
Counsel	*T Mpofu*, for the appellant *B Pesanai*, for the respondent
Case Type	Civil appeal
Annotations	Link to case annotations

Flynote

Delict – *actio legis Aquilia – negligence – harm giving rise to claim for damages – limits to forms of harm giving rise to damages – mental distress – need for plaintiff to have suffered recognised psychiatric complaint requiring treatment – duty of care – when duty of care exists – need to show that harm was reasonably foreseeable and that a reasonable* D *person would have guarded against such harm – claim – need to allege negligence and set out particulars*

Headnote

The respondent (plaintiff in the court *a quo*) issued summons claiming payment of damages and costs of suit. The basis of his claim was that he had E consumed a contaminated Coca-Cola and that further inspection of the bottle had revealed "a rusting iron nail and blackish foreign substances." In his declaration, he alleged that the appellant, as the manufacturer of the beverage in question, owed him and the general public a duty of care to ensure that the product was safe, clean and fit for human consumption and that the appellant had breached that duty by producing F the contaminated drink. In the alternative, he alleged that the appellant had "negligently allowed the production and selling of contaminated Coke" which he consumed. In the result he sought damages in the sum mentioned for what he termed "distress and anxiety."

It was not shown whether the particular bottle was produced by the appellant G or by another associated bottling company. The respondent agreed during cross examination in the court *a quo* that no psychiatric condition resulted. The medical report produced before the court showed that there were no pathogens in the sample that was analysed. No harm requiring medical treatment was proved. Indeed no medical evidence was called to confirm whether he had suffered any nervous shock as suggested. The H

A respondent in evidence admitted that the only outcome of the event was that he had become more cautious about drinking bottled beverages. An application for absolution having failed, the appellant appealed.

Held, that a claim for damages in respect of pain and suffering strictly constitutes more than a head in a general Aquilian action; it is in origin a separate remedy. It aims at compensating the victim for all pain, suffering, B shock and discomfort suffered by him as a result of the wrongful act. It includes both physical and mental pain and suffering and both past and future pain and suffering. Moreover, account must be taken, not only of the pain and suffering suffered as a direct consequence of the inflicting of the injuries, but also of pain and suffering associated with surgical C operations and other curative treatment reasonably undergone by the plaintiff in respect of such injuries.

Held, further, that damage is the detrimental impact upon any patrimonial or personality interest deemed worthy of protection by the law. The concept of damage is not unlimited in scope. It does not include every form of harm whatsoever and indeed some forms of harm are excluded. Only D harm in respect of legally recognised patrimonial and non-patrimonial interests of a person qualifies as damage. This may be the reason why losses and harm such as inconvenience, disappointment, fear or frustration are not compensable in terms of the Aquilian action. Mere mental distress, injured feelings, inconvenience or annoyance cannot support an award of Aquilian damages. Damages cannot be claimed for transient nervous E distress which does not lead on to a recognised psychiatric complaint requiring treatment.

Held, further, that with regard to whether negligence had been shown, the expression "duty of care" is used in two separate and distinct senses. The first is in connection with negligence: a person is said to have breached F the duty of care (i.e. to have been negligent) when he fails to foresee and guard against harm which the reasonable person would have foreseen and guarded against. The second is in connection with wrongfulness: although the reasonable man would have foreseen and guarded against harm, the defendant is not liable as the law does not recognise any duty of care to avoid causing that sort of harm (i.e. the conduct was G not wrongful or, to put it another way, there was no recognised legal duty to avoid causing harm by negligent conduct). In other words, in determining whether or not a person was negligent, there is need to determine whether harm was reasonably foreseeable and, if so, whether the reasonable person would have guarded against such harm. As no H particulars of the negligence alleged were set out or proved, there was

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no basis upon which the appellant could have been placed on its defence. A In an Aquilian action in which a plaintiff claims damages, whether for patrimonial or non-patrimonial loss, it is incumbent upon him to plead negligence on the part of the defendant and to set out the particulars of such negligence. Where such particulars are not set out, the defendant is embarrassed in his defence, as he cannot know the basis on which B liability is claimed. It is not enough to allege negligence and fail to give particulars of such negligence. A defendant is entitled to know the outline of the case that a plaintiff will try to make against him.

Held, further, that the liability of a beverage manufacturer or brewery is not absolute. If the steps it took to avoid contamination were reasonable, in the sense that nothing more could reasonably have been done, then it C would not be liable, because it would not have been negligent. It was for the respondent to prove that the manufacturing processes of the appellant were deficient in particular respects. Only then could the appellant have been placed on its defence. No such evidence was led.

Held, further, that absolution should accordingly have been granted. D

Cases referred to

Border Timbers Ltd v ZRA 2009 (1) ZLR 131 (H)

Delta Ops (Pvt) Ltd v Naraura S-106-99

Honikman v Alexandra Palace Hotels (Pty) Ltd 1962 (2) SA 404 (C) E

Case information

T Mpofu, for the appellant

B Pesanai, for the respondent

Judgment

Garwe JA: This is an appeal against the judgment of the High Court sitting at Harare dismissing with costs an application for absolution from the instance. F

Background

The respondent, who was plaintiff in the court *a quo*, issued summons claiming payment of damages in the sum of US$20 051 and costs of suit. The basis of his claim was that he had consumed a contaminated Coca-Cola beverage and that further inspection of the bottle had revealed "a rusting iron nail and G blackish foreign substances." In his declaration he alleged that the appellant as the manufacturer of the beverage in question owed him and the general public "a duty of care to ensure that the product is safe, clean, health (*sic*) and fit for human consumption" and that the appellant had breached that duty by producing the contaminated Coke. In the alternative, the respondent alleged that the appellant had "negligently allowed the production and selling H

Garwe JA

A of contaminated Coke" which he consumed. In the result he sought damages in the sum mentioned for what he termed "distress and anxiety." In its plea before the court *a quo*, the appellant denied that any harmful foreign particle of any nature was found in the unopened bottle of Coke and, in the event that it was, that it was inserted by the appellant before, during, or after the manufacturing process. The appellant further pleaded B that its manufacturing process was in line with international standards of quality and that in any event the cleaning, manufacturing and bottling process made it impossible to produce a beverage that contained a nail. In short the appellant denied producing contaminated Coca-Cola or any negligence in the production of the beverage.

C **The evidence**

During cross-examination in the court *a quo* the respondent appeared to accept that he had not suffered any nervous shock. The following exchange captures the evidence that came out during cross examination on this aspect:

"Q. Did you suffer any nervous shock as a result of consuming the contents? D A. Yes at that time. To my surprise it came to my attention, I thought what if I had consumed the nail, wondered what could have been the outcome.

Q. Let us not waste time on that; that does not constitute nervous shock does it? A. Yes I was actually shocked in that manner.

Q. The question is does that constitute nervous shock? A. No, I was actually shocked. Surprised and shocked at the same time in seeing the iron nail E in the bottle.

Q. You agree with me that no psychiatric condition developed as a result of the incident in you? A. No, nothing of that sort.

Q. As recorded in exhibit that we have placed before the court you similarly confirm that you did not develop any medical conditions? A. No, I did not develop any medical condition.

Q. If F in fact your personality was not in any way altered by the event that you described? A. My personality as after consuming the iron nail, there was a slight change when I was about to *(sic)* another bottle during since Coke was my favourite drink, I would observe more and look forward in seeing whether there is any substance inside or not.

Q. You are simply saying you became more careful, you are not saying there G was a change in personality. Is that not so? A. When you say personality what do you exactly mean? Can you define personality in change?

Q. Ok, I will not define what personality is but you accept that there has not been any change in you as a result of the incident that you described?

BERE J. He has become more cautious? A. That is what I would say."

H Questioned further, he had the following to say:

Garwe JA

"Q. Your claim is that you suffered anxiety and distress as a result of the incident. A Is that so? A. Yes it is.

Q. And, you allerge *(sic)* you also had fear for the worst? A. Yes I did have fear for the worst.

Q. And, this is all that this claim is about, anxiety and distress? A. Yes and also the manner in which my case was handled which I thought could have been B handled in a better manner."

Q. You say you could have been affected if you consumed the iron nail but you did not consume it and you were not affected? A. I repeat, my human body would have been affected if I had consumed the iron nail."

On the question whether the appellant's processes involved in the production of beverages fell below the standard expected of a reasonable beverage C manufacturer, the following exchange took place:

"Q. The basis of your claim is that defendant was negligent in manufacturing the product that you are talking about and you indicated in your evidence in chief that you were offered the opportunity to tour its facilities and you confirm now that you did not take that offer. Yes or no? A. No, I did not take that offer. As I had explained before for the banking of the site in D which I was managing and at that time actually had not done the banking, so, I was in a hurry in doing so.

Q. Did you subsequently take up your offer in order to be satisfied that defendant's process *(sic)* are below the standards expectant *(sic)* of a reasonable manufacturer? A. No, I did not take up the offer because it indicated to me during that meeting that they just wanted me to visit the plant in showing E me that I placed the iron nail myself.

Q. Do you agree with me that there is nothing that you can put before the court concerning the payment process? A. Sorry I did not get the last word?

Q. You agree with me that there is nothing that you can put before the court concerning defendant's process on the basis upon which the court can find F that defendant did not take necessary precautions or does not take necessary precautions in manufacturing its products? A. No, there is no evidence. You said is there evidence that I have?

Q. Yes that was the question and your answer is that there is no such evidence. Now, had there been any deficiencies, any defects in the defendant's processes. You agree with me that if you told the blunt you probably would G have seen those? A. No, I would not know of any defectives because I do not know how the machinery is operated but what I do know in any manufacturing process there is always room for human error."

On the question as to which manufacturer of Coca-Cola beverages in the country was responsible for the production of the beverage in question, the following exchange took place: H

Garwe JA

"Q. Are A you aware that there are two entities that manufacture, packaged and distribute the product that we are talking about? A. No, I do not know anything about the processes.

Q. If I told you about Mutare Bottlers, will that instill your memory? A. Yes I am aware.

Q. The relevant bottle that we are talking about who had manufactured, B packaged and distributed it? A. No, I would not know but what I do know is the deliveries that we do place and orders come from the Delta depot along Seke road."

During further cross examination the respondent stated as follows:-

"ADV MPOFU. Q. But you accept that the delivery is notwithstanding. It is important to establish the origins of the bottle because you do not know the C interparty arrangements between the manufacturers? A. I did not take in mind that the bottle came from different stock holds that is why I did not bother to identify where the bottle had come from."

At the close of the respondent's case (plaintiff in the court *a quo*) the appellant applied for absolution from the instance. Whilst acknowledging that the appellant was disputing that the drink in question had emanated from its D plant, the court *a quo* reached the conclusion that the evidence tended to show that all was not well in the appellants' manufacturing processes. The court further reasoned that, although issue had been taken with the propriety of a claim for distress and anxiety, this was a legal issue to be dealt with at the end of the trial. Accordingly the court *a quo* reached the conclusion that the E appellant should be placed on its defence to rebut the plaintiff's allegations. It is against that order that the appellant has now appealed to this court.

Grounds of appeal

In its grounds of appeal the appellant has attacked the decision of the court on the following grounds:

1. The F court *a quo* erred in placing the appellant on its defence against a claim for stress and anxiety which claim is not cognisable at law and despite there not having been any evidence to support the claim made.
2. The court *a quo* also erred in postulating (without invitation) that a claim for stress and anxiety might fall under the head of pain and suffering notwithstanding that such was never the plaintiff's position and the G plaintiff had specifically abandoned a claim for stress and anxiety in favour of a claim for nervous shock.
3. The court *a quo* further erred in coming to the conclusion that the appellant could be put on its defence notwithstanding that no negligence had been alleged against it as required by law and superior court authority H brought to the court's attention. It so erred in seeking to place reliance

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Garwe JA

upon evidence of alleged negligence that had nothing to do with the A claim placed before it.

4. The court a quo erred in placing the appellant on its defence notwithstanding that the plaintiff had not claimed that he had suffered any harm cognisable under the Aquilian action.
5. The court a quo erred in coming to the conclusion that the appellant B should be put on its defence to defend the $51 claim for medical expenses notwithstanding that it was accepted by the plaintiff that he had been offered medical assistance and freely decided not to take it despite not taking issue with either its nature or quality.

From my reading of the above grounds of appeal and the oral submissions C made before this court, it seems to me that there are in fact two main issues that arise for consideration. These are, firstly, whether the respondent's claim before the court *a quo* disclosed a proper cause of action and, in particular, whether he was entitled to damages for anxiety and distress or, as submitted by his counsel during submissions made before the court *a quo*, nervous shock. The second is whether negligence had been alleged and proved. D

The claim for distress and anxiety

The respondent's claim in the court *a quo* was for damages for distress and anxiety. Although during argument the respondent's counsel submitted that the claim for general damages is based on the fact that the respondent suffered nervous shock, the respondent's claim was never amended to reflect such E a claim. His claim on the pleadings remained one for distress and anxiety. It is the appellant's submission that no cause of action can be founded on a claim for distress and anxiety in our law and that even if it were to be accepted for a moment that the respondent's claim was one for nervous shock, such a condition was transient and did not result in a condition requiring treatment. F There would appear to be substance in this submission. It is not every form of harm which constitutes damage. The position is settled that:

> "A claim for damages in respect of pain and suffering strictly constitutes more than a head in a general Aquilian action; it is in origin a separate remedy. It aims G at compensating the victim for all pain, suffering, shock and discomfort suffered by him as a result of the wrongful act. It includes both physical and mental pain and suffering and both past and future pain and suffering. Moreover account must be taken not only of the pain and suffering suffered as a direct consequence of the infliction of the injuries but also of pain and suffering associated with surgical operations and other curative treatment reasonably undergone by the plaintiff in respect of such injuries . . ." H

Garwe JA

A See the *Quantum of Damages in Bodily and Fatal Injury Cases* 3 ed by Corbett, Buchanan and Gauntlett at pp 51-2.

Damage is the detrimental impact upon any patrimonial or personality interest deemed worthy of protection by the law. The concept of damage is not unlimited in scope. It does not include every form of harm whatsoever B and indeed some forms of harm are excluded. In this context, Neethling, Potgieter & Visser *The Law of Delict* 6 ed p 212 state:

> "The concept of damage does, of course, include more than harm for which compensation is recoverable, since satisfaction may be awarded for some forms of damage. As indicated by the definition above, only harm in respect of legally recognised patrimonial and non-patrimonial interests of a person qualifies as C damage. This may be the reason why losses and harm such as inconvenience, disappointment, fear or frustration are not compensable in terms of the Aquilian action, or why a husband may not claim for the loss of the comfort and society of his wife who has been killed, or why the frustration of an expectation of inheriting something does not constitute damage. One may, of course, also argue that the losses referred to are damage but that the law refuses compensation D for policy reasons. Reinecke's argument that the frustration of income from an unlawful activity does not amount to damage in the legal sense appears to be correct, although it has been subjected to criticism"

In Neethling Potgieter & Visser *The Law of Delict* 2 ed, the authors cite with approval remarks by Boberg *The Law of Delict* that:

> E "Mere mental distress, injured feelings, inconvenience or annoyance cannot support an award of Aquilian damages" (at p 224).

Professor G Feltoe A Guide to the Zimbabwean Law of Delict also states:

> "Whereas damages can be claimed for pain and suffering, damages cannot be claimed for transient nervous distress which does not lead on to a recognised psychiatric complaint requiring treatment."

F The position may therefore be accepted as settled that it is not every complaint that warrants an award of damages. The complaint must lead to a recognised medical condition which would require treatment before such damage can be cognizable in terms of the law.

In the present matter, the respondent agreed during cross examination in G the court *a quo* that no psychiatric condition resulted. The medical report produced before the court showed that there were no pathogens in the sample that was analysed. No harm requiring medical treatment was proved. Indeed no medical evidence was called to confirm whether he had suffered any nervous shock as suggested. It was his legal practitioner, Mr *Musimbe*, who H sought to lead such evidence from the bar when he stated:

Garwe JA

> ". . . it is my respectful submission that in terms of the evidence led by the plaintiff A his character changed every time he will get a Coke bottle, he examines it and, my Lord, he was shocked to see an iron nail in his Coke bottle. . .."

In his heads of argument before this court, Mr *Musimbe* further states:

> "It is further submitted that the respondent suffered a medical and psychiatric harm. After suffering from the shock of finding a nail in a Coke bottle, respondent B had to go to a doctor to be examined and the doctor then prescribed antibiotics and milk of magnesia. Further the psychiatric harm is revealed by his change of character where now every time he gets a Coke bottle he examines it and this always gives him shocking memories and can be equated to post traumatic disorder, a direct result of finding a nail in the Coke bottle. It is respectfully submitted that respondent suffered harm which is recognised under the Aquilian action."

The fact of the matter is that this submission does not disclose what, if any, C medical condition developed and the treatment that became necessary. In the absence of medical evidence, no real reliance can be placed on these remarks by the legal practitioner who clearly is not qualified to express an expert opinion on this matter. Indeed, Mr *Musimbe* conceded before this court that medical evidence should have been adduced to confirm whether the respondent had developed a medical condition following his consumption D of the beverage.

In the result therefore, I am satisfied that the respondent did not prove any damage such as would have founded a cause of action under our law of delict. Clearly, whatever distress or anxiety or nervous shock he may have experienced was transitory and no psychiatric or other medical condition E requiring treatment eventuated.

In the circumstances, the appellant had no case to answer. That should have been the end of the matter and absolution from the instance ought to have been granted.

Whether negligence proved F

There can be no doubt that the respondent's claim in the court *a quo* was based on the Aquilian action. The respondent specifically pleaded that the appellant owed the general public a duty of care

to ensure that its products are safe, clean, healthy and fit for human consumption. In the alternative, the respondent alleged that the appellant negligently allowed the production G and sale of a contaminated Coca-Cola beverage.

The expression "duty of care" is used in two separate and distinct senses. The first sense in which it is used is in connection with negligence. A person is said to have breached the duty of care (i.e. to have been negligent) when he fails to foresee and guard against harm which the reasonable person would have foreseen and guarded against. The second connotation of this phrase is in H

Garwe JA

A connection with wrongfulness. When it is used to denote wrongfulness, it will be used in this sort of way; although the reasonable man would have foreseen and guarded against harm, the defendant is not liable in the circumstances as the law does not recognise any duty of care to avoid causing that sort of harm (i.e. the conduct was not wrongful or to put it another way, there was no recognised legal duty to avoid causing harm by negligent conduct). See B G Feltoe *A Guide to The Zimbabwean Law of Delict* 3 ed (2001) at p 9.

In other words, in determining whether or not a person was negligent, there is need to determine whether harm was reasonably foreseeable and if so whether the reasonable person would have guarded against such harm. As stated by G Feltoe *op cit* at p 37:

> C ". . . there are some situations where, despite the fact that harm was reasonable, the reasonable person might not necessarily have taken any steps at all to prevent that particular harm or he might only have taken certain limited precautions. Therefore in addition to reasonable foreseeability, the question of what steps if any, the reasonable person would have taken has to be investigated . . ."

Attention is also drawn to similar remarks by Boberg *op cit* p 194.

D In his heads of argument, Mr *Mpofu*, for the appellant, argued that as no particulars of the negligence alleged were set out or proved, there was no basis upon which the appellant could have been placed on its defence. I am inclined to agree with this submission.

In an Aquilian action in which a plaintiff claims damages whether for E patrimonial or non-patrimonial loss, it is, I believe, incumbent upon such plaintiff to plead negligence on the part of the defendant and to set out the particulars of such negligence. Where such particulars are not set out, the defendant is embarrassed in his defence as he cannot know the basis on which liability is claimed. It is not enough to allege negligence and fail to give F particulars of such negligence. It is now well established that a defendant is entitled to know the outline of the case that a plaintiff will try to make against him: *Border Timbers Ltd v Zimbabwe Revenue Authority* 2009 (1) ZLR 131 (H) at 139D-E; *Honikman v Alexandra Palace Hotels (Pty) Ltd* 1962 (2) SA 404 (C) at 407A-B.

On the facts of this case, no particulars of negligence were alleged or proved. G Such failure assumes an important dimension when regard is had to the fact that the appellant is a beverage manufacturer. It is now settled that the liability of a beverage manufacturer or brewery is not absolute. If the steps it took to avoid contamination were reasonable, in the sense that nothing more could reasonably have been done, then it would not be liable because it would not H have been negligent: *Delta Operations (Pvt) Ltd v Naraura* S-106-99 at p 5.

Garwe JA

I would agree that at the end of the plaintiff's case before the court *a quo*, A there was no evidence before the court on the state or condition of the bottling equipment used by the appellant. There was no evidence that there was anything amiss with either the equipment or the procedures adopted during the manufacturing process. There was no evidence that the appellant had failed to take necessary precautions in the manufacturing process. In B a situation such as this, failure could have been not because of negligence but human error. There was therefore no evidence which could be tested against the objective standards of a reasonable beverage manufacturer. Evidence could indeed have been led from a neutral institution such as the Standards Association of Zimbabwe. It was for the respondent to prove that the manufacturing processes of the appellant were deficient in particular C respects. Only then could the appellant have been placed on its defence. Moreover it was common cause that there are two separate companies involved in the manufacturing of Coca Cola

beverages. Whether the beverage forming the subject of this case was manufactured by the appellant or by Mutare Bottlers was never determined. D

Disposition

I am satisfied that for the additional reason that negligence was not proved and a causal link shown between the beverage in question and the appellant, absolution should have been granted.

The appeal must therefore succeed. E

In the circumstances the following order is made:

(1) The appeal succeeds with costs.

(2) The order of the court *a quo* is set aside and in its place the following substituted:

"The application for absolution from the instance be and is hereby F granted with costs."

ZIYAMBI JA and OMERJEE AJA concurred.

Dube Manukai & Hwacha, appellant's legal practitioners G

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

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Document 37 of 79

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ECONET WIRELESS (PVT) LTD v TRUSTCO MOBILE (PTY) LTD & ANOR 2013 (2) ZLR 309 (S)
2013 (2) ZLR p309

Citation	2013 (2) ZLR 309 (S)
Case No	Judgment No. S-43-13
Court	Supreme Court
Judge	Malaba DCJ, Ziyambi JA & Garwe JA
Heard	26 June 2012; *CAV*
Judgment	26 September 2013
Counsel	*A P de Bourbon, SC,* for the appellant *T Mpofu,* for the respondents
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Appeal – *notice of – requirements for notice to be valid – need to state grounds of appeal concisely – unnecessarily prolix grounds not valid and may be struck out – need for notice to challenge order made – notice may* D *challenge reasons for order so as to attack order itself*

Contract – *cancellation – breach of contract by one party – party giving notice of intention to suspend obligations towards other party – anticipatory breach of contract – right of other party to accept repudiation*

Practice and procedure – *interdict – interim interdict – interdict having* E *effect of final interdict – such interdict not permissible*

Headnote

Rule 32 of the Rules of the Supreme Court, 1964 requires that a notice of appeal shall state the grounds of appeal concisely. "Concise" means brief, but comprehensive in expression. A notice of appeal must comply with the mandatory provisions of the Rules; if it does not, it is a nullity F and cannot be condoned or amended. A notice of appeal which is unnecessarily prolix is no t concise. Grounds of appeal which offend against the requirement to be concise will be struck out.

An appeal must be directed at the order made and not the reasons therefor, although there may well be instances, such as where a cross-appeal is G noted, where it might be necessary to attack the reasoning itself rather than the order. It is also permissible to challenge the reasoning of the court *a quo* in order to challenge the order.

In determining whether a party has repudiated a contract the test to be applied is whether the party has acted in such a way as to lead a reasonable person to the conclusion that he did not intend to fulfil his part of the contract. H It is also correct that repudiation is a species of anticipatory breach.

Repudiation may manifest itself in a variety of ways. If it takes place A before performance is due, it is sometimes described as an anticipatory breach and may take the form of a statement that the party concerned is not going to carry out the contract, or an unequivocal tender to perform less than is due, or an unwarranted but unequivocal refusal by a buyer to pay the full purchase price, irrespective of his true intention and the B amount of any reduction that may be claimed, or the taking of some action inconsistent with the intention to perform, or by his own conduct putting it out of his power to perform.

A clear intimation by one party that it was going to suspend all its obligations towards the other party, contrary to the procedure set out in the contract to be followed in the event of an alleged breach, would be an anticipatory C breach of contract. The other party would then have a choice: it could refuse or resist such repudiation and insist on specific performance, arguing, *inter alia,* that the notice of termination was not *ex nunc* and therefore invalid. Alternatively, it could accept the repudiation, such acceptance having the effect of terminating the agreement between the D parties.

Generally, a court should not grant interim relief which is similar to, or has the same effect as, the final relief prayed for. Interim relief should be confined to interim measures necessary to protect any rights that stand to be confirmed or discharged, as the case may be, on the return date. The practice of seeking interim relief, which is exactly the same as the E substantive relief sued for and which has the same effect, defeats the whole object of interim protection. In effect, a litigant who seeks relief in this manner obtains final relief without proving his case, because interim relief is normally granted on the mere showing of a *prima facie* case. Whilst no hard and fast rule can be laid down, there may well be cases where a court would be justified in holding, in such a situation, that the F application is not urgent and that it should be dealt with as an ordinary court application. There may also be cases where the court itself, as it is empowered to do, may amend the relief sought in order to make it clear that what is granted is interim protection, whilst the final order sought would be the subject of argument on the return date. G

Cases cited

Altem Enterprises (Pvt) Ltd v John Sisk & Son (Pvt) Ltd 2013 (1) ZLR 125 (S)

Chidyausiku v Nyakabomba 1987 (2) ZLR 119 (S)

Chinyerere v Fraser NO 1994 (2) ZLR 234 (H) H

Garwe JA

A *Jackson v Unity Insurance Co Ltd* 1999 (1) ZLR 381 (S)

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

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

Master of the High Court v Turner S-77-93

River Ranch Ltd v Delta S-38-10

Legislation considered B

High Court Rules 1971 (RGN 1047 of 1971), rr 244 & 246

Supreme Court Rules 1964 (RGN 380 of 1964), r 32

Case information

A P de Bourbon, SC, for the appellant

C *T Mpofu,* for the respondents

Judgment

Garwe JA: On 25 July 2011 the High Court at Harare granted an order

in the following terms:

> "FINAL RELIEF SOUGHT
>
> D That you show cause to this Honourable Court why a final order should not be made in the following terms:
>
> 1. Pending the determination of the dispute between the parties by the process of arbitration in terms of the provisions of the Arbitration Act, the first respondent shall not take any steps neither shall it act in any such manner as is inconsistent with the rights of the applicant arising from the agreement E between the parties (as amended), and shall not act in such a way unless entitled to so act in terms of any arbitral award that may be handed down.
> 2. The costs of this application shall be costs in the envisaged arbitration proceedings.
>
> INTERIM RELIEF GRANTED
>
> F That pending determination of this matter on the return date, applicants are granted the following relief:
>
> 1. The first respondent is directed to restore to the applicant the internet based reporting links and all access to Trustco mobile hardware and software, thus enabling it to monitor and process airtime purchase transactions and otherwise perform its obligations in terms of the agreement; and
> 2. The G first respondent be directed to refrain from undertaking and implementing a competing, infringing service to that provided by the applicant in terms of the agreement".

Dissatisfied with the order, the appellant filed a notice of appeal with this court. In essence, the appellant seeks an order setting aside the decision of the H court *a quo* and substituting it with one dismissing the application with costs.

Garwe JA

Background A

The appellant is a mobile network operator carrying out its operations in Zimbabwe. On 17 August 2010 the appellant concluded an agreement with the first respondent, a Namibian-based company and subsidiary of Trustco Holdings, whose core business is micro-insurance, financial services and the provision of various wireless application services through mobile telephony. B In terms of the agreement, the first respondent was to provide certain software and support services to facilitate the provision of free life cover to Zimbabwean cellular phone users and customers of the appellant against the purchase of cellular airtime from the appellant. In terms of the agreement life cover was to be underwritten by First Mutual Life Assurance Company of Zimbabwe ("First Mutual") at no cost to the appellant's customers but C against payment of a fee by the appellant to the first respondent calculated in terms of the agreement. First Mutual was to underwrite life cover against payment of a premium which was to be subtracted from the amounts due to the first respondent by the appellant. The project came to be known in Zimbabwe as "Ecolife". D

The project was to be facilitated by a transaction facilitation system, which allowed communication between users seeking insurance, their mobile service provider and the insurance underwriter. The system would record all the transactions that took place. A subscriber would only be entitled to life cover if he or she purchased airtime in excess of three dollars over a E period of a month. For life cover to be retained, further airtime of more than three dollars had to be purchased. All subscribers who spent more than three dollars would then be accepted for insurance by First Mutual.

The project was presented on the basis that it would result in a substantial increase in the appellant's airtime sales. It was a term of the agreement that it was to endure for an initial period of 18 months and that the appellant F was to refrain from performing any act contesting or impairing any part of the rights and infringing, copying, duplicating or passing off any of the first respondent's rights. It was also a term of the agreement that, in the event of a breach not remedied within fourteen days of notice of such breach, the innocent party was entitled to cancel the agreement without prejudice to any G other rights it may have had.

In February 2011 a dispute arose in regard to the first respondent's entitlement to certain royalties. Whilst the appellant agreed to pay a portion of the royalty fee, it however maintained that no fees would be paid in respect of customers whose details were not completely captured. On 26 May 2011the appellant wrote to the first respondent expressing, *inter alia*, its concerns H

Garwe JA

A over what it regarded as violations of the agreement by the first respondent. What happened thereafter is what gave rise to the proceedings the subject of this appeal.

On 31 May 2011 the first respondent sent a letter to the appellant, the contents of which triggered the dispute that is the subject of this matter. That letter B reads, in relevant part:

> "The current situation is unbearable. Econet, as a registered insurance broker, is holding out to 1.85 million subscribers that they in fact have life insurance while the true state of affairs is that the insurer is not obliged to pay any claim while its premiums are outstanding. Trustco cannot be associated with such a state of affairs.
>
> C *Therefore be advised that all obligations of Trustco will be suspended 3 June 2011 at 12h00 Namibian time if all overdue payments are not received by then.*
>
> …
>
> Kindly be further advised that if all overdue amounts, of which you have been advised, are not received within 14 days from date hereof Trustco will deem the contract cancelled in terms of Clause 17.1 of the agreement."(emphasis added).

D The appellant responded the following day, 1 June 2011, in the following terms:

> "We acknowledge receipt of your letter dated 31st May 2011 regarding the above. *Your intention to terminate the agreement has been noted and accepted.*
>
> Econet maintains that it has discharged all its obligations under our agreements with you. We repeat our averment that royalties are only payable in respect of subscribers who buy airtime of a value exceeding $3 per month. Those subscribers E who buy airtime amounting to $3, but do not buy any additional airtime are not entitled to cover. Consequently, no royalties are payable in respect of such subscribers …" (emphasis added).

In a letter dated 3 June 2011, the day it had threatened to suspend all obligations if all overdue payments were not received, the first respondent F wrote in the last paragraph thereof:

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

The appellant, in a letter dated 5 June 2011, responded:

> G "We refer to your letter of 3 June 2011 and advise that we stand by our letter of 1 June 2011 in terms of which we accepted your notice of termination of our agreement. Therefore, we consider the agreement terminated. We shall proceed to make arrangements to ensure that our subscribers are not prejudiced by the termination of the agreement that was initiated by you."

The appellant further advised that, in view of the decision it had taken on H the matter, it had commenced the steps necessary to discontinue the use of

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Garwe JA

the Trustco Mobile Concept and would not use the system with effect from A 14 June 2011.

On 5 June 2011 the appellant severed links with the first respondent's system. By letter dated 8 June 2011, the first respondent's lawyers, Rudolph Bernstein & Associates, wrote to the appellant advising that the letter of 31 May 2011 indicating an intention to cancel the agreement was never intended B to constitute an invitation to the appellant for the consensual termination of the agreement and that, by purporting to accept such termination, the appellant's conduct constituted an attempt to repudiate the agreement. The letter further made it clear that the first respondent would not accept such repudiation and that it had no intention of cancelling the agreement pending the resolution of the dispute between the parties. The letter further gave the C appellant until 9 June 2011 to restore all links, failing which urgent injunctive relief would be sought.

As a result of this impasse the first respondent, on 24 June 2011, filed an urgent chamber application in the High Court in which it sought relief in the terms already indicated. After hearing argument, the court *a quo* made D the following findings:

(a) that a reasonable explanation had been tendered for the delay in the filing of the application and that the matter was urgent;

(b) that the relief sought in the interim was restoration of the status *quo ante* and on the return day a show cause why the first respondent's E rights should not be preserved pending determination of the dispute by arbitration. In other words the relief sought on the return day was dissimilar to the interim relief sought;

(c) that the requirements for an interdict had been met and, in particular, the balance of convenience favoured the respondents; F

(d) that the notice to terminate issued by the first respondent was in the future and not *ex nunc* and therefore invalid. In the circumstances, there was no cancellation which the appellant could note and accept and consequently the agreement remained valid.

Consequent to the above findings, the court *a quo* granted an order in terms G of the draft filed. That order is the subject of the present appeal.

It is perhaps pertinent to mention at this juncture that the first respondent thereafter successfully applied for an order allowing execution notwithstanding the noting of the appeal. From the submissions made by counsel, it is apparent that the parties have been engaged in arbitration proceedings pursuant to the order granted by the court *a quo*. H

Garwe JA

A The appellant has attacked the decision of the court *a quo* on several bases. Since a point *in limine* has been taken in respect of the propriety of the notice of appeal itself, it becomes necessary to quote the grounds of appeal *in toto.* The appellant's grounds of appeal are:

"1. The learned judge in the court *a quo* erred, in fact and at law, by finding that the matter was urgent and, in so finding, failed to pay due regard to the B background to the matter, the activities of the respondents prior to the filing of the application, the submissions made and numerous authorities cited by the appellant and the matters raised by the appellant in its opposing papers.

2. The learned judge in the court *a quo* erred, in fact and at law, in finding that the relief sought in the amended provisional order did not suffer from the same defect as the provisional order originally filed and erred in finding that C the interim and final reliefs prayed were not the same or not substantially similar.

3. The learned judge in the court *a quo* erred in failing to appreciate that by granting the interim relief as amended, the order granted has the effect of a final order.

4. The learned judge in the court *a quo* erred, in fact and at law, by failing to D appreciate, and disregarding, case authorities drawn to his attention that the process of arbitration to which the final relief prayed for refers relies (sic) on an arbitration clause in the agreement which does not oblige the parties to have any dispute determined by the process of arbitration and in so finding took away the appellant's discretion to adopt other dispute resolution methods that are permissible at law and under the agreement.

5. Having E regard to the hostility between the parties that is evident on the papers, the protests by the appellant's subscribers over abuse of the appellant's system through unsolicited messages sent by the respondents, the fixed term nature of the contract between the parties, and the declaration by the respondents herein that they did not wish to honour their side of the contract, the learned

judge in the court *a quo* erred in finding that respondents had established all F requirements for the grant of a temporary interdict and, in particular, erred in finding:

5.1 that the respondents' fear that the appellant had infringed its concept was well grounded, such finding having been erroneously arrived at in view of the appellant's averment that such infringement was not in fact possible because the appellant does not have access to the source code G of the respondents' system;

5.2 that the balance of convenience favoured the granting of the interdict; and

5.3 that no other adequate remedy was available to the respondents.

6. Having regard to the same factors referred to in paragraph 5 above, the learned judge in the court *a quo* erred in exercising his discretion to grant H specific performance of the agreement in all the circumstances.

2013 (2) ZLR p316

Garwe JA

7. Generally, the learned judge in the court *a quo* did not apply himself to the facts A of the matter before him, as a result of which he made the following findings of fact that are not supported by the facts of the matter before him, namely:

7.1 that the agreement between the parties required the first respondent to procure free life cover for the appellant's subscribers from First Mutual when the agreement contained no such requirement at all, and the facts before the judge showed that the first respondents would not have been B able to do so as it was the appellant that sought and obtained approval from the Commissioner of Insurance to obtain insurance cover for its subscribers and pay for such cover on behalf of its qualifying subscribers.

7.2 that the "business model for the provision of free life cover as against the purchase of airtime amounts to an intellectual property" when the agreement between the parties did not so provide. C

7.3 that 'copyright and international patent had been applied for' when the agreement stipulated falsely that the first respondent already was a holder of International patent over the 'Trustco Mobile Concept', and the undisputed facts on record showed that such patent had been sought and declined on the basis the Trustco Mobile Concept was not novel and was thus not patentable, facts that the first respondent kept hidden D from appellant.

7.4 that 'substantial revenue running into millions of US dollars was reaped from it (the system) to the benefit of the three parties to the agreement', thereby adopting the first respondent's bald and disputed assertions without question and in the absence of evidence to that effect.

8. More specifically, the learned judge in the court *a quo* based his judgment on E the letter dated 31 May 2011 written by the first respondent and found that the contents thereof was a mere expression of an intention to terminate the agreement after 14 days, which intention the first respondent was entitled to withdraw on the following selective quotation of the first respondent's letter of 31 May 2011:

> *'Therefore be advised that all obligation of Trustco will be suspended F on 3 June 2011 at 1200 hours Namibian time if all overdue amounts, of which you have been advised, are not received by then … Kindly be further advised that if all overdue amounts, of which you have been advised, are not received within 14 days from the date hereof Trustco will deem the contract cancelled in terms of clause 17.1 of the main agreement.'*

Had the learned judge *a quo* considered the full text of the relevant part of the G letter, which reads as follows:

> *'Therefore be advised that all obligations of Trustco will be suspended on 3 June 2011 at 1200 hours Namibian time if all overdue amounts, of which you have been advised, are not received by then.*
>
> *We expect yourselves to appraise the Postal & Telecommunications Regulatory of Zimbabwe (Potraz), the Insurance and Pension Commission* H

2013 (2) ZLR p317

Garwe JA

> A *as well as the Reserve Bank of the status quo of Eco Life with immediate effect. On Monday 6 June 2011 Trustco will advise the Zimbabwean Press and its shareholders via SENS of the status quo of Ecolife as required by the regulatory environment Trustco operates in.*
>
> *Kindly be further advised that if all overdue amounts, of which you have been advised, are not received within 14 days from the date hereof* B *Trustco will deem the contract cancelled in*

terms of clause 17.1 of the main agreement.',

he would have come to the inevitable conclusion:

a. that the letter was an unequivocal expression by the first respondent of an intention not to discharge its obligations under the agreement with effect from 3 June 2011 prior to the expiry of the 14 days, and

b. that C such conduct at law constitutes anticipatory breach of contract, or repudiation of contract, from which the first respondent was not entitled to approbate, particularly as such repudiation was accepted and acted upon by appellant in notifying the regulatory authorities and its subscribers of the situation before 3 June 2011, and proceeding to disconnect the first respondent's system from its network.

c. that D such repudiation had been accepted by the appellant in writing, or by the appellant's conduct in disconnecting the first respondent's system from its network. The learned judge in the court *a quo* thus erred, both in fact and In the application of the law.

9 The learned judge in the court *a quo* erred, in fact and at law, by rejecting the E submission that the facts of the matter before him related to repudiation of contract, or anticipatory breach, and was thus distinguishable from the case of *Waste Management Services (Pvt) Limited* that he relied upon in his judgment.

10. The learned judge in the court *a quo* erred, in fact and at law, in failing to attach weight to various threats by the first respondent to suspend its obligation under the contract and by creating the impression that the Trustco Mobile F Concept worked flawlessly for nine months when the facts on the record showed repeated failures that were well documented and were not disputed.

11. In any event, the learned judge in the court *a quo* erred in granting relief to the second respondent in the absence of a finding that second respondent has a substantial interest in the matter particularly as the second respondent was not a party to the agreements between the parties in this matter."

G In their heads of arguments the respondents also took a number of points *in limine*. Most were not persisted in save for two. These are:

(1) whether the grounds of appeal are concise and if not whether the appeal is fatally defective for that reason.

(2) That the appeal is not directed at the order but the reasoning of the judge H in the court *a quo*.

2013 (2) ZLR p318

Garwe JA

I turn to deal with the above issues as well as the others that arise from the A papers.

Whether the notice of appeal is lacking in precision and therefore null and void.

Rule 32 of the Supreme Court Rules 1964 requires that the notice of appeal shall state the grounds of appeal concisely. The position is now well established B that a notice of appeal must comply with the mandatory provisions of the Rules and that if it does not, it is a nullity and cannot be condoned or amended. See *Jensen v Acavalos* 1993 (1) ZLR 216 (S).

I have, earlier in this judgment, cited verbatim the grounds of appeal filed by the appellant. Whilst one must accept, as I do, that some of the grounds C are sufficiently clear to enable the respondents to appreciate the basis upon which the order of the court *a quo* is sought to be impugned, there can be no doubt that grounds 7 and 8 in particular offend against the requirement that these must be clear and concise. I am inclined to agree with remarks by the respondents that:

> "There is nothing concise about these grounds of appeal … The grounds stretch D over five pages and contain in certain instances quotations from letters exchanged between the parties. …
>
> There is indeed a difference between the grounds of appeal and the heads filed for this appellant, the difference being that the heads are a lot more concise than the grounds of appeal."

Indeed Mr *de Bourbon* for the appellant, conceded that it was unnecessary to E quote in the grounds of appeal passages from the correspondence exchanged between the parties. I am satisfied that grounds 7 and 8 are not clear and concise. In this regard I can do no better than to quote the remarks of Korsah JA in *Master of the High Court v Turner* S-77-93 in which the learned judge of appeal stated at p 1 of the judgment:

"... the prolixity of each ground of appeal offended r 32 of the Rules of the F Supreme Court, which requires that 'the grounds of appeal shall be set forth concisely' in separate numbered paragraphs. For example, the first ground in the notice of appeal scans two foolscap pages and, as well as being unnumbered, is argumentative.

... It goes without saying that by concise is meant brief, but comprehensive G in expression ..."

Attention is also drawn to the decision in *River Ranch Ltd v Delta* S-38-10. Whilst ground 1 is somewhat vague, one can discern that what is attacked is the decision by the court *a quo* to decide to hear the matter on the basis of urgency. I would give the appellant the benefit of the doubt in so far as this ground of appeal is concerned. H

2013 (2) ZLR p319

Garwe JA

A In so far as ground 7 is concerned, as there has been no compliance with the Rules, it becomes inevitable that it be struck off from the notice of appeal. The first two paragraphs of ground 8 sound like heads of argument. That portion of ground 8 must also be struck off with the result that that ground will read:

"more specifically, the learned judge should have found:

(a) that B the letter was an unequivocal expression by the first respondent. . ."

Whether the appeal is directed at the reasons rather than the order

That an appeal must be directed at the order made and not the reasons thereof is now well established. The authority for this proposition, if any is required, is Herbstein & van Winsen *Civil Practice of the Supreme Court of South Africa* 4 ed at p 868-9 and *Chidyausiku v Nyakabambo* 1987 (2) C ZLR 119 (S) at 124C.

In the *Chidyausiku* case *supra* what was sought to be challenged was not the order but the reasoning that led to the order. There was no request that the order made consequent to that reasoning should be set aside. I am satisfied that the principle enunciated in that case is in general correct, although D recently I had occasion to suggest in *Altem Enterprises (Pvt) Ltd t/a Ruwa Furnishers v John Sisk & Son (Pvt) Ltd* 2013 (1) ZLR 125 (S) that there may well be instances, such as where a cross appeal is noted, where it might be necessary to attack the reasoning itself rather than the order.

The circumstances of the present case are, in my view, different. As Mr *de Bourbon* correctly pointed out, it is the order that is challenged, but in order E to do so the reasoning of the learned judge is challenged as the basis of the challenge to the order. At the end of the day the appellant would want to have the order set aside.

It seems to me that the principle that comes out in the *Chidyausiku* case *supra* is not always fully appreciated, even amongst lawyers. That case F is not authority for the proposition that in an appeal one should not attack the reasons for the order. What that case says is that an appeal should be directed at the order and not simply the reasons. Quite clearly, if the intention is not to have the order interfered with in any way, then no purpose would be achieved by attacking the reasons therefor. It goes without saying that in order to attack the order made, one must attack the reasoning process G leading to the order. In other words, in order to attack the order made, one must attack the findings made that justify the order made. I am satisfied in the present case that the appeal has sought to attack the order given but, in order to do so, has attacked the reasons therefor. There is nothing wrong with such an approach.

H The point *in limine* must therefore fail

2013 (2) ZLR p320

Garwe JA

The question of urgency A

It is common cause on the papers that the urgent application filed by the respondents was only filed on 22 June 2011, almost three weeks after the events giving rise to the dispute had occurred.

It is the appellant's contention that the delay in filing the application was inordinate and that the court *a quo* therefore erred in deciding to hear the B matter on the basis of urgency.

In deciding to hear the matter on the basis of urgency, the court *a quo* considered a number of factors. It considered the fact that the respondents, which are Namibia-based companies, had had to brief their lawyers on the highly technical aspects of the Trustco Mobile Concept, that the services of a C South African advocate experienced in intellectual property-related issues had to be sought, that there was need to obtain advice across three jurisdictions and, in particular, on the procedural and substantive issues applicable to the law in Zimbabwe, that thereafter trips had to be undertaken by the first respondent's managing director and a South African lawyer to Zimbabwe to consult with Zimbabwe-based lawyers. The court *a quo* was of the view D that the explanation given for the delay was not only reasonable but was also understandable. The court further found that the matter was urgent.

It is clear that in terms of rr 244 and 246 of the High Court Rules the decision whether to hear an application on the basis of urgency is that of the judge. The decision is one therefore that involves the exercise of a discretion. It E follows from this that this court has very limited grounds upon which it can interfere with the exercise of such a discretion. Various decisions of this court have stressed the point that, unless the inferior court makes a mistake on the law or the facts, or acts upon a wrong principle, or allows extraneous considerations to influence its decision, or fails to take into account relevant F facts or more generally makes a decision that is irrational, an appellate court would have no basis for interfering with the exercise of discretion in such a situation.

The position is now settled that what constitutes urgency is not only the imminent arrival of the day of reckoning but also if, at the time the need to act arises, the matter cannot wait. Urgency which stems from a deliberate G or careless abstention from action until the deadline draws near is not the type of urgency contemplated by the Rules.

It is the submission by the appellant that it being common cause that the respondents had taken three weeks to file the urgent application, the court *a quo* erred in deciding to hear the matter on the basis of urgency. It is H

Garwe JA

A not suggested that the court misdirected itself in any other way or that its decision is irrational.

It seems to me that on the facts the matter was urgent. The delay in filing the explanation was explained satisfactorily. I find no basis upon which the decision by the court *a quo* to deal with this matter on the basis of urgency B can be impugned.

This ground of appeal must also fail.

Whether the interim and final relief sought are the same

it is important at this stage to highlight the fact that the appeal to this court is against the provisional order sought and granted by the court *a quo*. The C agreement between the parties has since run its course and therefore the order sought on the return day no longer arises.

It is the appellant's submission that the court *a quo* erred in finding that the relief sought in the amended provisional order did not suffer from the same defect as the provisional order originally filed, and further erred in finding that the interim and final reliefs sought were not the same or substantially D the same. In particular, the appellant has submitted that the court *a quo* erred in granting a provisional order which is final in effect and that consequently the respondents lost the incentive to have the provisional order so granted confirmed as it gave them final relief.

It is correct that, in general terms, a court should not grant interim relief which E is similar to or has the same effect as the final relief prayed for. The reason for this is obvious. Interim relief should be confined to interim measures necessary to protect any rights that stand to be confirmed or discharged, as the case may be, on the return date. Indeed, in *Kuvarega v Registrar General & Anor* 1998 (1) ZLR 188 (H), the High Court slammed the tendency by F some litigants to seek the same relief both as a provisional and a final order.

The court stated at 193A-C:

"The practice of seeking interim relief, which is exactly the same as the substantive relief sued for and which has the same effect, defeats the whole object of interim protection. In effect, a litigant who seeks relief in this manner obtains final relief without proving his case. That is so because interim relief is normally granted on the mere showing of a *prima facie* case. If the interim relief sought G is identical to the main relief and has the same substantive effect, it means that the applicant is granted the main relief on proof merely of a *prima facie* case. This, to my mind, is undesirable especially where, as here, the applicant will have no interest in the outcome of the case on the return day. The point I am making will become clearer if I put it another way. If, by way of interim relief, the applicant had asked for a postponement of the election pending the discharge H or confirmation of the provisional order she would not in that event gain an

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2013 (2) ZLR p322

Garwe JA

advantage over the respondents, because the point she wanted decided would A have been resolved before the election was held. But, if the interim relief were granted in the form in which it is presently couched, she would get effective protection before she proves her case and the election will be conducted on the basis that it is unlawful to wear T-shirts emblazoned with party symbols and slogans. Thereafter it would be fruitless for the respondents to establish their entitlements to wear such T-shirts. Care must be taken in framing the interim B relief sought as well as the final relief so as to obviate such incongruities".

I would certainly agree with the above remarks. Although the learned judge in that case did not suggest that such a defect renders an application a nullity, it seems to me that, whilst no hard and fast rule can be laid down, there may well be cases where a court would be justified in holding, in such a situation, that the application is not therefore urgent and that it should be dealt with as C an ordinary court application. There may also be cases where the court itself, as it is empowered to do, may amend the relief sought in order to make it clear that what is granted is interim protection whilst the final order sought would be the subject of argument on the return date. Rule 240 of the High Court Rules permits a court, after hearing argument, to vary an order sought. D It is this power to grant an order that is consistent with the facts which a court can use in order to obviate a situation where final relief is granted by way of a provisional order.

The order granted in the interim was to restore the internet links and to ensure the protection of the respondents' rights in the concept. The order obliges the E parties during that limited time to perform in terms of the contract. In other words, the provisional order merely restored the *status quo ante*.

On the other hand, the order to be confirmed or discharged on the return date was to operate in contemplation of, and pending, the process of arbitration. It also sought to cast a broad obligation on the appellant not to conduct itself in a manner inconsistent with the agreement. In other words, on the return F date, the respondents would have been required to show not only why the *status quo ante* should be confirmed but also that it was entitled to interdict the appellant from acting in a manner which might interfere with the broader demands of the agreement.

In my view, the situation can be described in a more succinct manner. In the G interim the *status quo ante* was to be restored. On the return day, and only if the respondents proved that there was a binding agreement still in force and consequently that the parties were obliged to go for arbitration, would the order be confirmed. In other words, if on the return day the appellant proved that the agreement had terminated or that the dispute was not subject to arbitration, the provisional order would be discharged. The mere restoration H

2013 (2) ZLR p323

Garwe JA

A of the links was not to be a panacea for the respondents' problems. At the end of the day the agreement was about the payment of money and this was not going to happen if the respondents sat back, in the hope that they had achieved through the provisional order what they required by way of final order, the very situation which the *Kuvarega* case *supra* cautions against.

In all the circumstances therefore, I am of the view that the interim relief B prayed for did not have the same effect as the final order sought. Accordingly, this ground of appeal must fail.

Who between the parties repudiated the agreement and whether the appellant lawfully terminated it

C As correctly found by the court *a quo*, this is the axis of the matter between the two parties.

In his submissions Mr *de Bourbon* contended that, on a proper reading of the letters of 31 May 2011 and 3 June 2011 from the first respondent's group managing director, it is clear that the first respondent intended to resile from its obligations in terms of the agreement. That anticipatory or actual breach D required the appellant to make an election either to accept the termination or to enforce the agreement. The appellant could have said "we do not accept your suspension of the contract and we hold you to it". Instead, firm in its conviction that it would not pay the disputed amounts, it accepted the termination. Whether or not the termination by the first respondent was valid or not was not relevant. Once the appellant accepted the repudiation E this brought the agreement to an end. There would have been no further continuing obligations and the order made by the court *a quo* would therefore have been wrong. Whether or not the notice was to terminate the contract in future was irrelevant.

Mr *Mpofu*, in his submissions, argued that it was the appellant that sought F to repudiate the agreement. He accepted that repudiation is a species of anticipatory breach and that the innocent party has an election either to resist and sue for specific performance or alternatively to accept the repudiation which then brings the contract to an end. It was the appellant in this case which sought to repudiate. The first respondent did not accept the repudiation. Further, he submitted that as the threat to terminate the agreement by the first G respondent was not *ex nunc* but was to take place at a later date, and as the issue before the court was whether a *prima facie* case had been established, the court correctly granted the provisional order.

It is correct that in determining whether a party has repudiated a contract, the test to be applied is whether the party has acted in such a way as to lead H a reasonable person to the conclusion that he did not intend to fulfil his part

---

Garwe JA

of the contract. It is also correct that repudiation is a species of anticipatory A breach. See *Chinyerere v Fraser NO* 1994 (2) ZLR 234 (H). Repudiation may manifest itself in a variety of ways. As stated by R.H Christie *The Law of Contract in South Africa* 3 ed pp 572-3:

> "If it takes place before performance is due it is sometimes described as anticipatory breach and may take the form of a statement that the party concerned is not going B to carry out the contract, or an unequivocal tender to perform less than is due, or an unwarranted but unequivocal refusal by a buyer to pay the full purchase price, irrespective of his true intention and the amount of any reduction that may be claimed, or the taking of some action inconsistent with the intention to perform, or by his own conduct putting it out of his power to perform …".

In his letter of 31 May 2011, the first respondent's group managing director C wrote, inter alia:

> "Therefore be advised that all obligations of Trustco will be suspended on 3 June 2011 at 12h00 Namibian time if all overdue payments are not received by then".

In my view, this was a clear intimation that the first respondent, for the reasons given in the letter, was going to suspend all its obligations towards the appellant. The letter further made it clear that if all outstanding amounts D were not paid within fourteen days of the date of the letter, the first respondent was to deem the contract cancelled.

That this was an anticipatory breach there can be no doubt. The procedure to be followed by either party in the event that it believed that a breach had occurred at the instance of the other was clearly provided for in the agreement E entered into and signed by both parties. Nowhere in the agreement was the first respondent entitled to suspend all its obligations within three days of giving notice to that effect. Such conduct suggested that the first respondent no longer believed it was bound by the agreement previously entered into by the parties.

The position is now settled that a party in the appellant's position has F an election to make. The appellant could have refused or resisted such repudiation and insisted on specific performance. The appellant, in holding the first respondent to the agreement, could have *inter alia* argued that the notice of termination was not *ex nunc* and therefore invalid. Alternatively, the appellant could have accepted the repudiation, such acceptance having G the effect of terminating the agreement between the parties.

In its response the appellant "noted the intention to terminate the agreement and accepted" it. It is apparent from the appellant's response that it accepted the repudiation. In my view, that brought

the contract to an end. There were no further obligations as the contract had come an end. Therefore, when the first respondent wrote on 3 June 2011 advising that on legal advice received H

Garwe JA

A it was not entitled to switch off the system until fourteen working days had lapsed and that the system would remain operational until then, it was too late as there no longer was any contract in existence between the two parties, a position the appellant stressed in its letter of 5 June 2011.

The court *a quo* found that the notice to terminate the agreement was in the future and not *ex nunc.* The court also found that in the circumstances there B was no valid cancellation of the agreement and that the agreement therefore remained in existence. The court erred in coming to the above conclusion. It failed to consider the implications in our law of contract of the first respondent's letter of 31 May 2011, and the response by the appellant of 1 June 2011 in which it accepted what it termed the termination of the agreement but which C in fact was a repudiation of the agreement. Clearly, therefore, whilst *Jackson v Unity Insurance Company Ltd* 1999 (1) ZLR 381 (S) correctly stated the law when it held that a valid notice of cancellation must be exercised *ex nunc,* the issue that arises in this case is different.

I am satisfied therefore that the contract ceased to exist once the appellant accepted the first respondent's repudiation. In the circumstances, the order D of specific performance granted by the court *a quo* was improper and ought therefore to be set aside.

Two other issues were the subject of much debate. These were whether the requirements for an interdict were met and whether the appellant could appeal against the interim order granted in favour of the respondents, regard E being had to the provisions of art 9 of the UNCITRAL Model Law set out in the Arbitration Act [*Chapter 7:15*]. In the course of the preparation of this judgment these issues exercised my mind for quite some time.

In the light of the conclusion that I have reached that the contract came to an end once the appellant accepted the repudiation, it becomes unnecessary to consider these issues.

F The appeal must therefore succeed.

In the result, it is ordered as follows:

1. The appeal is allowed with costs.
2. The judgment of the court *a quo* is set aside and in its place the following G substituted:
   "The application be and is hereby dismissed with costs".

MALABA DCJ and ZIYAMBI JA concurred

Mtetwa & Nyambirai, appellant's legal practitioners

H *Gill, Godlonton & Gerrans*, respondents' legal practitioners.

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Document 38 of 79

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SIBANDA & ANOR v OCHIENG & ORS 2013 (2) ZLR 326 (S)

Citation 2013 (2) ZLR 326 (S)

Case No Judgment No. S-46-13

Court Supreme Court, Harare

Judge	Ziyambi JA, Garwe JA and Patel JA
Heard	23 July 2013; *CAV*
Judgment	1 October 2013
Counsel	Appellants in person *P Kachidza,* for the first to the twelfth respondents *F Girach,* for the thirteenth respondent *D Ochieng,* for the fourteenth respondent *M Mahlangu,* for the fifteenth respondent
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Legal practitioner – *practice – requirement for three years' practical training before being entitled to practise on own account – person proposing to practise as an advocate – not exempt from requirement for appropriate training – "pupillage" arrangement effectively allowing newly qualified* D *practitioner to practise on his own account not lawful*

Headnote

The appellants were legal practitioners registered as much in terms of the Legal Practitioners Act [*Chapter 27:07*]. Shortly after their admission they successfully applied to the Advocates Chambers Association, E one of the respondents, and sought to practice at chambers as a "pupil advocates". Thereafter, and in terms of the prevailing system of pupillage, the applicants accepted briefs in their own names, charged their own fees and accounted to no one for their time. In due course it was realised by the association that its system of pupillage was contrary to the provisions of s 4 of the Legal Practitioners (General) Regulations 1999 F (SI 137 of 1999), which prohibited legal practitioners from practicing on their own account until they have been employed for a period of three years by a legal practitioner of at least four years' standing. In an effort to redress the situation, the association revised the terms of the appellants' systems of pupillage so as to conform with the regulations. G The appellants objected and sought relief from the High Court, which was refused. On appeal therefrom:

Held, dismissing the appeal, that the fact the appellants had accepted briefs in their own names, charged their own fees and accounted to no one for their time was evidence that they were practicing as principals on their own account. H

2013 (2) ZLR p327

Ziyambi JA

A *Held*, further, that the provisions of s 4 of the Legal Practitioners (General Regulations) 1999 were mandatory and the appellants could not practice as legal practitioners on their own account except in compliance therewith. The letter of admission from Advocates Chambers could not legalise their unlawful conduct. The court *a quo* was therefore correct both in B its assessment of the law and in its refusal to grant the order sought.

Judgment of Mtshiya J in *Sibanda & Anor v Ochieng & Ors* 2012 (2) ZLR 254 (H) upheld.

Legislation considered C

Legal Practitioners (General) Regulations 1999 (SI 137 of 1999), s 4

Case information

Appellants in person

P Kachidza, for the first to the twelfth respondents

F Girach, for the thirteenth respondent

D Ochieng, for the fourteenth respondent

M Mahlangu, for the fifteenth respondent

Judgment

Ziyambi JA: In 1981, the legal profession in Zimbabwe was fused. Prior to fusion there were two categories of legal practitioners, namely, attorneys and advocates. The latter could only operate upon receipt of briefs by attorneys. The former, while they freely appeared in magistrates courts, had no right of audience in the superior courts. The advocates were governed by the Bar Association and the Attorneys by the Law Society. Every practising legal practitioner had to be a member, or practise under the auspices of, one of these bodies.

The effect of the Legal Practitioners Act 1981 was that all practising lawyers were called legal practitioners. They were all endowed with the right of audience in the superior courts. Former attorneys began to appear in the High and Supreme Courts, no longer fettered by the need to brief advocates. The former advocates chose to continue with their previous mode of practice. They remained at Advocates Chambers and communicated to the former attorneys their intention to continue as before. As a result, what is now known as a *de facto* bar emerged and is still in existence today. In 1999, the Legal Practitioners (General) Regulations ("the Regulations") were published. Section 4 thereof provides, in part, as follows:

Ziyambi JA

> **"4. Practical legal training after registration**
>
> (1) Subject to this section, a legal practitioner shall not commence to practise as a principal, whether on his own account or in partnership or association with any other person, unless he has been employed as a legal assistant for not less than thirty-six months after registration with a legal practitioner who has himself –
>
> (a) been in practice in Zimbabwe for at least forty-eight months; and
>
> (b) been approved by the Minister after consultation with the Council for Legal Education and the Council of the Society …"

The appellants are legal practitioners who were registered in terms of the Legal Practitioners Act. Shortly after their registration, and this is common cause, the appellants applied to Advocates Chambers and were admitted thereat as "pupils". It is also common cause that the appellants had not, at the time of their admission to advocates chambers, completed the mandatory 36 months' employment in the service of a legal practitioner of four years standing. The letter accepting their application stated as follows:

> "I refer to your application for admission to Advocates' Chambers as a pupil. I am pleased to advise that your application has been successful subject to the following:
>
> 1. You will need to be issued with a valid practising certificate by the Law Society of Zimbabwe for the year 2012. If you present this letter to the Law Society and pay the required amount you will be issued with the certificate.
> 2. You will be subject to the Bar Rules and Constitution and to the Constitution of the Advocates' Chambers. As an advocate you will not be allowed to accept any work other than from a duly licenced legal practitioner/attorney/ solicitor.
> 3. You will be allocated a room in Chambers upon payment of the required sum of money. You will be advised of the amount by Mrs Benn or by the Honorary Treasurer in due course.
> 4. You will be a pupil under the supervision of the senior members of these Chambers. All work which you return to instructing legal practitioners must be signed by your pupil Master.
>
> I take this opportunity to welcome you to the Advocates' Chambers and hope that your association with the distinguished members of the profession in this Chambers will assist you in your professional development."

The appellants were issued with practising certificates as "advocates" and commenced to practise from Advocates' Chambers. In the appellants' words, they complied with the following further terms and conditions imposed on them by the Advocates Chambers ("the thirteenth respondent")

"They were to report to their pupil masters any matters on which they required guidance and supervision; H

2013 (2) ZLR p329

Ziyambi JA

A They would be entitled to receive briefs and instructions from law firms *in their own name* and as pupil advocates;

Their master would countersign any work they had done as a form of quality control;

They would be under the general supervision of other senior members of the Bar and that in the unlikely event of being briefed to appear in a matter *in which* B *their masters had been briefed in opposition*, any other senior member of the bar would countersign such work;

That they would receive assignments from their masters or any other member of Chambers and if the latter were satisfied with their input they would be entitled to ownership of the documents, for example, heads of argument;

They would have the *right of audience in all courts of law in Zimbabwe* and all C other quasi-judicial hearings which allow for legal representation;

Their *masters would determine the duration of their pupillage* taking into account their performance, competence and general professional development. Until such time as their masters indicated that they were ready to be 'weaned', they would remain under pupillage"(my emphasis).

D The agreement between the appellants and the thirteenth respondent was clearly contrary to s 4 of the Regulations. By joining Advocates' Chambers they were able to practise freely on their own account. They were granted practising certificates as "advocates" by the fifteenth respondent ("the Law Society"), accepted briefs in their own names, charged their own fees and were not accountable for their whereabouts to anyone save that their work was E supervised by their "masters". In their new position as "pupil advocates" they were able to avoid the restrictions imposed on them by s 4 of the Regulations.

The thirteenth respondent therefore acted outside its powers by creating a system of pupillage which is not provided for in the Act or Regulations. By accepting the appellants into chambers on the terms set out in its letter, it was F assisting the appellants to infringe the law. The thirteenth respondent woke up to this fact and, in an attempt to redress the matter without causing undue harm and distress to the appellants, held a meeting of its members at which it revised the terms of the appellants' "pupillage" in an endeavour to bring their arrangement within the confines of the Regulations. The revised terms were embodied in a document entitled "Regulatory Framework Governing G Pupillage at Advocates Chambers". In terms thereof, the appellants could no longer be called "advocates" and their practising certificates would not describe them as advocates; they could not accept briefs in their own names nor could they charge fees in their own names; they could not appear in the superior courts in the absence of their masters; their practising certificates H would bear an endorsement that the pupils could only accept instructions

2013 (2) ZLR p330

Ziyambi JA

under the supervision of their masters; the pupillage would be for 36 months A and the pupils were to account to their masters for their whereabouts.

The regulatory framework was communicated to the appellants under copy of a letter dated 22 August 2012. They were required to sign the letter signifying their acceptance of the framework which contained the terms on which they would thenceforth operate. They were to deliver the signed B copies to the thirteenth respondent by close of business on 29 August 2012 failing which their "pupillage contract" would be deemed terminated with effect from that date.

The appellants were highly incensed by the letter. They considered the regulatory framework to be an infringement of their rights. They refused to sign the letter and insisted on their "right", as set out in their letter of C admission, to practise in terms of that letter. They were, they claimed, not practising as principals but as "pupil advocates". They maintained that they had a right to use the title "advocate" which right could not be taken away by the thirteenth respondent. They filed an urgent application in the High Court seeking the following relief. D

"TERMS OF FINAL ORDER SOUGHT:

That you show cause to this Honourable Court why a final order should not be made in the following terms:

1. The terms and conditions which applied to the applicants at the time of their admission be and are hereby declared to be binding on the respondents.
2. The regulatory framework imposed on the applicants on 22 August 2012 E be and is hereby declared a nullity.
3. The resolutions of the meeting of 7 August 2012 be and are hereby declared null and void.
4. That the respondents who oppose the application pay the costs.

INTERIM RELIEF GRANTED: F

Pending determination of this matter, the applicant is [*sic*] granted the following relief:

1. The applicants' tenancy at 13th Floor Old Mutual Centre be and is hereby restored.
2. The respondents be and are hereby ordered not to interfere with the applicants'practice in any manner contrary to the terms and conditions G which applied to the applicants at the time of their admission.
3. That those respondents who oppose the application pay the costs thereof."

The application was dismissed. The learned judge was of the view that the appellants were practising on their own account as principals in breach of s 4 of the Regulations. It is against this judgment that the appellants have appealed. H

2013 (2) ZLR p331

Ziyambi JA

A Thirteen grounds of appeal were raised by the appellants. However the crux of the matter is whether the court was correct in its finding that the "pupillage" of the appellants was contrary to the provisions of s 4 of the regulations. A determination of this question would dispose of the appeal.

It was submitted by Mr *Mahlangu,* for the Law Society, that the appeal was academic since the appellants had already surrendered the practising B certificates (describing them as advocates) and had obtained employment as legal assistants with firms of legal practitioners in compliance with s 4 of the Regulations. However, the appellants were of the contrary view as, so they claimed, there were other advocates' chambers from which they could operate as pupils if the appeal were to be determined in their favour.

C The provisions of s 4 of the Regulations are mandatory. The appellants could not lawfully practise as legal practitioners on their own account except in compliance therewith. They would therefore have had to have been employed by legal practitioners of a minimum of four years' standing for a period of three years before they could practise on their own account.

The fact that they accepted briefs in their own names, charged their own D fees and accounted to no one for their time, was evidence that they were practising as principals on their own account. The letter of admission from Advocates Chambers could not legalise their unlawful conduct. The court *a quo* was therefore correct both in its assessment of the law and in its refusal to grant the order sought.

E On the question of costs, which normally follow the event, the respondents generously declined to pursue their prayers for costs as prayed in their opposing affidavits.

In the circumstances the appeal lacks merit and it is hereby dismissed.

F GARWE JA and PATEL JA concurred.

Mtetwa & Nyambirai, appellants' legal practitioners

Coghlan, Welsh and Guest, first, fourth, and eleventh respondents' legal's practitioners

G *Lawman Chimuriwo,* third respondent's legal practitioner

Honey & Blanckenberg, second, fifth, sixth, seventh, tenth and twelveth respondents' legal practitioners

H *Gill, Godlonton & Gerrans,* fifteenth respondent's legal practitioners

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Document 39 of 79

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2013/Volume 2/DOMINION TRADING FZ-LLC v VICTORIA FOODS (PVT) LTD 2013 (2) ZLR 332 (H)

DOMINION TRADING FZ-LLC v VICTORIA FOODS (PVT) LTD 2013 (2) ZLR 332 (H)

Citation	2013 (2) ZLR 332 (H)
Case No	Judgment No. HH-324-13
Court	High Court, Harare
Judge	Mathonsi J
Heard	10 September 2013; *CAV*
Judgment	2 October 2013
Counsel	*F Girach,* for the applicant *A Moyo* with *U Sakhe,* for the respondent
Case Type	Civil application
Annotations	No case annotations to date

Flynote

Company – *winding up – grounds – company unable to pay its debts – court's discretion even where company shown to be unable to pay its debts – amount of debt disputed and agreement made to refer dispute to arbitration – company paying off debt and in process of recapitalisation* D *– winding up refused*

Headnote

The applicant, which was in the business of selling bulk grain commodities to wholesale customers, entered into written agreements with the respondent, which was in the business of purchasing such commodities for resale E to the local retail market. In pursuance thereof, the applicant supplied wheat, maize and rice to the respondent and invoiced the respondent for payment which was due within a period of 60 days from the date of invoice. The respondent made certain payments towards the debt and was credited for such payment, as well as for some wheat which was F damaged by rain and weight variance, thereby reducing the applicant's claim. A dispute arose as to the exact amount owing: the respondent disputed the figures presented by the applicant, the quantities allegedly delivered and the values. It turned out that some of the wheat allegedly delivered was still locked up in the applicant's silos and had not in fact been delivered. The parties instead agreed to refer the dispute to G arbitration and an arbitrator was appointed. However, the applicant, impatient with that process, made an about turn and launched an application in terms of s 206(f) and (g) of the Companies Act [*Chapter 24:03*], that the respondent was unable to pay its debts and that it was just and equitable that it be wound up. The applicant insisted that, when demand for payment was made, the respondent failed to effect payment, H

A even though it acknowledged indebtedness and repeatedly undertook to pay. Additionally, the applicant maintained that it had lost confidence in the manner in which the respondent was run and, as creditor, it would rather have the respondent wound up, it being just and equitable to do so.

The respondent opposed the application, stating that the debt was not yet due because there was a serious dispute as to the exact amount owing, B which dispute had been referred to arbitration. The respondent itemised various areas of conflict, and argued the dispute should be resolved by arbitration in terms of the agreement of the parties. The facts showed that the respondent owed the applicant substantial sums of money, the exact figure of which was in dispute. Although the respondent admitted C to owing some of the money, it had not admitted a specific amount; but the respondent had continued to pay the applicant. The applicant submitted that the best evidence of solvency is the payment of debts and, the respondent having failed to pay on demand, it was insolvent and should be wound up. The disputation of the amount owing by the respondent was merely a ruse to buy time.

D *Held*, that while, in terms of s 205 of the Act, the respondent could be regarded as being unable to pay its debts, the court has a very wide discretionary power to accede to the application or not. Indeed, even where it has been shown that the company is unable to pay its debts, the court still has a narrow discretion: narrow in the sense that a creditor is entitled to a E winding up *ex debito justitiae,* save in exceptional circumstances. The essence of the discretion is a decision as to whether to withhold relief, objective grounds for the granting of which have been established. The discretion is a judicial value judgement to be made on all the relevant factors.

If the company whose winding up is sought can show that it has a *bona fide* F and reasonable defence to the petitioning creditor's claim, the creditor cannot succeed. Where *prima facie* it appears that the respondent is indebted to an applicant in an application for liquidation, the onus is on the respondent to show that such indebtedness is disputed on *bona fide* and reasonable grounds. Here, the respondent had shown that the amount being claimed by the applicant was disputed and that such dispute G was awaiting arbitration. The respondent pointed to discrepancies in the applicant's figures and indeed the applicant also made some small concessions, reducing the amount claimed in the process. The respondent had thus discharged the onus resting upon it. It would be unsafe to allow the liquidation of the respondent, regard being had to its far-reaching H consequences, only for the liability to be successfully contested.

Further factors influencing the discretion in favour of the respondent were: (a) A the fact that the parties had agreed to refer the dispute to arbitration must have involved a realisation that there was a bona fide dispute involving figures; (b) the fact that, without a fair determination of the dispute, the applicant pursued this application for winding up, thereby seeking to deprive the respondent of the opportunity, provided by the agreement B between the parties, to have the dispute determined by arbitration; and (c) the fact that the respondent had assets of substantial value. While the existence of assets would not necessarily disentitle the creditor to a winding up order, it is a factor that could not be overlooked, especially where, as here, the respondent had not only been paying the debt, but also was in the genuine process of recapitalisation. C

To insist on winding up, against this background, was indicative of an abuse of process and amounted to harassment or oppression of the respondent.

Cases referred to

ANZ v Media and Information Commission 2006 (1) ZLR 128 (H)

Badenhorst v Northern Construction Enterprises (Pty) Ltd 1956 (2) SA 346 (T) D

Croc-Ostrich Breeders of Zimbabwe (Pvt) Limited v Best of Zimbabwe (Pvt) Ltd 1999 (2) ZLR 410 (H)

Millward v Glaser 1950 (3) SA 547 (W)

Stambolie & Anor v Nyamutamba Transport (Pvt) Ltd 1985 (2) ZLR 320 (H) E

Sultan v Fryfern Enterprises (Pvt) Ltd & Anor 2000 (1) ZLR 188 (H)

Legislation considered

Companies Act [*Chapter 24:03*], s 205(a), (b) & (c); 206(g) F

High Court Rules 1971 (RGN 1047 of 1971), r 235

Case information

F Girach, for the applicant

A Moyo with *U Sakhe,* for the respondent

Judgment

Mathonsi J: The applicant, a corporation registered in the United Arab G Emirates, has made an approach to this court, on court application, seeking a provisional liquidation order against the respondent, another corporation cherishing its domicile in Zimbabwe, on the basis that it is unable to pay its debts and that it is just and equitable that the respondent be wound up. The application is made in terms of s 207 of the Companies Act [*Chapter 24:03*] (the Act). H

2013 (2) ZLR p335

Mathonsi J

A At the commencement of the hearing, Mr *Moyo* for the respondent made two applications, namely, for the admission of two supplementary affidavits filed by the respondent and for the exclusion of a letter dated 26 June 2012 written by Kantor and Immerman, the respondent's legal practitioners, to Dube Manikai and Hwacha the legal practitioners for the applicant marked "Strictly without prejudice". Mr *Moyo* also sought the exclusion of annexures B attached to the applicant's answering affidavit running into 110 pages being a pre-acquisition due diligence report dated 26 March 2012 prepared by Ernst and Young, but is referred to as the audited accounts of the respondent on the papers, and a business valuation report dated 16 March 2012, prepared by Banc ABC.

C Both preliminary applications were opposed by Mr *Girach* who appeared for the applicant. In respect of the supplementary affidavits, Mr *Moyo* submitted that after the respondent had filed its opposing affidavit, the applicant had gone on to file an answering affidavit which is so lengthy that, taken together with its annexures, it runs into 231 pages in which it raised new issues not covered in the founding affidavit. This then made it necessary for the respondent to D file an additional affidavit to address those new issues.

Mr *Moyo* submitted that the second affidavit sets out the current state of affairs of the respondent and seeks to inform the court what has transpired between the parties since the application was filed. In his opposition to the admission of the additional affidavits Mr *Girach* submitted that nothing E should be read from the volume of the answering affidavit which makes only essential averments. The applicant had to file a lengthy answer because the respondent started denying liability in its opposing affidavit when all the time it had acknowledged it and asked for time to pay. In order to assert its case the applicant was constrained to place before the court all the relevant F documentation establishing liability.

Mr *Girach* maintained that the documents annexed to the answering affidavit speak to the respondent's liability and its inability to pay. Regarding the letter of Kantor and Immerman dated 26 June 2012, which was written on a "without prejudice" basis and therefore privileged, Mr *Girach* conceded that it should not have been relied upon by the applicant on the ground of G privilege. Rule 235 of the High Court Rules 1971 provides:

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

The respondent gave a good explanation as to why the two extra affidavits became necessary. In a way Mr *Girach*'s point that the applicant had to H place more evidence before the court than had been included in the founding

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2013 (2) ZLR p336

Mathonsi J

affidavit, is the very basis why, in the interest of justice, the respondent should A also be allowed to comment on that evidence: *ANZ v Media and Information Commission* 2006 (1) ZLR 128 (H) at 131E.

The gravamen of this matter is a determination of whether the respondent is insolvent and therefore should be wound up. The application having been filed on 4 July 2012 but only set down for argument on 10 September 2013, B the court will certainly benefit from an update of the current extent of liability as well as measures that have been put in place to improve the fortunes of the respondent. For these reasons, I granted leave to the respondent to introduce additional affidavits

which can only assist the court in determining the dispute between the parties. I also expunged the letter of Kantor and Immerman dated 26 June 2012 on the ground of privilege. C

Regarding the annexures to the answering affidavit, Mr *Moyo's* gripe with them was two-fold: namely that the authors of the reports made it clear that they were not to be used in this court and that they are misleadingly referred to in the answering affidavit as the audited accounts of the respondent, when they are demonstrably not. In respect of the "Pre-acquisition Due Diligence D Report" prepared by Ernst and Young dated 26 March 2012, the erstwhile auditors added an endorsement on the face of that draft report that "Reliance Restricted".

Ernst and Young went on to qualify their report in the following:

> "This draft report was prepared on the specific instructions of the directors of Holbud Limited ('Holbud') solely for the purpose of assisting them in connection E with the proposed acquisition of an equity stake in Victoria Foods and should not be relied upon for any other purpose. For the reason that others may seek to use it for different purposes, this report should not be quoted, referred to or shown to any other parties unless so required by court order or regulatory authority, without our prior consent in writing."

They went on to say: F

> "This report is based on a limited review of Victoria Foods and may not capture certain aspects that a full scale commercial due diligence investigation would reveal"

The valuation report of the respondent by Banc ABC contains similar qualifications which Mr *Girach* argued is standard procedure in the preparation G of financial reports of that nature.

In my view, the objection to the production of the two reports made on behalf of the respondent cannot sustain an exclusion of the reports in question. To my mind the qualifications I have alluded to above speak to their evidentiary value; what reliance can be placed on them in determining the dispute between the parties and whether they sit in a higher pedestal than the financial record H

Mathonsi J

A relied upon by the respondent must be determined. I am only prepared to go that far and look at them in that light and not to exclude them from the record as the applicant is entitled to rely on whatever evidence it has at its disposal in seeking to persuade the court to grant the relief that it seeks.

The applicant, which is in the business of selling bulk grain commodities to wholesale customers, entered into written commodity supply agreements with B the respondent, which is into the business of purchasing such commodities for resale to the local retail market. In pursuance thereof, the applicant supplied wheat, maize and rice to the respondent and invoiced the respondent for payment which was due within a period of 60 days from the date of invoice. The total invoiced by the applicant was a sum of US $6 542 048.60.

C It would appear that the respondent made certain payments towards the debt and was credited for such payment as well as for some wheat which was damaged by rain and weight variance, thereby reducing the claim of the applicant to US$5 685 841.61. On 29 February 2012 the parties signed a document with the title "Victoria Food Sign off" which sets out figures D of what was allegedly delivered to the respondent, in terms of which they agreed that what was owed by the respondent to the applicant was a sum of US$ 6 542 048.60.

Subsequent to that a dispute arose as to the exact amount owing and despite the agreement signed on 29 February 2012, the respondent disputed the figures presented by the applicant, the quantities allegedly delivered and the values. E It turned out that some of the wheat allegedly delivered was still locked up in the applicant's silos and had not in fact been delivered. During the process of reconciliation conducted by the parties, the applicant agreed to reduce its claim from the original figure of US$6 542 048.60 to US$5 685 841.61. However, the respondent still disputed that figure. In terms of the agreements F entered into between the parties between February 2010 and August 2011 the standard terms of the Grain and Feed Trade Association's Rules 100 (GAFTA No 100) applied, meaning that all disputes between the parties were to be resolved by arbitration in the United Kingdom.

It is probably for that reason that the parties instead agreed to refer the G dispute to arbitration, but not in the United Kingdom. It was referred to the Commercial Arbitration Centre in Harare and retired Justice Smith had the privilege of being appointed to arbitrate. Presumably having grown

extremely impatient with that process as the debt remained unpaid, the applicant made an about turn and launched this application in terms of s 206(f) and (g) of the Companies Act, namely, that the respondent is unable to pay its debts H and that it is just and equitable that it be wound up.

2013 (2) ZLR p338

Mathonsi J

The applicant insisted that when demand for payment was made the A respondent failed to effect payment even as it acknowledged indebtedness and repeatedly undertook to pay. Additionally, the applicant maintained that it has lost confidence in the manner in which the respondent company is run and as creditor, it would rather have it wound up, it being just and equitable to do so. As proof of the applicant's inability to pay, the applicant B made reference to various correspondence penned by CFI Holdings Ltd, the holding company of which the respondent is a subsidiary, between March 2011 and March 2012 wherein promises to pay were made but none was effected. I must mention, however, that throughout that correspondence, no specific figure was cited as the amount owing, although the respondent expressed a willingness to settle the debt. C

The respondent has opposed the application, stating that the debt is not yet due because there is a serious dispute as to the exact amount owing, which dispute has been referred to arbitration. The arbitration is still to be undertaken in order to settle the dispute and determine the amount due. It made reference to areas of conflict, namely the allegedly undelivered wheat D worth US$462 835.60 which is included in the claim, weight differences accounting for about US$46 438.08 and $167 500 defective delivery (rotten rice) worth $14 000, and errors in computation of interest which would reduce its liability by $73 192.21. For these reasons, the respondent argued, the dispute should be resolved by arbitration in terms of the agreement of E the parties.

The respondent also stated in the supplementary affidavit of Stephen Paradzai Kuipa, which I have admitted, that it has secured an investor to inject capital into its business. The liability to the applicant having been disclosed to the investor, the debt owed to the applicant will be paid from that investment. Meanwhile, the respondent has paid to the applicant a total sum of $2 165 000 F towards the reduction of the debt.

Mr *Girach* for the applicant submitted that the best evidence of solvency is the payment of debts and the respondent having failed to pay on demand is insolvent and should be wound up. In his view, the disputation of the amount owing by the respondent is merely a ruse to buy time. The respondent has not G shown that the debt is not due, it has not produced a reconciliation showing what it regards as being due, a clear sign that the respondent wants to leave the issue hanging in order to buy time.

In terms of s205 of the Act

> "A company shall be deemed to be unable to pay its debts – H

2013 (2) ZLR p339

Mathonsi J

> (a) if A a creditor, by cession or otherwise, to whom the company is indebted in a sum exceeding one hundred 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
>
> (b) if B the execution or other process issued, on a judgement, 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 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 its debts, the court shall take into account the contingent and prospective C liabilities of the company."

In approaching this case, I am mindful of the fact that in an application for a provisional order for liquidation the applicant is only required to establish a *prima facie* case. I am also mindful of the fact that even where reliance is placed on s206(g) for seeking the relief sought by the applicant, the court has D a very wide discretionary power to accede to the application or not. Indeed. even where it has been shown that the company is unable to pay its debts, the court still has a narrow

discretion. The point is made by Gillespie J in *Croc-Ostrich Breeders of Zimbabwe (Pvt) Ltd v Best of Zimbabwe (Pvt) Ltd* 1999 (2) ZLR 410 (H) at 414E-415A that:

> "Even were I incorrect in such a finding I would still not countenance the winding E up of the respondent. Mr *Girach* for Best of Zimbabwe urged upon me the discretion inherent in the court to refuse to order liquidation notwithstanding the proven existence of grounds for liquidation. Such discretion is deliberately provided for by the use of the permissive 'may' in the enactment providing the grounds of winding up by the court [1]. Even without this the court would, in the proper case, have the discretion flowing from its inherent jurisdiction to prevent F abuse of its process [2]. These two sources together provide a judicial discretion, based on all the relevant circumstances of any case, to withhold an order of winding up even if grounds have technically been established.
>
> The discretion is regarded as a narrow one [3]. Narrow in the sense that a creditor G is entitled to a winding up *ex debito justitiae* save in exceptional circumstances [4].

2013 (2) ZLR p340

Mathonsi J

> The essence of the discretion is a decision as to whether to withhold relief, A objective grounds for the granting of which have been established. The factors to be considered in any case do not differ depending on the grounds advanced for winding up. The discretion is a judicial value judgement to be made on all the relevant factors." [5]

In making a pronouncement on the ground for winding up set out in s 206(g) Chatikobo J stated in *Sultan v Fryfern Enterprises (Pvt) Ltd & Anor* 2000 (1) ZLR 188 (H) B at 192A-B:

> "Section 206 (g) of the Act has been said to postulate not facts, but only a broad conclusion of law, justice and equity as a ground for winding up.
>
> > 'In its terms and effect (the section) confers upon the court a very wide discretionary power the only limitation originally being that it had to be C exercised judicially with due regard to the justice and equity of the competing interests of all concerned':
>
> *per* Trollip J in *Moosa NO v Mavjee Bhawan (Pvt) Ltd & Anor* 1967 (3) SA 131 (T) at 136 H."

I have been called upon to decide whether the respondent is unable to pay its debts and whether it is just and equitable to order liquidation of the D respondent in the circumstances of this matter. The facts show clearly that the respondent owes the applicant substantial sums of money, the exact figure of which remains in dispute. Although the respondent admits to owing some of the money, it has not admitted a specific amount. The respondent has continued to pay to the applicant and has, since the dispute started, paid E a total sum of $2 165 000.00. But for the dispute on the figure, it should have been paid within 60 days of the date of invoicing. The question of the exact amount owing has been referred to arbitration, a process which the applicant does not appear keen to follow, it having elected instead to go for the winding up of the respondent.

When setting out the grounds for winding up by the court R H Christie F *Business Law in Zimbabwe* 2 ed at p 427 states of the inability to pay debts:

> "The cases make clear that it will not avail the company to show that its assets exceed its liabilities if it is in a state of commercial insolvency, i.e. that it cannot meet its liabilities without liquidating its assets, the liquidation of assets for this purpose being one of the objects of winding up. But if the company can G show that it has a *bona fide* and reasonable defence to the petitioning creditor's claim the creditor cannot succeed (*Mazongororo Paper Converters (Pvt) Ltd v Mazongororo Sales (Pvt) Ltd* 1987 (1) ZLR 81 (S)) nor can he succeed if by his own actions he is causing the company's inability to pay its debts: *Goodhope Enterprises (Pvt) Ltd v CAPS Holdings Ltd* 1991 (1) ZLR 9 (S)." H

2013 (2) ZLR p341

Mathonsi J

A Indeed, where *prima facie* it appears that the respondent is indebted to an applicant in an application for liquidation, the onus is on the respondent to show that such indebtedness is disputed on *bona fide* and reasonable grounds: *Stambolie & Anor v Nyamutamba Transport (Pvt) Ltd* 1985 (2) ZLR 320 (H); *Badenhorst v Northern Construction Enterprises (Pty) Ltd* 1956 (2) SA 346 (T).

B *In casu* it is clear that the respondent is indebted to the applicant and that it has not paid the debt on demand. *Prima facie* the applicant would be entitled to an order of winding up. However, the respondent has shown that the amount being claimed by the applicant is disputed and that such dispute is awaiting arbitration. The respondent has pointed to discrepancies in the applicant's C

figures and indeed the applicant has also made some small concessions, reducing the amount claimed in the process.

In my view, the respondent has discharged the onus resting upon it to show that the indebtedness is disputed on *bona fide* and reasonable grounds. It would be unsafe to allow the liquidation of the respondent, regard being D had to its far reaching consequences, only for the liability to be successfully contested. I would therefore not countenance the winding up of the respondent in the circumstances. Even if I am wrong in that conclusion, this is a matter in which I would, in the exercise of my narrow discretion, withhold the order of winding up because of a number of reasons. In the first instance, the parties agreed to refer the dispute to arbitration and that arbitration E process is yet to commence. Surely referral of the matter to arbitration was upon a realisation that there was a *bona fide* dispute involving figures. In the second instance, without a fair determination of the dispute, the applicant stopped midstream and then pursued this application for a winding up. In so doing it is seeking to deprive the respondent of an opportunity, provided F by the agreement between the parties, to have the dispute determined by arbitration. Indeed the applicant would like the consequences of winding up to set in without it having proved its claim, without subjecting the claim to the test of arbitration.

More importantly, the respondent has been shown to have assets of substantial value. While the existence of assets will not necessarily disentitle the creditor G to a winding up order, it is a factor that I cannot overlook especially in the circumstances of this case where the respondent has shown that not only has it been paying the debt, it having paid in excess of $2 million, but also that it is in the genuine process of recapitalisation.

It occurs to me that the insistence of the applicant on a winding up, against H this background is indicative of an abuse of process, the employment of the

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Mathonsi J

judicial process for a purpose other than that for which it was intended. To A my mind, the applicant is aware that arbitration which was agreed by the parties would not yield positive results and has therefore elected to employ the procedure for winding up in order to enforce payment of a disputed debt. This is unacceptable as it amounts to harassment or oppression of the respondent: *Millward v Glaser* 1950 (3) SA 547 (W) at 551. B

In the result, the application is hereby dismissed with costs.

Dube, Manikai & Hwacha, applicant's legal practitioners

Kantor & Immerman, respondents' legal practitioners C

1 Section 206 of the Companies Act [*Chapter24:03*]; *Pillay& Anor* v *Liquadators, Union & Rhodesian wholce Ltd* 1927 SR 136 at 150
2 *Henochsberg on the Companies Act* 4 ed Vol II p583
3 *Service Trade Supplies (Pty) Ltd* v *Dasco & Sons (Pty) Ltd* 1962 (3) SA 424 (T) at 428
4 *Cf Tuckers Land & Development Corp (Pty) Ltd v Soja (Pty) Ltd* 1980 (3) SA 253 (W) at 257C; Pillay *supra* n 3 p 150
5 Henochsberg op cit 582; *Pillay supra* n 3 at 153

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Document 40 of 79

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2013/Volume 2/NORTHERN FARMING (PVT) LTD v VEGRA MERCHANTS (PVT) LTD & ANOR 2013 (2) ZLR 343 (H)

NORTHERN FARMING (PVT) LTD v VEGRA MERCHANTS (PVT) LTD & ANOR 2013 (2) ZLR 343 (H)

Citation	2013 (2) ZLR 343 (H)
Case No	Judgment No. HH-328-13
Court	High Court, Harare
Judge	Mafusire J
Heard	24 July 2013; *CAV*
Judgment	3 October 2013
Counsel	*R Chawatama*, for the applicant *O Kadare* and *G Machingura*, for the first respondent *B Dhlakama*, for the second respondent
Case Type	Urgent application for interdict
Annotations	No case annotations to date

Flynote

Arbitration – *proceedings – pending proceedings – interim protective measures – may be sought from High Court – measures include interdict to secure preservation of goods and any other order to ensure arbitral* D *proceedings not rendered ineffectual*

Practice and procedure – *interdict – "anti-dissipation" interdict – nature and purpose of interdict – requirements for grant of – same as any other interim interdict – reasons to grant interdict – what must be shown*

Headnote

E The applicant had sold maize to the first respondent on a credit term arrangement. The first respondent had failed to pay in full, having paid about one third of what was due. The credit term facility had an arbitration clause. At the time of the hearing the arbitration proceedings had just been initiated. The applicant alleged that the first respondent was disposing of the maize to third parties and receiving payment but was F refusing or failing to pay it. The second respondent was one of the third parties. It admitted owing money to the first respondent in terms of their own contractual arrangements. The applicant sought what it termed an anti-dissipation interdict to restrain the first respondent from disposing of the maize held for it by another company pending the determination of its claim by the arbitrator. The applicant said it feared that if the first G respondent was not so restrained any award in its favour by the arbitrator would be a *brutum fulmen* because there would be nothing left to levy execution on, given that the first respondent was indigent.

Held, that an anti-dissipation interdict is just an ordinary interdict to restrain the disposal of assets. The name of the interdict and its essential content H have been the subject of some debate. It has been variously called a

Mareva-type interdict (after the term used in English law), an interdict A *in securitatem debiti* and an anti-dissipation interdict. The interdict prevents the respondent from dealing freely with his assets but grants the applicant no preferential rights over those assets. In some cases, the interdict is not sought to prevent the respondent from dissipating his assets, but rather from preserving them so well that the applicant cannot B get his hands on them. The normal grounds for the grant of an interim interdict must be shown.

Held, further, that the purpose of such an interdict is to prevent the respondent from freely dealing with his own property to which the applicant lays no claim, because justice may require such restriction in cases where the respondent is shown to be acting *mala fide* with the intention of C

preventing execution in respect of the applicant's claim, even though there would not normally be any justification to compel a respondent to regulate his *bona fide* expenditure so as to retain funds in his patrimony for the payment of claims. The purpose of the interdict is not to be a substitute for the claim but to reinforce it – to render it more effective. And the question whether the claim is a satisfactory remedy in the D absence of an interdict would normally answer itself.

Held, further, that in an application for this type of interdict, one of the major considerations is whether the respondent would still have sufficient property to satisfy any judgment that may eventually be given against him and whether the respondent's continued disposal of his assets is E deliberately intended to frustrate any such judgment. *Held*, further, that in this case, the evidence was that, in the face of a demand for payment, and in the face of its claim having been submitted for arbitration, the respondent was still disposing of the maize but without remitting anything to the applicant. Not only was arbitration not a remedy to what the applicant feared, but also that there existed no other F *satisfactory* remedy, the first respondent having no source other than the maize from which to satisfy its contractual obligations to the applicant.

Held, further, that although arbitration proceedings had been instituted, it was permissible, in terms of article 9 of the First Schedule to the Arbitration Act [*Chapter 7:15*], for the applicant to seek an interim measure of G protection from the High Court where the arbitral tribunal has not yet been appointed and the matter is urgent. Such measures include an order for the preservation, interim custody or sale of any goods which are the subject-matter of the dispute, an interdict or other interim remedy and any other order to ensure that any award which may be made in the arbitral proceedings is not rendered ineffectual. H

Cases referred to A

Absa Bank Ltd v Rhebokskloof (Pty) Ltd & Ors 1993 (4) SA 436 (C)

Bricktec (Pty) Ltd v Pantland 1977 (2) SA 489 (T)

Flame Lily Invstm Co (Pvt) Ltd v Zimbabwe Salvage (Pvt) Ltd & Anor 1980 ZLR 378 (G)

B *Hix Networking Technologies v System Publishers (Pty) Ltd & Anor* 1997 (1) SA 391 (A)

Knox D'Arcy Ltd and Others v Jamieson and Others 1996 (4) SA 348 (A)

Mcitiki & Anor v Maweni 1913 CPD 684

Setlogelo v Setlogelo 1914 AD 221

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

Legislation considered

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

Case information

R Chawatama, for the applicant

D *O Kadare* and *G Machingura*, for the first respondent

B Dhlakama, for the second respondent

Judgment

Mafusire J: On 24 July 2013, I granted the following interim relief in favour of the applicant:

E "That pending determination of the dispute between the applicant and the first respondent by the arbitrator, the applicant is granted the following relief:

1. The first respondent be and is hereby interdicted from using, selling, transferring, disposing or dealing in any other way with the 32 metric tonnes of maize held at Mash Co Premises, Mazowe Road, Centenary.
2. The Deputy Sheriff be and is hereby directed to place under attachment F the said 32 metric tonnes of maize and hold the same under his custody at Mash Co Premises, Mazowe Road, Centenary pending finalization of arbitration proceedings between the parties.

3. The second respondent be and is hereby interdicted from paying the sum of US$80 810 to the first respondent but that such amount when due, shall be paid to the Sheriff of the High Court who shall hold the money in trust pending finalization of the arbitration proceedings between the applicant G and the second respondent."

The above provisional order followed an urgent chamber application by the applicant. The brief facts were that the applicant had sold some 709 tonnes of maize to the first respondent on a 14 day credit term arrangement. The first respondent had failed to pay. The final balance due by the first respondent H was said to be US$179 608.35 following a payment of US$98 100. The

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credit term facility had an arbitration clause. At the time of the hearing the A arbitration proceedings had just been initiated. The applicant alleged that the first respondent was disposing of the maize to third parties and receiving payment but was refusing or failing to pay it. The second respondent was one of the third parties. It admitted owing first respondent in terms of their own contractual arrangements. B

The applicant further alleged that apparently the first respondent had had no capacity to raise capital for its business in the first place; that the first respondent had enticed the applicant to offer credit terms as a means of raising that capital and that it had no assets of its own other than the maize. On that basis the applicant sought what it termed an anti-dissipation interdict to restrain the first respondent from disposing of the maize held for it by C a company called Mash Co pending the determination of its claim by the arbitrator. The applicant said it feared that if the first respondent was not restrained as aforesaid any award in its favour by the arbitrator would be a *brutum fulmen* because there would be nothing left to levy execution on given that first respondent was undoubtedly indigent.

What is an anti-dissipation interdict? It is just an ordinary interdict to restrain D the disposal of assets. In *Knox D'Arcy Ltd and Others v Jamieson and Others* 1996 (4) SA 348 (A) both the court of first instance and the appeal court debated the propriety of the term "anti-dissipation interdict". None of them found the name quite suitable and none of them, for the case before them, could quite understand the content of such interdict. In the end the appeal E court was content to say that the South African courts had recognised this type of interdict for many years without giving it any specific name. The full debate over the interdict is captured in the judgment of Grosskopf JA at pp 371-372:

> "The nature of the interdict sought by the petitioners is to prevent the respondents F from concealing their assets. The petitioners do not claim any proprietary or quasi-proprietary right in these assets. It is conceded that the assets are the unencumbered property of the respondents. The interdict sought was therefore of an unusual nature. It is not the usual case where its purpose is to preserve an asset which is in issue between the parties. Here the petitioners lay no claim to the assets in question. They merely allege a general right to damages. Moreover, G the conduct on the part of the respondents which is sought to be interdicted is *prima facie* lawful. It is therefore not surprising that both the name of the interdict and its essential content have been the subject of some debate.
>
> As far as the name is concerned, the petitioners referred to it as a Mareva-type interdict after the term used in English law. The court *a quo* did not like this name since the use of the English term might suggest that English principles are automatically applicable (see 1994 (3) SA at 705A- 706B). I agree with this H

> A criticism. The alternatives suggested by Stegmann J were not, however, much more felicitous. Thus he referred to an interdict *in securitatem debiti* and an anti-dissipation interdict. The former expression may suggest that the purpose of the interdict is to provide security for the applicant's claim. This is not so. The interdict prevents the respondent from dealing freely with his assets but grants the applicant no preferential rights over those assets. And 'anti-dissipation' suffers from the defect that in most cases and, certainly in the present case, the B interdict is not sought to prevent the respondent from dissipating his assets, but rather from preserving them so well that the applicant cannot get his hands on them. Having criticised the names used for the interdict I find myself unfortunately unable to suggest a better one. I console myself with the thought that our law has recognised this type of interdict for many years without giving it any specific name."

C What the applicant sought in the present matter was simply a prohibitory interdict in the interim. The requisites for such an interdict are:

1. a *prima facie* right;
2. a well-grounded apprehension of irreparable harm if the relief is not granted;
3. that D the balance of convenience favours the granting of an interim interdict;
4. that there is no other satisfactory remedy.

See Setlogelo v Setlogelo 1914 AD 221 at 227; *Tribac (Pvt) Ltd v Tobacco Marketing Board* 1996 (2) ZLR 52 (S) at 56*; Hix Networking Technologies v System Publishers (Pty) Ltd & Anor* 1997 (1) SA 391 (A) at 398I-399A E; *Flame Lily Investment Company (Pvt) Ltd v Zimbabwe Salvage (Pvt) Ltd and Anor* 1980 ZLR 378 (G); *Universal Merchant Bank Zimbabwe Ltd v The Zimbabwe Independent & Anor* 2000 (1) ZLR 234 (H) at 238.

The first respondent opposed the application. However, its affidavit was F predominantly argumentative and wordy but too short on facts. Its point *in limine* was that the matter was not urgent. However, its basis for saying so was in effect its only major point on the merits. It was argued that in the absence of an award or judgment in its favour it was premature for the applicant to seek an order that would have the effect of interfering with the respondent's normal commercial activities. It was further argued that the G relief sought by the applicant would virtually force the first respondent to close down its operations and that the process of arbitration that the applicant had just initiated would be an adequate remedy.

I was satisfied that the matter was urgent. The applicant presented evidence that the first respondent was disposing of its maize stocks at such a rate that H there would be little or nothing left by the time the arbitration process was

concluded and that if the applicant succeeded it would be left with an empty A judgment. In both the opposing affidavit and in its submissions during the hearing, the first respondent conspicuously skirted what I considered to be applicant's major cause for alarm and apprehension. That point was that the first respondent had no other assets apart from the maize. The applicant's apprehension was grounded on the perception that in the event that the B arbitrator found in its favour, the respondent would have nothing left from which to satisfy any award.

It seems that in an application for this type of interdict one of the major considerations is whether the respondent would still have sufficient property to satisfy any judgment that may eventually be given against him and whether the respondent's continued disposal of his assets is deliberately intended to C frustrate any such judgment. That seems to be the rationale for the interdict. The principle was laid down in *Mcitiki and Another v Maweni* 1913 CPD 684. It was followed in *Bricktec (Pty) Ltd v Pantland* 1977 (2) SA 489 (T) and in the *Knox D'Arcy* case above. In *Mcitiki supra* at 686-687 Hopley J laid down the principle as follows: D

> "It is said if one were to interdict a man like respondent in such circumstances from parting with some of his property so as to satisfy a judgment, one would be revolutionising the practice of this court. The practice of this court is to do justice between people according to the circumstances that may arise. It has, of course, long been the practice of this court that if the respondent, although an *incola*, were *in fuga*, the court would in such circumstances restrain him from E parting with certain property pending the result of an action; *and that doctrine has been extended a little further where the respondent is a prodigal wasting his money or is purposely making away with funds although remaining an* incola *of the country, so that eventually when his creditor gets the judgment it may be a barren one*; and to use a graphic phrase in one of our old law cases, when he went there with his writ of execution, such creditor would find he was 'fishing behind the net'. It is to protect a *bona fide* plaintiff against a defeat of justice in F such a case that such orders are given. The cases cited, such as *David v Reinhard* (1893) 8 EDC 30; *Robinson, Miller and Co v Lennox and Another* (1908) 18 CTR 402; *Fredericks v Gibson* (1899) 9 CTR 445, all have their distinguishing features, *but they all proceeded upon the wish of the court that the plaintiff should not have an injustice done to him by reason of leaving his debtor possessed of funds sufficient to satisfy the claim, when circumstances show that such debtor* G *is wasting or getting rid of such funds to defeat his creditors, or is likely to do so*" (emphasis added).

In the *Knox D'Arcy* case above it was held that the purpose of such an interdict was to prevent the respondent from freely dealing with his own property to which the applicant lays no claim, because justice may require such restriction in cases where the respondent is shown to be acting mala H

Mafusire J

A *fide* with the intention of preventing execution in respect of the applicant's claim, even though there would not normally be any justification to compel a respondent to regulate his *bona fide* expenditure so as to retain funds in his patrimony for the payment of claims.

In the present case, the applicant presented evidence that, in the face of a B demand for payment, and in the face of its claim having been submitted for arbitration, the respondent was still disposing of the maize but without remitting anything to the applicant. That arbitration was a remedy available to the applicant was hardly a sound basis for opposing the interdict. In *Knox D'Arcy supra* that kind of argument was dismissed in the following terms, at pp 372-373:

> C "It is often said that an interdict will not be granted if there is another satisfactory remedy available to the applicant. In that context a claim for damages is often contrasted with a claim for an interdict. The question is asked: should the respondent be interdicted from committing the unlawful conduct complained of, or should he be permitted to continue with such conduct, leaving the applicant to recover any damages he may suffer?
>
> D That is not the question which arises here. In the present circumstances *there is no question of a claim for damages being an alternative to an interdict.* The only claim which the petitioners have is one for damages. There is no suggestion that it could be replaced by a claim for an interdict. *The purpose of the interdict is not to be a substitute for the claim for damages but to reinforce it – to render it more effective.* And the question whether the claim is a satisfactory remedy E in the absence of an interdict would normally answer itself. *Except where the respondent is a Croesus1, a claim for damages buttressed by an interdict of this sort is always more satisfactory for the plaintiff/applicant than one standing on its own feet*. The question of an alternative remedy accordingly does not arise in this sort of case. The interdict with which we are dealing is *sui generis*. It is either available or it is not. No other remedy can really take its place (except, F possibly, in certain circumstances [of] attachments or arrests)" (emphasis added).

1 Croesus was an ancient king of ancient Lydia who was famed for his wealth and whose name is said to be synonymous with terms like "capitalist", "deep pocket", "fat cat", "moneybags", etc. Of Croesus, and dealing with an apparent non-disclosure of an essential asset by the director of an insolvent company in a liquidation matter, Berman J in *Absa Bank Ltd v Rhebokskloof (Pty) Ltd & Ors* 1993 (4) SA 436 (C) G said:

> "There is in any event good cause for suspecting that the truth concerning this alleged asset has not been forthcoming. In setting out his financial position in his original opposing or answering affidavit, Key states that it 'frankly escaped his mind to deal with it'. I venture to suggest that no man of wealth, from Croesus to Rockefeller, when in a tight financial situation could conceivably H have simply forgotten the existence of an asset so substantial."

Mafusire J

On the facts before me, I was satisfied that, not only was arbitration not a A remedy to what the applicant feared, but also that there existed no other *satisfactory* remedy. The first respondent did not seem to have any source other than the maize from which to satisfy its contractual obligations to the applicant.

The applicant's claim was predicated on art 9 of the Model Law contained B in the First Schedule to the Arbitration Act [*Chapter 7:15*]. But in its notice of opposition the respondent argued as follows:

> ". . . Article 9 of the Arbitration Act certainly does not confer jurisdiction on the court to make an ordinary debt matter urgent, or to interfere with normal commercial activity between corporates or of the first respondent or to make another contract for the parties specifically on how the disputes were to be resolved, how one party is to recover on the contract and also the method of recovery such as barring receipt of payment, barring trade, attachment of stocks in trade in the absence of any court order and in my view, supplementing the arbitration procedure that was agreed to by the parties to be final."

I found the first respondent's meandering averment above to be plainly without C merit and quite absurd. Article 9 of the Arbitration Act reads as follows:

> **"ARTICLE 9**
>
> Arbitration agreement and interim measures by court
>
> (1) It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from the High Court an interim measure of protection and subject to paragraphs (2) and (3) of this article, for the High D Court to grant such measure.
>
> (2) Upon a request in terms of paragraph (1) of this article, the High Court may grant –

(a) an order for the preservation, interim custody or sale of any goods which are the subject-matter of the dispute; E

(b) an order securing the amount in dispute or the costs of the arbitral proceedings; or

(c) an interdict or other interim remedy; or

(d) any other order to ensure that any award which may be made in the arbitral proceedings is not rendered ineffectual.

(3) The High Court shall not grant an order or interdict in terms of paragraph G (1) of this article *unless* –

(a) the arbitral tribunal has not yet been appointed and the matter is urgent; or

(b) the arbitral tribunal is not competent to grant the order or interdict; or

(c) the urgency of the matter makes it impracticable to seek such order or interdict from the arbitral tribunal; H

2013 (2) ZLR p351

Mafusire J

A and the High Court shall not grant any such order or interdict where the arbitral tribunal, being competent to grant the order or interdict, has determined the application therefore.

(4) The decision of the High Court upon any request made in terms of paragraph (1) of this article shall not be subject to appeal"(emphasis added).

It is plain that in terms of both the common law and the Arbitration Act this B court can grant such an interdict. Article 9 could not have been clearer. I was satisfied that the applicant had fulfilled the conditions under which the interdict could be granted. Among other things, and as I have already pointed out, the applicant argued strongly that the first respondent had no other assets apart from the maize. During argument I expressly invited counsel for the first respondent to address the point. He said nothing of substance.

C It was first respondent's argument that the relief sought by the applicant would cripple its operations and put it out of business. However, I was not persuaded by that argument. The first respondent was a grain merchant. It sourced maize from disparate suppliers. The applicant was just one of them. The first respondent would then on-sell the maize to its own customers. It D boasted of an ability to source the maize at so competitive prices as to enable it to on-sell to its own customers at considerable discounts, even coming down to as much as less than the price at which it would have bought the maize from the applicant. So what puzzled me was how an embargo on a paltry 32 tonnes could cripple and put the first respondent out of business. For the relief sought the applicant had identified and targeted a particular E item – maize – and a particular quantity – 32 tonnes. The first respondent was free to trade in any excess of that commodity. I thought that the first respondent was concealing more than it was revealing. In the final result I found the respondent's opposition to be without merit and I granted the order sought.

F *Mawere & Sibanda,* legal practitioners for the applicant

G Machingambi Legal Practitioners, legal practitioners for first respondent

B Dhlakama Attorneys, legal practitioners for the second respondent

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Document 41 of 79

Source:
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SHERIFF OF THE HIGH COURT v MACKINTOSH & ORS 2013 (2) ZLR 352 (H)

2013 (2) ZLR p352

Citation 2013 (2) ZLR 352 (H)

Case No Judgment No. HH-330-13

Court	High Court, Harare
Judge	Mathonsi J
Heard	19 September 2013; *CAV*
Judgment	9 October 2013
Counsel	Ms *F Makarau,* for the applicant *T R Tanyanyiwa,* for the first and second respondent *S Simango,* for the judgment creditor
Case Type	Opposed application
Annotations	Link to case annotations

Flynote

Company – *legal proceedings – proceedings against company – company carrying on business under trade name other than its registered name – may be sued in name in which it carries on business*

Practice and procedure – *parties – joinder – principles – joinder of third* D *party – avoidance of multiplicity of actions dealing with same subject matter and involving same evidence*

Headnote

The judgment creditor in these interpleader proceedings entered into a written contract with an entity styling itself "Harare Kawasaki", which E was represented by the first respondent. The contract stated that "Harare Kawasaki" was "a company incorporated in Zimbabwe". Following legal proceedings successfully brought by the judgment creditor against Harare Kawasaki, the applicant placed under attachment certain items of property located at the business address of Harare Kawasaki. All the goods placed under attachment were claimed by the first respondent, a F director of the second respondent, a company, as well as by the second respondent itself. The first respondent stated that the applicant wrongly attached his assets as well as those of the second respondent, because Harare Kawasaki was not a separate legal entity capable of owning assets or suing or being sued in its own right, it being merely a brand name G under which the second respondent conducted business. He maintained that the writ of execution issued against Harare Kawasaki was a nullity for the same reason, given that it was issued against a non-existent entity

It was argued for the respondents that, whilst r 8C of the High Court Rules 1971 allows for a person carrying on business in a name or style to be sued in that name or style, the rule does not apply to corporations. H

A *Held*, it is a central principle of company law that a company, once incorporated, becomes a fictitious person. To that extent, therefore, the use of the word "person" in r 8C should, of necessity, include a corporation. A corporation which carries on business in a name or style can be sued in that name or style. While r 7 defines "association" as including a trust, a partnership, a syndicate, a club or any other association of persons which is not a B body corporate, r 8C does not refer to an "association" as defined in r 7, but to "a person." The judgment creditor was thus entitled to sue the second respondent in its trading name or style. The second respondent presented itself to the public as "Harare Kawasaki". The contract of the parties even referred to Harare Kawasaki as "a company incorporated in Zimbabwe." It was dishonest in the extreme for the second respondent C to attempt to evade liability in terms of the judgment taken against it in the name or style in which it related to the public. What belonged to Harare Kawasaki clearly belonged to the second respondent.

Cases cited

Forestry Commission v Moyo 1997 (1) ZLR 254 (S)

Inyanga Downs Orchard v Buwu HH-108-10

Legislation considered

High Court Rules 1971 (RGN 1047 of 1971), r 8C

Case information

Ms *F Makarau,* for the applicant

T R Tanyanyiwa, for the first and second respondent

S Simango, for the judgment creditor

Judgment

Mathonsi J: In the discharge of his duties as Sheriff the applicant placed under attachment certain items of property located at 162 The Chase, Mount Pleasant, Harare. This was in pursuance of a writ of execution issued by the judgment creditor in HC 437/13 against Harare Kawasaki after he obtained judgment against that entity on 25 March 2013 in the sum of US$82 511.50. All the goods placed under attachment in pursuance of the writ of execution have been claimed by the first respondent, who is a director of the second respondent, an incorporation, as well as by the second respondent itself. This necessitated the institution of interpleader proceedings by the applicant in order to settle the conflicting claims, given that the judgment creditor did not admit the claims made by the respondents.

The background of the matter is that the judgment creditor entered into a written consultancy agreement with Harare Kawasaki, which was represented

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Mathonsi J

by the first respondent on 12 November 2011, in terms of which he was engaged as a sales manager for a salary and commission and was, *inter alia,* entitled to be paid "a share of 10 ten percent of net profit of Harare Kawasaki". The preamble to that agreement reads:

> "The following contract has been entered into by and between:
>
> HARARE KAWASAKI
>
> (represented by AW Mackintosh, managing director)
>
> (hereinafter referred to as 'the Company')
>
> And
>
> PUMULANI NCUBE
>
> (represented by him),
>
> (hereinafter referred to as "the Consultant")
>
> Harare Kawasaki is a company incorporated in Zimbabwe, which undertakes motorcycle sales, clothing and accessories for all aspects of motorcycling both for competition and leisure."

In due course the judgment creditor sued Harare Kawasaki under that consultancy agreement for payment of the sum of $82 511.50 aforesaid, due in terms of that agreement. Judgment was granted in his favour on 25 March 2013. It is the execution of that judgment which has given rise to these interpleader proceedings.

In his opposing affidavit, which he deposed to in his personal capacity as well as in his capacity as a director of the second respondent, the first respondent stated that the applicant wrongly attached his assets as well as those of the second respondent because Harare Kawasaki is not a separate legal entity capable of owning assets or suing or being sued in its own right, it being merely a brand name under which the second respondent conducts business. He maintained that the writ of execution issued against Harare Kawasaki was a nullity for the same reason given that it was issued against a non-existent entity.

In respect of his personal claim, the first respondent made reference to vehicle registration books showing that a Trailer Super Bike and a Mazda Demio belong to himself while a Ford Ranger pickup

belongs to Grenadier Safaris (Pvt) Ltd and a Range Rover Station wagon belongs to Charles Phillip Bwerinofa. I must mention that, at the hearing of the matter, Mr *Simango,* G who appeared for the judgment creditor, conceded that there is no basis for refusing to admit the claim for the vehicles and therefore that they should be released. Nothing more needs to be said about that aspect of the dispute. An order for the release of the vehicles will be made.

Regarding the claim to the rest of the items placed under attachment, Mr *Tanyanyiwa* for the first and second respondents submitted that the property H

Mathonsi J

A in question belongs to the second respondent, which is a duly incorporated company and is therefore not Harare Kawasaki, which is a mere brand name. As Harare Kawasaki does not exist as a separate entity, the attachment of property belonging to the second respondent was wrong. He however conceded that it is the second respondent which trades as Harare Kawasaki. It also employed the judgment creditor.

B Mr *Tanyanyiwa* submitted that while r 8C allows for a person carrying on business in a name or style to be sued in that name or style, that rule either does not apply to incorporations or it has been overtaken by time. Rule 8C provides:

> "Subject to this Order, a person carrying on business in a name or style other C than his own name may sue or be sued in that name or style as if it were the name of an association, and rules 8A and 8B shall apply, *mutatis mutandis*, to any such proceedings."

The entire Order 2A relates, as the heading states, to "proceedings by or against associations, etc." To my mind, that heading has a telling effect on the extent of its application, especially when read with the word "person" in r 8C.

D Mr *Tanyanyiwa* relied on the authority of *Inyanga Downs Orchards v Buwu* HH-108-10 in which Musakwa J stated at p 5 of the judgment:

> "Regarding the identity of the applicant, Mr *Mpofu* submitted that a party may sue or be sued by its trade name. Mr *Mpofu* cited Order 2A r 8. However this provision relates to associates being able to sue or be sued in the name of the E association. He must have had in mind Order 2A r 8C . . . As submitted by Mr *Chikumbirike*, in the papers before this court the applicant is not described as an association. Reverting to r 8C, Mr *Mpofu* sought to argue that the applicant is sufficiently described in para 3 of the founding affidavit where it is stated that:
>
> > 'The applicant, as a person at law was first incorporated in terms of the law as far back as 1968.'
>
> Now, the effect of incorporation is that a company assumes the name by which F it is registered. In this respect see s 22(2) of the Companies Act [*Chapter 24:03*]. Although Mr *Mpofu* drew the court's attention to para 3 of the founding affidavit, it is clear that the applicant is not sufficiently described by its trade name. Therefore Mr *Chikumbirike* was quite correct that the respondent does not know who Inyanga Downs Orchard is. The applicant should have instituted proceedings in the name by which it was incorporated."

G In my view, the foregoing passage in the judgment of Musakwa J does not support the contention that the provisions of r 8C have been overtaken by time. It would be absurd to have a provision in the rules which has no application, neither does it support the assertion that r 8C does not apply to incorporations. All the learned judge said was that r 8C applies to associations. H He did not say that it does not apply to incorporations. That rule provides

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Mathonsi J

that "a person" can be sued in a name or style other than its own name and A in the name or style in which it carries on business.

It is a celebrated principle of company law that a company, once incorporated, becomes a fictious person. That is the whole essence of the legal *persona* principle of our law. To that extent therefore, the use of the word "person" in r 8C should, of necessity, include an incorporation. In my view, an B incorporation which carries on business in a name or style can be sued in that name or style. Once one examines that provision from that perspective, the definition of an association as a trust, or a partnership, a syndicate, a club or any other association of persons which is not a body corporate in r 7 pales. Rule 8C does not refer to an association as defined in r 7 but to "a person." Rules of court

are there to regulate the practice and procedure of the court: C *Forestry Commission v Moyo* 1997 (1) ZLR 254 (S) at 259A.

I conclude therefore that the judgment creditor was entitled to sue the second respondent in its trading name or style, what Mr *Tanyanyiwa* chose to call "a brand." Clearly the second respondent presented itself to the transacting public as Harare Kawasaki. In fact, the passage in the contract of the D parties which I cited above even refers to Harare Kawasaki as "a company incorporated in Zimbabwe." While admitting that it employed the judgment creditor, the second respondent wants to dissociate itself from the judgment taken against it in its trading name, a trading name it elected to use in the consultancy agreement, a real case of hiding behind the proverbial finger. E It cannot succeed.

To me it is dishonest in the extreme for the second respondent to attempt to evade liability in terms of the judgment taken against it in the name or style in which it relates to the public. What belongs to Harare Kawasaki clearly belongs to the second respondent. It would appear that the second respondent uses the two names interchangeably in order to confound creditors. Therefore F the claim made by the second respondent has no merit.

In the result, I make the following order, that

1. The first respondent's claim to the Trailer Super Bike, Mazda Demio, Ford Ranger pickup and Range Rover station wagon is hereby upheld.
2. The applicant is directed to release the said vehicles from attachment. G
3. The second respondents' claim to the goods placed under attachment in execution of the judgment in HC 437/13 is hereby dismissed.
4. The goods set out in the notice of seizure and attachment dated 29 May 2013 issued by the applicant, except for the goods set out in para 1 above, are hereby declared executable. H

Mathonsi J

A 5. The second respondent shall bear the costs of the judgment creditor and the applicant.

Kantor & Immerman, applicant's legal practitioners

Muhonde Attorney, first and second respondent's legal practitioners

B *Nyikadzino, Simango & Associates*, judgment creditor's legal practitioners

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Document 42 of 79

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2013/Volume 2/WEI WEI PROPERTIES (PVT) LTD v S & T EXPORT AND IMPORT (PVT) LTD 2013 (2) ZLR 358 (H)

WEI WEI PROPERTIES (PVT) LTD v S & T EXPORT AND IMPORT (PVT) LTD 2013 (2) ZLR 358 (H)

Citation	2013 (2) ZLR 358 (H)
Case No	Judgment No. HH-336-13
Court	High Court, Harare
Judge	Mathonsi J
Heard	24 September 2013; *CAV*

Judgment 9 October 2013

Counsel *T A Tovenhave,* for the applicant
C *McGown,* for the respondent

Case Type Civil application

Annotations No case annotations to date

Flynote

Arbitration – *award – registration – grounds for refusing registration – limited grounds on which registration may be refused – averment that award contrary to public policy – what must be shown*

Costs – *higher scale – ill-conceived litigation – application for setting aside* D *of arbitral award and opposition to the registration thereof – application without merit – costs on the higher scale appropriate*

Headnote

The operative clause in a lease agreement about the duration of the lease provided that the lease would be for a fixed term, but also provided that E either party could terminate this agreement by providing three months' notice. Acting in terms of this provision, the applicant gave the respondent three months' written notice of termination of the lease on the ground that it required the premises for its own use. The ensuing dispute was referred to arbitration. The arbitrator confirmed the validity of the notice of termination, holding that the clear meaning of the contract was that F either party could at any time terminate the lease agreement on giving three months' notice, without having to give any reason or justification for the termination and that the applicant was entitled to an order for the eviction of the respondent. When the applicant sought to register the award, the respondent opposed registration on the ground that the G award offended the established precepts of law and natural justice, in that it is not competent at law to terminate a lease agreement when there has been no breach on the part of the tenant.

Held, that registration of an arbitral award or its recognition for the purposes of enforcement can be only be refused upon the person, against whom it is invoked, satisfying the court of the existence of grounds of refusal H

A set out in article 36 of the Model Law, contained in the First Schedule to the Arbitration Act [*Chapter 7:15*] Here, the only ground that might have been relied on was to show that recognition or enforcement would be contrary to the public policy of Zimbabwe. In this regard, "an arbitral award which . . . goes beyond mere faultiness or incorrectness and constitutes a palpable inequity that is so far reaching and outrageous in B its defiance of logic or acceptable moral standards that a sensible and fair minded person would consider that the conception of justice in Zimbabwe would be intolerably hurt by award, then it would be contrary to public policy to uphold it" *(dicta per* Gubbay CJ in *ZESA v Maposa* 1999 (2) ZLR 452 (S) at 446 followed).

C *Held*, further, that the arbitrator gave effect to the wishes of the parties, who contracted to the exclusion of any protection they may have enjoyed under the law. They agreed that the lease would be terminable on the giving of three months' notice. The arbitrator did not go outside the contract. He did not make a contract for the parties but merely respected the sanctity of contract. His conclusion could not be faulted. The award D should therefore be registered.

Held, further, that where an attempt to set aside an arbitral award was not only out of time but also without any merit whatsoever and should not have been undertaken at all, it was appropriate for the court to award costs on the higher scale.

Cases referred to E

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

Delta Operations (Pvt) Ltd v Origen Corporation (Pvt) Ltd 2007 (2) ZLR 81 (S)

F *Tapera & Ors v Fieldspark Invstms (Pvt) Ltd* HH-103-13

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

Legislation considered

Arbitration Act [*Chapter* 7:15], First Schedule, art 36

Case information

G *T A Tovenhave,* for the applicant

C *McGown,* for the respondent

Judgment

Mathonsi J: This is an application for the registration of an arbitral award made by retired Justice Smith on 31 May 2012 in terms of which he H confirmed as valid the termination of a lease agreement between the parties,

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Mathonsi J

directed the respondent to vacate the leased premises, namely 1st and 2nd A Mezzanine Floors, Century House West, 36 Nelson Mandela Avenue, Harare, (the premises), or face eviction and directed the respondent to bear the applicant's costs on the scale of legal practitioner and client

The application is opposed by the respondent, which has also filed a counter application seeking the setting aside of the arbitral award which counter B application is also opposed by the applicant.

The applicant is the owner of the premises which it leased to the respondent by lease agreement signed on 6 July 2010. The said agreement was due to expire on 31 December 2012. In terms of Clause 1 of the lease agreement:

> "1. DURATION C
>
> 1.1. Notwithstanding the date of signature hereof this agreement shall commence on 1 January 2010 and shall continue for a period of 3 years terminating on 31 December 2012 (hereinafter referred to 'the terminal date') and the agreement shall continue in full force as a periodic lease, terminable by either party on three calendar months written notice.
>
> 1.2. Operating Costs Attributable share shall be based upon the ratio which the D floor areas of the leased premises bears to the total lettable areas of the building.
>
> 1.3. Notwithstanding the terms of sub-paragraph 1.1 above, this agreement shall continue in full force and effect after the terminal date as a periodic lease, terminable by either party on three calendar months written notice to the other unless notice to the contrary has been given by either party to E the other not less than three calendar months prior to the terminal date.
>
> 1.4. Notwithstanding sub-paragraph 1.1 and 1.3 either party may terminate this agreement by providing 3 months notice"

The lease agreement also contained an arbitration clause, providing for reference of any disputes arising between the parties to arbitration. The F applicant gave the respondent three months' written notice of termination of the lease on 31 March 2011 on the ground that it required the premises for its own use. The respondent contested the applicant's right to terminate the lease in terms of Clause1.4 of the lease agreement, arguing that a lease for a fixed period cannot be terminated on the giving of three months notice. The G respondent also alleged the existence of an oral lease agreement the parties allegedly entered into on 7 July 2011, in terms of which it was entitled to remain in occupation, notwithstanding the notice.

In accordance with the lease agreement, the dispute was referred to arbitration and Justice Smith issued an award aforesaid. In arriving at the decision he made, Justice Smith reasoned that: H

Mathonsi J

> A "The fact that paragraph 1.4 does not impose any conditions or restrictions is a very clear indication that the parties intended that either party could at anytime terminate the lease agreement on giving 3 months notice, without having to give any reason or justification for the termination. Accordingly I find that the

claimant was within its rights to terminate the lease agreement and, that being the case, that it is entitled to an order of eviction of the respondent."

B As I have already stated, the applicant seeks registration of the award for enforcement, which is opposed by the respondent on the basis that the award offends the established precepts of law and natural justice in that it is not competent at law to terminate a lease agreement when there has been no breach on the part of the tenant. For that reason the interpretation by the C arbitrator "is wrong". The respondent also attacked the arbitrator's conclusion that there was no oral agreement as "not correct".

In its counter application filed on 11 October 2012, the respondent seeks the setting aside of the award on essentially the same grounds used to oppose registration. Other than to say that the arbitrator was wrong in concluding that the applicant was entitled to terminate the lease on notice, the respondent D did not advance any other discernable ground for seeking to set aside the award. Registration of an arbitral award or its recognition for purposes of enforcement can only be refused upon the person against whom it is invoked satisfying the court of the existence of grounds of refusal set out in Article 36 of the mode law in the Arbitration Act [*Chapter 7:15*]: *Tapera & Ors* v E *Fieldspark Investments (Pvt) Ltd* HH-103-13.

Article 36 sets out the grounds for refusal of recognition or enforcement of an arbitral award and states that the party against whom it is invoked must show the court proof that;

1. A party to an arbitration agreement was under some incapacity or the F agreement was invalid under the law to which the parties subjected it to or under the law of the country where the award is made.
2. The party was not given proper notice of the appointment of an arbitrator or the arbitral proceedings or was otherwise unable to present his case.
3. The award deals with a dispute not contemplated or not falling within the G terms of reference to arbitration.
4. The composition of the arbitral tribunal or the procedure was not in accordance with the agreement of the parties or the law of the country where the arbitration took place.
5. The award has not yet become binding on the parties or has been set aside H or suspended by a court of law.

Mathonsi J

6. The court finds that the subject matter of the dispute is not capable of A settlement by arbitration under the law of Zimbabwe or recognition or enforcement will be contrary to the public policy of Zimbabwe.

The respondent has not set out any of the grounds for refusal of recognition or enforcement set out above. The closest the respondent has come to setting out grounds is its challenge on the correctness of the interpretation accorded B to the lease agreement by the arbitrator. Mr *McGown* for the respondent submitted that the award is against the law and the public policy of this country because a lease agreement for a fixed period cannot be terminated by notice given by either party as it only expires by effluxion of time. As I said, this is the same ground relied upon for seeking to set aside the award. C

Accordingly, a resolution of that issue will also resolve the propriety of the counter application. What is crystal clear from the papers is that the respondent takes issue with the award on the basis that the interpretation of the lease agreement done by the erstwhile arbitrator is wrong, faulty and incorrect. In that regard the seminal pronouncement of Gubbay CJ in *ZESA v Maposa* 1999 (2) ZLR 452 (S) at 466E-G is salutary. D

He remarked:

> "Under articles 34 or 36, the court does not exercise an appeal power and either uphold or set aside or decline to recognise and enforce an award by having regard to what it considers should have been the correct decision. Where, however, the reasoning or conclusion in an award goes beyond mere faultiness or incorrectness and constitutes a palpable inequity that is so far reaching and outrageous in its E 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 consequence applies where the arbitrator has not applied his mind to

> the question or has totally misunderstood the issue and the resultant injustice reaches the point mentioned above." See also *Decimal Investments (Pvt) Ltd v Arundel Village (Pvt) Ltd & Anor* F

2012 (1) ZLR 581 (H); *Delta Operations v Origen Corp (Pvt) Ltd* 2007 (2) ZLR 81 (S) at 85C-D.

I am unable to say that the reasoning or conclusion in the award constitutes a palpable inequity that defies logic as to offend our conception of justice. G Quite to the contrary, the arbitrator gave effect to the wishes of the parties, for it is them who contracted to the exclusion of any protection they may have enjoyed under the law. They agreed that the lease would be terminable on the giving of three months' notice. The arbitrator did not go outside the contract. He did not make a contract for the parties but merely respected the sanctity of contract. Indeed his conclusion cannot be faulted. H

2013 (2) ZLR p363

Mathonsi J

A In any event, even if the arbitrator's conclusion was faulty, I cannot substitute my own conclusion, as I am not exercising an appeal power. Clearly, therefore, the inescapable conclusion is that both the opposition to the application for registration and the application for setting aside the arbitral award are completely devoid of merit.

B As if that was not enough, the respondent has the unenviable task of proving that the counter application was filed timeously. In terms of article 34(3) of the model law, an application for setting aside an award must be made within three months from the date the award was delivered. The applicant objected to the application in its opposing affidavit, pointing to the fact that, the award having been delivered on 31 May 2012, the application to set it aside should C have been made no later than 31 August 2012. As this application was filed on 11 October 2012 it was filed out of time and should fail on that basis. The respondent had an opportunity to disprove that allegation in its answering affidavit but failed dismally to do so. In the answering affidavit of John Stouyannides, the respondent's managing director could only say in para 4:

> D "This is denied. The counter application is properly before the court. The award was received sometime the end of July 2012 and the application has been made well in time."

In my view, this is not only vague in the extreme but disarmingly inadequate. It is not clear why the respondent chose to be vague about the date of receipt E of the award. It is improbable that the award could only be delivered to the respondent two months after it was handed down. The only inference to be drawn from the respondent's vagueness is that indeed the award was received immediately after it was handed down on 31 May 2012. I can conceive of no reason why it was not. For that reason the counter application was filed out of time.

F I am satisfied that this is a matter in which the respondent should be penalised with an award of punitive costs. Not only was the opposition demonstrably without merit, even the feeble attempt to set aside the award, coming as it did well out of time and without any merit whatsoever, should not have been undertaken at all. In pursuing that ill-conceived misadventure right up G to the end even after the life span of the lease agreement had expired on 31 December 2012, the respondent was abusing the process of the court. It should therefore pay for that as it unnecessarily put the applicant out of pocket. In the result, it is ordered that:

1. The arbitral award handed down on 31 May 2012 by Honourable Justice H L G Smith (Retired), be and is hereby registered as an order of this court.

2013 (2) ZLR p364

Mathonsi J

2. The respondent and all those claiming occupation through it should A vacate Stand 2551 Salisbury Township Harare also known as Century House West, 36 Nelson Mandela Avenue, Harare upon service of this order.
3. The respondent's counter application for setting aside the award is hereby dismissed. B
4. The respondent shall bear the costs of both applications on a legal practitioner and client scale.

Tavenhave & Machingauta, applicant' legal practitioners

Venturas & Samukange, respondent's legal practitioners C

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Document 43 of 79

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CHEMATRON PRODUCTS (PVT) LTD v TENDA TRANSPORT (PVT) LTD & ANOR 2013 (2) ZLR 365 (H)

Citation	2013 (2) ZLR 365 (H)
Case No	Judgment No. HH-343-13
Court	High Court, Harare
Judge	Mafusire J
Heard	11 September 2013; *CAV*
Judgment	9 October 2013
Counsel	*C Kuhuni,* for applicant *T K Hove,* for first respondent
Case Type	Civil application
Annotations	No case annotations to date

Flynote

Appeal – *noting of – effect – judgment appealed against suspended – rationale for practice – position in English practice – need for unsuccessful party* D *to apply for stay of execution pending appeal – desirability of following such practice in Zimbabwe*

Headnote

In this country, unless otherwise provided, the common law rule of practice is that the noting of an appeal automatically suspends the execution of the judgment appealed against. The party that succeeds in the court of E first instance has to seek the leave of the court to execute the judgment whilst the appeal is pending. The rationale for this rule is that there is need to prevent an irreparable damage from being caused to the appellant. On the other hand, if the purpose of the rule is to prevent an irreparable damage from being caused to the intended appellant, the automatic F suspension of the judgment or decision appealed against may equally cause an irreparable injustice or harm to the respondent, who would have been the successful party. It is he who is prevented from enjoying the fruits of his success in the court of first instance.

In England, the noting of an appeal does not automatically suspend the execution of the judgment appealed against. The intending appellant G must apply, and show special circumstances, for the execution to be stayed. The rationale for the English position is that a successful litigant should not be deprived of the fruits of his litigation. It should be for the unsuccessful party to have to seek leave for the judgment to be suspended if an appeal is noted. That party should be the one required to show that H special circumstances exist which justify the suspension sought.

The system that prevails in Zimbabwe must have the effect of encouraging A some debtors or persons with doubtful claims to appeal simply in order to play for time. Since an appeal automatically suspends execution, a debtor who wants to delay may as well appeal, even if he knows the appeal is hopeless or even if he knows that he will abandon it. At least it will buy him time. Our rule tends to encourage an abuse of the court process. In B practice, a party that loses the first round in the court of first instance is less likely to want to press for the expeditious determination of the appeal, especially as the outcome is uncertain. Given the inevitable and often inordinate delays experienced in the appeal process, the appellant is often content to let matters drag on and, in the process, frustrate the respondent who was the successful party. The respondent has to wait C patiently before he can enjoy the fruits of his success. The situation can be quite desperate in eviction cases. Where the landlord obtains an order for the ejectment of the tenant from the rented premises for which the tenant is not paying rent and the tenant appeals the order, the landlord can be stuck with the intransigent tenant for months on end, even years, D unless he obtains leave to execute.

The situation obtaining in the English legal system has been adopted in Zimbabwe in maintenance and labour cases. The appellant must apply for the order appealed against to be suspended.

Cases referred to E

Arches (Pvt) Ltd v Guthrie Holdings (Pvt) Ltd 1989 (1) ZLR 152 (H)

Econet (Pvt) Ltd v Telecel Zimbabwe (Pvt) Ltd 1998 (1) ZLR 149 (H)

Fox & Carney (Pvt) Ltd v Carthew-Gabriel (2) 1977 (4) SA 970 (R)

Geffen v Strand Motors (Pvt) Ltd 1962 (3) SA 62 (SR).

Levin v Felt and Tweeds Ltd 1951 (1) SA 213 (C) F

Malan v Tollekin 1931 CPD 214

Monk v Bartram [1891] 1 QB 346.

Olifants Tin "B" Syndicate v De Jager 1912 AD 477

Reid & Anor v Godart & Anor 1938 AD 511

Santam Insurance Company Ltd v Paget (2) 1981 ZLR 132 (GDS) G

South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd 1977 (3) SA 534 (A)

The Annot Lyle (1886) 11 PD 114 (CA)

Verkouteren v Savage 1919 AD 183

Wood NO v Edwards & Anor 1966 RLR 336 (G)

*Zaduck v Zaduck (2)*1965 RLR 635 (G); 1966 (1) SA 550 (SR) H

Mafusire J

A *ZDECO (Pvt) Ltd v Commercial Careers College (1980) (Pvt) Ltd* 1991 (2) ZLR 61 (H)

Legislation considered

Labour Act [*Chapter 28:01*], s 92E

Maintenance Act [*Chapter 5:09*], s 27(3)

Case information

B *C Kuhuni,* for applicant

T K Hove, for first respondent

Judgment

Mafusire J: In this country, unless otherwise provided, the noting of an C appeal automatically suspends the execution of the judgment or decision appealed against: *Wood NO v Edwards & Anor*

1966 RLR 336 (G) (*per* Lewis J). It is the same in South Africa: *Olifants Tin "B" Syndicate v De Jager* 1912 AD 477 at p 487; *Verkouteren v Savage* 1919 AD 183 at p 184; *Malan v Tollekin* 1931 CPD 214; *Reid v Godart* 1938 AD 511; *Levin v Felt and Tweeds Ltd* 1951 (1) SA 213 (C) at 217 and *Geffen v Strand Motors* D *(Pvt) Ltd* 1962 (3) SA 62 (SR).

The party that succeeds in the court of first instance has to seek the leave of the court to execute the judgment whilst the appeal is pending. This is a common law rule of practice. In *Levin's* case above van Winsen AJ, at p 217F, explained the rule as follows:

> E "The common law is clear that a notice of appeal, save in certain exceptional cases, automatically suspends the execution of the judgment appealed against. No application is necessary to ensure this result. If the party who succeeds in the judgment against which the notice of appeal has been lodged wishes to execute upon the judgment, then it is he who is required to make an application to do so."

The rationale for the common-law rule is that there is need to prevent an F irreparable damage from being caused to the appellant. In *Reid's* case above de Villiers JA said, at p 513:

> "Now, by Roman-Dutch Law, the execution of all judgments is suspended upon the noting of an appeal; that is to say, the judgment cannot be carried out; and no effect can be given thereto, whether the judgment be one for money (on which a writ can be issued and levy made) or for any other thing or any form G of relief granted by the court appealed from. … The foundation of the commonlaw rule as to suspension of a judgment on the noting of an appeal is to prevent irreparable damage from being done to the intending appellant, whether such damage be done by a levy, under a writ, or by the execution in any other manner appropriate to the nature of the judgment appealed from."

Corbett JA put it as follows in *South Cape Corporation (Pty) Ltd v* H *Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) at 544:

Mafusire J

> ". . . it is today the accepted common law rule of practice in our court that generally A the execution of a judgment is automatically suspended upon the noting of an appeal … The purpose of the rule is to prevent irreparable damage from being done to the intended appellant."

If the purpose of the rule is to prevent an irreparable damage from being caused to the intended appellant, the automatic suspension of the judgment B or decision appealed against may equally cause an irreparable injustice or harm to the respondent who would have been the successful party. It is he who is prevented from enjoying the fruits of his success in the court of first instance. Smith J criticised the rule in *Econet (Pvt) Ltd v Telecel Zimbabwe (Pvt) Ltd* 1998 (1) ZLR 149 (H). He noted that the position was the other way round in England. In England an appeal does not automatically suspend C the execution of the judgment appealed against. The intending appellant must apply and show special circumstances for the execution to be stayed. The rationale for the English position is that a successful litigant should not be deprived of the fruits of his litigation: *The Annot Lyle* (1886) 11 PD 114 (CA) and *Monk v Bartram* [1891] 1 QB 346.

In the *Econet* case Smith J. proposed a change in our law. At p 157 he stated D as follows:

> "It seems to me that there would be merit in changing our law on this aspect so as to follow the English system. If a party has obtained a judgment or order from a court of first instance, then *prima facie* that party should be entitled to the benefit of that judgment or order. It should be for the unsuccessful party E to have to seek leave for the judgment to be suspended if an appeal is noted. That party should be the one required to show that special circumstances exist which justify the suspension sought. The system that prevails in Zimbabwe must have the effect of encouraging some debtors or persons with doubtful claims to appeal simply in order to play for time, as in this case. In other words, since an appeal automatically suspends execution, a debtor who wants to delay may as well appeal even if he knows the appeal is hopeless or even if he knows that F he will abandon it. At least it will buy him time." I agree with the learned judge. Our rule in a way encourages an abuse of the

court process.In practice a party that loses the first round in the court of first instance is less likely to want to press for the expeditious determination of the appeal,especially as the outcome is uncertain. Thus, given the inevitable G and often inordinate delays experienced in the appeal process, the appellant is often content to let matters drag on and in the process frustrate the respondent who was the successful party. The respondent has to wait patiently before he can enjoy the fruits of his success. The situation can be quite desperate in eviction cases. Where the landlord obtains an order for the ejectment of the tenant from the rented premises for which the tenant is not paying rent and H

Mafusire J

A the tenant appeals the order the landlord can be stuck with the intransigent tenant for months on end, even years, unless he obtains leave to execute. Smith J. noted with interest that the situation obtaining in the English legal system has been adopted in Zimbabwe in maintenance cases. In terms of s 27(3) of the Maintenance Act [*Chapter 5:09*], the noting of an appeal against B a decision of a maintenance court does not, whilst the appeal is pending, suspend the decision appealed against unless the maintenance court, on application, directs otherwise.

I note too with interest that the English position has also been extended to labour matters. The Labour Act [*Chapter 28:01*], in different sections, provides for appeals to the Labour Court and for appeals to the Supreme C Court. Section 92E, a 2005 amendment, then provides that an appeal in terms of that Act shall not have the effect of suspending the determination or decision appealed against. The Labour Court is empowered, on application, to make interim determinations on matters pending before it on appeal. In practice, these include applications for stay of execution pending appeal.

D Smith J. in the *Econet*, case concluded by recommending the wholesale adoption of the English position. At p 157 of his judgment he said:

> "I would recommend that consideration be given to amending the law insofar as it provides for the automatic suspension of the execution of any judgment or order granted by the High Court or the magistrates court where an appeal is noted."

I support such recommendation.

E The present application is a typical application for leave to execute pending appeal. There was a trial in 2006. The applicant was the plaintiff. The first respondent was the defendant. The applicant sought specific performance. It said it had bought a property from the first respondent. It said it had paid the agreed purchase price. The first respondent contested the claim. It said F there had never been any valid agreement between the parties or that if there had been one then such agreement had been cancelled because of a breach by the applicant. At the conclusion of the trial this court, Bere J, *inter alia*, granted the order for specific performance but reserved his reasons. It was only three years later, in February 2012, that those reasons were made available.

Upon receipt of the reasons for judgment the first respondent appealed to the G Supreme Court. It had applied to the Supreme Court for the condonation of the late noting of the appeal. Although neither the application for condonation nor the order of the Supreme Court was placed before me it was common cause that condonation had been granted.

Slightly over a month after the first respondent had noted the appeal, the H applicant applied for leave to execute. The applicant sought the same order

Mafusire J

for specific performance as it had sought at the trial, namely that the first A respondent should be ordered to transfer the property in question to it failing which the Sheriff for this court, or his lawful deputy, should be authorised and empowered to do so. The applicant based its application on the ground that it continued to suffer considerable prejudice by not having the property registered in its name when it could mortgage it to raise finance for its B business operations. The applicant also attacked the propriety of the first respondent's appeal. It said the appeal was frivolous and vexatious, a ploy to buy time and one simply meant to harass the applicant because it had no prospects of success.

On the other hand, the first respondent opposed the application. It relied C chiefly on its grounds of appeal. They were as follows:

(1) that the learned judge had erred by holding that the applicant had proved its case on a balance of probabilities;

(2) that no due weight had been placed on the fact that the applicant had breached the terms of the original agreement of sale between the parties; D

(3) that no due weight had been placed on the fact that there had been no valid and binding agreement of sale between the parties;

(4) that the court had erred by not taking due cognizance of the fact that there had been no resolution by the respective boards of the parties authorising the sale of the property. E

On the question of the lack of merit of the appeal the first respondent argued, among other things, that the Supreme Court had granted condonation for the late noting of the appeal on the same facts and that therefore that court must have accepted that the appeal had prospects of success.

The applicant objected to the first respondent's inclusion of ground no. (4) F above in its ground of opposition, on the basis that such ground had not been part of the issues for trial. Apparently none of the parties' counsel had been involved in the trial. Mr *Hove*, for the first respondent, submitted from the bar that he had perused the trial record and had noted that the aspect of the lack of board resolutions by either party had been one of the issues for trial G but that the learned trial judge had omitted it in his judgment. However, Mr *Hove* conceded that nothing had been placed before me in the present application to back him up on that point. I shall revert to this aspect later on in my judgment.

Both parties were alive to the requirements for an application for leave to execute as they not only dealt with them in the affidavits but also in argument. H

Mafusire J

A The court has an inherent power to control its own process. Thus, in the exercise of its wide discretion it can order the stay of execution of its judgment or order that the judgment be carried into execution. The court strives to achieve real and substantial justice. In *Santam Insurance Company Ltd v Paget (2)* 1981 ZLR 132 Gubbay J, as he then was, stated as follows, at 134-135:

> B "As observed by Goldin J, as he then was, in *Cohen v Cohen (1)* 1979 RLR 184 (G); 1979 (3) SA 420 (R) at 423B-C, the court enjoys an inherent power, subject to such rules as there are, to control its own process. It may, therefore in the execution of a wide discretion, stay the use of its process of execution where real and substantial justice so demands. See also *Graham v Graham*, 1950 (1) SA 655 (T) at 658. The onus rests on the party claiming this type of relief to satisfy the court that injustice would otherwise be caused to him or, to C express the proposition in a different form, of the potentiality of his suffering irreparable harm or prejudice."

In an application for leave to execute pending an appeal the court considers the following factors:

(a) the preponderance of equities; that is to say the potentiality of irreparable D harm and prejudice to the applicant if leave to execute is granted, or the potentiality of irreparable harm and prejudice to the respondent on appeal if leave to execute is refused;

(b) the prospects of success of the appeal, whether the appeal is frivolous or vexatious or has been noted not with the genuine intention of correcting E a perceived wrong but merely in order to buy time;

(c) if the competing interests are equal, then the balance of hardship to either party.

See *Zaduck v Zaduck* (2)1965 RLR 635 (G); 1966 (1) SA 550 (SR); *Graham v Graham (supra); South Cape Corporation v Engineering Management* F *Services (supra); Fox & Carney (Pvt) Ltd v Carthew-Gabriel* (2) 1977 (4) SA 970 (R); *Arches (Pvt) Ltd v Guthrie Holdings (Pvt) Ltd* 1989 (1) ZLR 152 (H); *ZDECO (Pvt) Ltd v Commercial Carriers College* (1980) *(Pvt) Ltd* 1991 (2) ZLR 61 (H); *Econet (Pvt) Ltd v Telecel Zimbabwe (Pvt) Ltd (supra)*.

I now turn to consider each of the above requirements in relation to the G facts of this matter.

(i) preponderance of the equities

The applicant's position was that the first respondent had both the money and the property. It said it was neither unable to develop the property nor to utilize it for raising mortgage finance because it was still registered in the H first respondent's name.

Mafusire J

On the other hand, the first respondent argued that it would complicate matters A if in the meantime the property was to be transferred to the applicant. The applicant would in all probability mortgage the property but only to have the situation unscrambled again should the appeal succeed. The first respondent put it this way in its heads of argument:

"Prejudice will be occasioned on the part of respondent (appellant) if leave to B execute is granted because if an innocent third party acquires the property or developments are effected on the property then this will complicate the whole case."

The first respondent also submitted that ever since the disputed transaction it had refrained from transferring or selling the property to any other person or to encumber it in any way and he undertook to keep the situation like that C until the appeal was determined.

Whilst the applicant was able to explain prejudice to itself directly if execution was not granted and the status quo remained, first respondent's concern was only in respect of potential third parties to whom the property might potentially be sold or mortgaged by the applicant should it get transfer D whilst the appeal was pending. On this score I consider that a preponderance of the equities favour the applicant. However, I cannot identify such harm to either party as would be irreparable should execution pending appeal be granted or refused.

(ii) the prospects of success on appeal E

Mr *Hove*, for first respondent, argued strenuously that the fact that the Supreme Court had granted first respondent's application for condonation in which it necessarily had to deal with its prospects of success, must mean that the superior court had been satisfied with the merits of the appeal. However, I have considered it quite unsafe to rely on this argument. There was nothing placed before me to show what material had been placed before the Supreme F Court for the condonation application. The Supreme Court judgment, if any, was not produced either. It would be presumptuous to hold as fact that the Supreme Court was satisfied that the appeal had prospects of success.

I have carefully analysed the judgment of Bere J which the first respondent has appealed against. In ground no 2 of its notice of appeal the first respondent G refers to a breach of the agreement by the applicant. However, I consider that such a breach, if indeed there was, would have had no bearing on the outcome of the case. The breach would have been an immaterial factor. Whatever initial agreement there had been between the parties it had undoubtedly been novated subsequently. A new agreement had come into being. The applicant had paid the purchase price in terms of the new agreement. The H

Mafusire J

A first respondent's own lawyers, evidently upon instructions from the first respondent itself, and evidently upon being satisfied of the payments by the applicant, had not only tendered transfer of the property to the applicant and had not only raised a pro forma invoice for the transfer fees, but had also gone to actually receipt the payment. That was the most telling piece of evidence which was common cause and which tilted the scales of probabilities heavily B in favour of the applicant. I do not see the appeal court upsetting this finding. The first respondent's third ground of appeal is also without merit. From the analysis of the evidence by the trial judge, the conclusion could not have been anything other than that there had been a valid agreement between the parties that had been successfully consummated. It was manifestly an afterthought C that the first respondent was trying to shift the goal posts on the question of interest. It is quite evident that the first respondent had wanted to pass onto the applicant the whopping rate of interest of 600 per cent which it was allegedly being charged by its own bank but in an unrelated transaction. It was undoubtedly the applicant's refusal to accept this rate of interest, well D after it had paid the purchase price in full, that the first respondent had then turned around and had refused to pass transfer, alleging, a breach of the agreement by the applicant. Again I do not see the appeal court upsetting the trial judge's findings on this aspect.

The first respondent's fourth ground of appeal, namely that the court had E failed to consider that the agreement of sale had not been sanctioned by the boards of directors of both parties, is frivolous and, in my view, opportunistic. If the aspect of the board resolutions had been identified as one of the issues for trial it surely would have been listed in the joint pre-trial conference minute. Almost at the beginning of his judgment Bere J mentioned that the matter had been referred to trial at the pre-trial conference held before F Kudya J and that there had been only four issues for trial. Those had been listed as follows:

(1) whether or not there had been a valid and binding agreement of sale between the parties,

(2) if G there had been a valid agreement of sale, had the plaintiff breached the agreement of sale such as to enable the defendant to cancel?

(3) was the plaintiff entitled to take transfer of the property into their name?

(4) what order as to costs was just and equitable?

The trial court could not concern itself with an issue which had not been H referred to trial, if at all it had been raised as an issue.

2013 (2) ZLR p374

Mafusire J

At the hearing Mr *Hove* submitted from the bar that, before filing the notice A of appeal, he had perused the record of proceedings and had noted that the aspect of the board resolutions had been an issue for trial. However, when I queried why such evidence had not been placed before me in this application, no plausible explanation was given.

I am satisfied that the appeal has no prospects of success. I see no justification B for the applicant to wait for the determination of the appeal before it can enjoy the fruits of its success in the trial court. In the premises the application for execution pending appeal is hereby granted with costs. I make the following order:

(a) Execution of the judgement obtained in this court in HC1140/07 on 6 February 2012 is hereby granted pending the determination of the appeal C to the Supreme Court in SC 67/12.

(b) The respondents are hereby ordered to effect transfer of ownership of Stand 4 of Subdivision B of Prospect to the applicant and the first respondent is hereby ordered and directed to sign, or cause to be signed, all the necessary transfer documents within 14 days of the date of this D order, failing which the Sheriff for Zimbabwe, or his lawful deputy, shall be authorised and empowered to sign any such documents.

(c) The costs of this application shall be paid by the first respondent.

C Kuhuni Attorneys, legal practitioners for applicant

T K Hove & Partners, legal practitionersfor first respondent E

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Document 44 of 79

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2013/Volume 2/MUTYAMBIZI v GONCALVES & ANOR 2013 (2) ZLR 375 (H)

MUTYAMBIZI v GONCALVES & ANOR 2013 (2) ZLR 375 (H)

2013 (2) ZLR p375

Citation	2013 (2) ZLR 375 (H)
Case No	Judgment No. HH-354-13
Court	High Court, Harare
Judge	Dube J
Heard	2 October 2013; *CAV*
Judgment	9 October 2013
Counsel	*I Ndudzo*, for the applicant *C Venturas*, for the respondent

Case Type Application for contempt order

Annotations No case annotations to date

Flynote

Practice and procedure – *process – service – on whom process must be served – claim for order affecting liberty of respondent – must be served on respondent personally*

Headnote

D In terms of r 39(1) of the High Court Rules 1971, process in relation to a claim for an order affecting the liberty of a person must be served by delivery of a copy thereof to that person personally. An application to commit the respondent to prison for contempt of court would be an instance of such an application. Imprisonment is a harsh form of punishment and deprives a person of his liberty and is therefore a grave consequence the E respondent may have to endure. It is imperative, in contempt of court applications, where the remedy sought is likely to result in imprisonment, that process is served personally. The fact that there is a proviso in the order sought that enables the court to suspend the imposition of a custodial sentence does not take away the requirement for personal F service. Service on .the respondent's legal practitioner is not sufficient.

Cases referred to

Macheka v Moyo 2003 (2) ZLR 49 (H)

Scheelite King Mining Co (Pvt) Ltd v Mahachi 1998 (1) ZLR 173 (H)

Wilson v Min of Defence & Ors 1999 (1) ZLR 144 (H)

Legislation considered G

High Court Rules 1971 (RGN 1047 of 1971), r 39(1)

Case information

I Ndudzo, for the applicant

H *C Venturas*, for the respondent

2013 (2) ZLR p376

Judgment

Dube J: This is an application for an order for contempt for court against A the first respondent. The terms of the order sought are as follows:

"IT IS DECLARED THAT:

1. The first respondent is guilty of contempt of court of the order of this Honourable Court granted under case no. HC 99052/11 and HC 6661/13 in that:
   (a) he has wilfully disregarded that orders refused to comply with it and B has deliberately continued to prevent the applicant from enjoying his rights as established in the court orders;
   (b) he has also expelled all the applicant's employees from the farm

IT IS ACCORDINGLY ORDERED THAT:

2. The first respondent is sentenced to 60 days' imprisonment with labour until full compliance by the first respondent and all persons acting through C him with terms of the orders of the court in case no. HC 9052/11 and HC 6661.13.

   Provided that that term of imprisonment shall be wholly suspended on condition:

   (a) the first respondent does not return to or enter upon the farm, unless the applicant has voluntarily vacated the farm or been evicted therefrom D in terms of an order of a competent court having final effect; and

(b) the first respondent that does not aid and abet anybody in any way in any attempt to evade the terms of this order or the order in case no. HC 9052/11 and HC 6661/13 while these orders are in place

3. This order shall itself constitute and serve as a writ for the arrest and detention of the first respondent. E

4. The costs of this application shall be borne by the first respondent."

The first respondent is alleged have defied court orders in HC 9052/11 and HC 6661/13 respectively.

The application for contempt of court was served on P Kapfumbe at Granger and Harvey Legal Practitioners. It is the applicant's contention that the F first respondent is now barred for failure to file opposing papers in terms of Order 43 of the High Court Rules. The first respondent also failed to appear in court today to answer the contempt charges. Mr *Venturas*, who appeared in court for the first respondent, advised the court that he now acts for the respondent in this matter. He has dealt with other matters for the respondent. He was unaware that this matter had been set down for today. G When he saw it on the roll, he decided to appear on behalf of the respondent but he had no instructions. The matter was stood down to chambers. When the matter resumed Mr *Venturas* advised the court that he now acts for the first respondent. He enquired from Mr *Harvey* whether he was aware of the case. Mr *Harvey* confirmed receiving the contempt of court papers but he has since renounced agency. H

Dube J

A Mr *Ndudzo* submitted that contempt of court process is governed by Order 43 and that r 39(1) does not apply to the service of this application as that rule relates to summons and other documents. Rule 35(1) states thus:

"Manner of service of process generally

(1) Process in relation to a claim for an order affecting the liberty of a person shall be served by delivery or a copy thereof to that person personally."

B Rule 35(1) defines "process" as follows:

"In this order –

(1) 'process' means any document which is required to be served on any person in terms of these rules."

The rule is clear that the term "process" is inclusive of any document which is C required to be served on any person in terms of the rules. Rule 39(1) therefore applies to the application before the court. The rule specifically provides for service where the liberty of an individual is affected and contemplates personal service. Rule 39(1) has not been complied with as there has been no personal service of the application on the first respondent. The application was not brought to the personal notice of the respondent.

D This being an application for contempt of court wherein applicant seeks that first respondent be imprisoned for 60 days if he does not abide by the order of this court, and that the order granted by this court serve as a warrant for the arrest of the first respondent, it is the court's view that service of the contempt of court papers was not proper as service was effected on E

Mr *Kapfunde* and not on the first respondent personally. Imprisonment is a harsh form of punishment and deprives a person of his or her liberty and is therefore a grave consequence the respondent may have to endure. It is imperative, in contempt of court applications, where the remedy sought is likely to result in imprisonment that process is served personally.

The likelihood that these proceedings may result in a court imposing a custodial F sentence is real. In *Macheka v Moyo* 2003 (2) ZLR 49 (H) the court stated:

"It is trite that the principal objective of civil contempt of court process is to compel, by means of personal attachment and committal to gaol, the performance of the court order. The imprisonment imposed is very often suspended pending fulfillment by the defaulter of his obligations."

The applicant's argument that personal service was not necessary because G it is unlikely that a court will impose a custodial sentence because there is a proviso in the order sought that enables the court to suspend the imposition of a custodial sentence if he vacates the property does not find favour with this court. He is supposing that the respondent will vacate the farm.

The court must satisfy itself that the respondent has been properly served. The H rationale for requiring personal service in a case where a person's liberty is

Dube J

likely to be affected arises from the realization that an order for imprisonment A is harsh and has drastic consequences. The courts have emphasized on the need for personal service in civil imprisonment and contempt of court proceedings. As was put in *National Insurance Company of Zimbabwe v Dhlamini* 1999 (2) ZLR 196 (H) at 197 *per* Bartlett J:

> "Civil imprisonment for a debt is, it goes without saying, a drastic remedy. Personal service of a civil imprisonment summons is (in the absence of unusual B circumstances) a necessity."

The approach has always been to require personal service in contempt of court proceedings. In *Scheelite King Mining Company (Pvt) Ltd v Mahachi* 1998 (1) ZLR 173 (H) the court dealt with an application for contempt of court. Process had been served on the respondent's attorneys and the respondent C had defaulted. The court refused to grant the order as there had been no personal service. The court, being alive to the need for personal service, ordered and directed the Deputy Sheriff to place under arrest the person of the respondent and bring him before the court.

In *Wilson v Minister of Defence and Others* 1999 (1) ZLR 144 (H) the court had issued a provisional order against the respondents calling upon them D *inter alia* to show cause why they should not be declared to be in contempt of court and fined specified amounts. The order required personal service on the respondents.

The sentiments of the court in the above cases confirm that contempt of court proceedings do restrict the liberty of a person and hence it is my E view that compliance with r 39(1) is therefore mandatory. Where there is likelihood that the liberty of a person may be restricted, r 39(1) should be strictly complied with.

The court in this case was alive to the requirements of r 39(1). It is therefore the court's view that by their very nature, contempt of court proceedings do require personal service and are rightfully governed by r 39(1) because they F are a claim for an order affecting a person's liberty. It did not appear to the court that the first respondent was aware of the hearing.

In the result it is ordered as follows:

The application is removed from the roll for want of compliance with r 39(1). The applicant is directed to comply with r 39(1) before enrolling G this application for consideration by this court.

Mutamangira and Associates, for the applicant

Venturas and Samukange, for the first respondent H

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Document 45 of 79

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2013/Volume 2/MORTEN v MORTEN & ANOR 2013 (2) ZLR 379 (H)

MORTEN v MORTEN & ANOR 2013 (2) ZLR 379 (H)

Citation	2013 (2) ZLR 379 (H)
Case No	Judgment HH- 339-13
Court	High Court, Harare
Judge	Uchena J

Heard 25 September 2013; CAV

Judgment 10 October 2013

Counsel *C Chinyama,* for the plaintiff
B Diza, for the first defendant

Case Type Civil trial

Annotations No case annotations to date

Flynote

Evidence – *foreign law – finding or decision of court of foreign country – when such finding or decision may be accepted as stating what law of such country is*

Headnote

D The plaintiff, a Philippine national resident in Zimbabwe, married her first husband, also a Philippine national, in the Philippines in 1984. In February 2000, in Zimbabwe, she married her second husband (since deceased), an American who was resident in Zimbabwe. She presented herself as a divorcee, presenting a divorce order apparently granted E in the Dominican Republic. The first defendant is the daughter of the plaintiff's second husband. She had been appointed the executrix dative of her late father's estate. She challenged the validity of the plaintiff's Zimbabwean marriage, to her late father.

It was argued that the first defendant had established that, according the Constitution of the Philippines, Philippine nationals are not allowed to F divorce. Counsel relied on the evidence of the first defendant and on a judgment of the Philippines Supreme Court. Further, according to the certified records held by the Administrator and Civil Registrar General National Statistics' Office of the Republic of the Philippines, the plaintiff was still married to her first husband. The first defendant admitted that she was not an expert in Philippine law.

G *Held,* with regard to what the law of the Philippines is, under s 25(3)(a) of the Civil Evidence Act [*Chapter 8:01*], the court, in considering any issue as to the law of any foreign country or territory, may have regard to any finding or decision purportedly made or given in any court of record in that country or territory, where the finding or decision is reported or H recorded in citable form. In terms of subs (5), a finding or decision shall

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be taken to be reported or recorded in citable form only if it is reported A or recorded in writing in a report, transcript or other document which, if the report, transcript or document had been prepared in connection with legal proceedings in Zimbabwe, could be cited as an authority in legal proceedings in Zimbabwe. The judgment produced was a finding or decision in terms of s 25(3)(a) and could be accepted in considering B the Philippines law on divorce and how it would affect the plaintiff's purported divorce in the Dominican Republic. The official records from the Administrator and Civil Registrar General also presented a serious challenge to the validity of the plaintiff's marriage to the first defendant's father. C

Cases cited

Munhuwa v Mhukakura Bus Services (Pvt) Ltd 1994 (2) ZLR 382 (H)

Standard Chartered Finance Zimbabwe Ltd v Georgias & Anor 1998 (2) ZLR 547 (H) D

Legislation considered

Civil Evidence Act [*Chapter 8:01*], s 25

Case information

C Chinyama, for the plaintiff

B Diza, for the first defendant E

Judgment

Uchena J: The plaintiff is a Philippino national resident in Zimbabwe. On 1 June 1984 she married Apolonio Ramos Dacany ("Dacany"), a Philippino, in the Philippines. Thereafter ,on 16 February 2000, she married the late Baker Eddy Morten, an American who was resident in Zimbabwe. The later marriage was solemnised in Zimbabwe. At the subsequent marriage, she F presented herself as a divorcée. She apparently complied with the requirements for the marriage of a divorcée. The magistrate who conducted the marriage said she presented a divorce order which enabled her to issue them with a marriage certificate.

The first defendant is the late Baker Eddy Morten's daughter, who has been G appointed the executrix dative of her late father's estate. She challenged the validity of the plaintiff's Zimbabwean marriage to her late father. She alleged that the plaintiff was, at the time of the Zimbabwean marriage, still married to Dacany.

The parties agreed on the issues to be determined at the trial. The issue of the validity of the plaintiff's marriage to the first defendant's father was agreed H

A to be a determining issue and thus the parties agreed that it be determined first, before the trial progresses into the other issues.

The first defendant, who raised the challenge to the validity of the plaintiff's marriage, led evidence after which Mr *Chinyama,* the plaintiff's counsel, applied for absolution from the instance. Absolution from the instance is B granted when the party who has led evidence fails to establish a *prima facie* case against the defending party on which a court might make a reasonable mistake and find for her.

Mr *Chinyama* submitted that the first defendant has not presented a *prima facie* case which justifies putting his client on her defence. He submitted that:

(1) the plaintiff presented a decree of divorce to the marriage officer;

(2) Wendy C Dias' search in the Supreme Court of Santo Domingo was not exhaustive and is thus not proof that the plaintiff did not divorce in the Dominican Republic;

(3) the late Baker Eddy Morten admitted, in an e-mail message, that he hired a con artist, who obtained a decree of divorce for the plaintiff and D that the first defendant in evidence admitted that this was merely the deceased's opinion on the validity of the decree of divorce;

(4) Dacany deposed to an affidavit in which he says he is aware of the divorce which the plaintiff instituted;

(5) the first defendant conceded that the search in the Dominican Republic E was not exhaustive;

(6) the Philippine law on divorce has not been properly ventilated; etc.

Mr *Diza,* for the first defendant, submitted that the first defendant has established that according the Constitution of the Philippines, Philippines nationals are not allowed to divorce. He relied on the evidence of the first F respondent and a judgment of the Philippines Supreme Court in the case of *Van Dorn v Judge Romilo* GR No L-68470 8 October 1985. He further submitted that according to the records held by the Administrator and Civil Registrar General National Statistics' Office of the Republic of the Philippines, the plaintiff is still married to Dacany. This means that the plaintiff has two co-existing marriages. That suggests that she was married when she entered G into the Zimbabwean marriage, which could only have been validly entered into after the lawful dissolution of the Philippine marriage.

The real dispute is not on whether the plaintiff and the late Baker Eddy Morten performed the formalities which could have constituted a valid marriage in Zimbabwe. It is also not the production of a decree of divorce H to the marriage officer which determines whether or not the plaintiff was

Uchena J

actually divorced. The search by Wendy Dias and Dacany's confirmation of A the divorce are also not conclusive evidence of the existence of the divorce order. The ventilation of the Philippines law on divorce is conclusive evidence on the existence of a subsisting marriage between the plaintiff and Dacany. That issue will be considered in detail in the court's main judgment guided by the provisions of s 25 of the Civil Evidence Act [*Chapter 8:01*] ("the B Act"), which provides as follows:

> "(1) A court shall not take judicial notice of the law of any foreign country or territory, nor shall it presume that the law of any such country or territory is the same as the law of Zimbabwe.
>
> (2) Any person who, in the opinion of the court, is suitably qualified to do so on account of his knowledge or experience shall be competent to give expert C evidence as to the law of any foreign country or territory, whether or not he has acted or is entitled to act as a legal practitioner in that country or territory.
>
> (3) In considering any issue as to the law of any foreign country or territory, a court may have regard to –
>
> (a) any finding or decision purportedly made or given in any court of record in that country or territory, where the finding or decision is reported or D recorded in citable form; and
>
> (b) any written law of that country or territory; and
>
> (c) any decision given by the High Court or the Supreme Court as to the law of that country or territory.
>
> (4) The law of any foreign country or territory shall be taken to be in accordance E with a finding or decision mentioned in paragraph (a) of subsection (3), unless the finding or decision conflicts with another such finding or decision on the same question.
>
> (5) For the purposes of paragraph (a) of subsection (3), a finding or decision shall be taken to be reported or recorded in citable form only if it is reported or recorded in writing in a report, transcript or other document which, if the report, transcript or document had been prepared in connection with legal proceedings F in Zimbabwe, could be cited as an authority in legal proceedings in Zimbabwe."

This issue will depend on whether the first defendant qualifies to give expert evidence on the Philippines law on divorce as provided by subs (2) of s 25 of the Act. In her evidence, she said that she is not an expert on Philippine law, and that concession settles the question whether or not expert evidence G has been led on the divorce laws of the Philippines. The issue will, however, further depend on the acceptability of the reported decision in the case of *Van Dorn v Judge Romilo supra* a decision of the Supreme Court of the Republic of the Philippines, where Melencio-Herrera J said at p 3:

> "What he is contending in this case is that the divorce is not valid and binding in this jurisdiction, the same being contrary to local law and public policy. H

Uchena J

> A It is true that owing to the nationality principle, embodied in Article 15 of the Civil Code, only Philippine nationals are covered by the policy against absolute divorces the same being considered contrary to our concept of public policy and morality. However aliens may obtain divorces abroad, which may be recognised in the Philippines, provided they are valid according to their national law."

Without going into detail, I am satisfied that this is a decision recorded B and reported in citable form as required by s 25(3)(a) of the Act, which I can have regard to in considering the Philippines law on divorce and how it will affect the plaintiff's purported divorce in the Dominican Republic. It meets the criteria set by s 25(5) of the Act. At this stage I will, however, remain open to any evidence the plaintiff may lead to the contrary effect C as envisaged by s 25(4) of the Act. This, however, means the plaintiff must open her case and lead evidence. Her application for absolution from the instance cannot therefore succeed.

The other real issue is whether what happened before the marriage officer in Zimbabwe constitutes a valid marriage in view of authenticated documents from the Philippines, which clearly state that the plaintiff is still married to D Dacany. There is therefore evidence that the plaintiff is in two monogamous marriages. She has to prove that what these documents allege is not true and that her marriage to the late Baker Eddy Morten is valid. It can not be valid as long as the Philippino records, indicates that she is still married to Dacany. The Phillipino marriage which was registered on 1 June 1984 E invalidates the later marriage entered into by the plaintiff and the late Baker Eddy Morten on 16 February 2000.

In my view, the official records from the Administrator and Civil Registrar General present a serious challenge to the validity of the plaintiff's marriage to the first defendant's father. It is a certification of the existence F of the marriage between the plaintiff and Dacany issued by the appropriate

authority after a search of the Philippines national records of marriages solemnised between 1945 and 2013. According to exhibit 3, the search was to establish the existing and subsisting marriage between the plaintiff and Dacany. The search established that the plaintiff is still married to Dacany. The plaintiff, who should have better knowledge of the alleged divorce, G should give evidence, if she has such evidence. She should not be afraid of testifying on the validity of her marriage to Baker Eddy Morten. She is the one who obtained the divorce order. She should know from which court she obtained it. She should be able to tell the court how such an order would be registered in the Philippines to bring to an end her marriage to Dacanay. H I would therefore lean in favour of proceeding with the trial See

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2013 (2) ZLR p384

Uchena J

Standard Chartered Finance Zimbabwe Ltd v Georgias & Anor 1998 (2) ZLR 547 (H) A at 554A-B where Smith J said:

> "In doing so, I was very conscious of Beadle CJ's comments in the *Supreme Service Station* case*, supra,* that in case of doubt, a judicial officer should always lean on the side of allowing the case to proceed. In this case I had no doubt in the matter."

In this case I do not do so because of any doubt but because the first defendant B established the existence of two marriages which would have the effect of nullifying the Zimbabwean marriage. In *Munhuwa v Mhukahuru Bus Services (Pvt) Ltd* 1994 (2) ZLR 382 (H) at 387B-D Chatikobo J said:

> "However, in the *Supreme Service Station* case *supra* at 5H-I Beadle CJ said that: C
>
> > '. . . rules of procedure are made to ensure that justice is done between the parties and so, as far as possible, courts should not allow rules of procedure to be used to cause an injustice. If the defence is something peculiarly within the knowledge of a defendant, and the plaintiff has made out some case to answer, the plaintiff should not lightly be deprived of his remedy without first hearing what the defendant has to say. A defendant who might be afraid D to go into the witness box should not be permitted to shelter behind the procedure of absolution from the instance.'
>
> The bus was on the defendant's premises. It is the defendant's servants who are accused of removing the parts. The defendant is therefore particularly well placed to answer the accusations and this would in normal circumstances be sufficient evidence upon which I could make a reasonable mistake and find for E the plaintiff."

It is only fair that the plaintiff testifies as to how she got the divorce order in the Dominican Republic and its effect on the marriage registered in the Philippines. She has particular knowledge on how she got the divorce order she presented to the marriage officer and its validity and effect on her marriage to Dacany. F

In the result, the plaintiff's application for absolution from the instance is dismissed with costs.

Chinyama & Associates, plaintiff's legal practitioners

Mutetwa & Nyambirai, legal practitioners for the first defendant G

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Document 46 of 79

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2013/Volume 2/STANDARD CHARTERED BANK ZIMBABWE LTD v CHINA SHOUGANG INTERNATIONAL 2013 (2) ZLR 385 (S)

STANDARD CHARTERED BANK ZIMBABWE LTD v CHINA SHOUGANG INTERNATIONAL 2013 (2) ZLR 385 (S)

2013 (2) ZLR p385

Citation 2013 (2) ZLR 385 (S)

Case No Judgment No. S-49-13

Court	Supreme Court
Judge	Ziyambi JA, Garwe JA and Hlatswayo JA
Heard	15 July 2013; *CAV*
Judgment	11 October 2013
Counsel	*A P de Bourbon SC*, for the appellant *T C Masawi*, for the respondent
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Bank – *client – bank's obligations to – moneys paid by client into bank – ownership of such moneys – bank's duty to repay money to client on demand – bank surrendering money in client's account to Reserve Bank* D *in obedience to unlawful directive – bank nonetheless obliged to repay money to client on demand*

Contract – *performance – impossibility – supervening impossibility – where defence applicable – directive by exchange control authority to bank to pay monies held in a customer's bank account to Reserve Bank – directive held to be ultra vires – cannot amount to a supervening impossibility –* E *defence to a claim against bank inapplicable*

Exchange control – *Reserve Bank – directive to commercial bank to surrender money in client's foreign currency account – lawfulness of such directive – directive ultra vires s 35(c) of Exchange Control Regulations (SI 109 of 1996)*

Headnote

F The appellant was a commercial bank with whom the respondent held two accounts. Consequent upon a directive issued by the Reserve Bank of Zimbabwe (RBZ) to the appellant, and purportedly made in terms of s 35(1) of the Exchange Control Regulations 1996 (SI 109 of 1996), the G appellant transferred to the RBZ a sum of money from these two bank account. The respondent thereupon demanded a repayment from the appellant of the sum of money so transferred from its bank account to the RBZ. The appellant, however, refused to repay, claiming that the RBZ had rendered it impossible to comply with its contractual obligation to make payment to respondent. The respondent successfully applied H to the High Court for an order compelling the repayment of the money.

On appeal therefrom, the appellant persisted in its opposition, based on A supervening impossibility, to the claim. The appellant, however, conceded that the directive from the RBZ was *ultra vires* the provisions of s 35(1).

Held, that the general rule relating to deposits made in a bank account by a customer in that the money becomes the property of the bank, which can use such deposit as it pleases, so long as it pays to the depositor, B on demand, the equivalent of the amount deposited in the account. The legal relationship is that of debtor and creditor. Although the customer "deposits" money to the credit of his account with the bank, the transaction is not one of *depositum* but of loan. Accordingly, what the appellant paid over to the RBZ was its own money. The respondent's right to be re-paid the equivalent of its deposits, on demand, remained unaffected by its C bank's dealings therewith. The transfer to the RBZ, in obedience to its directive, was made at the appellant 's risk and did not extinguish the appellant's contractual obligation to make payment to the respondent.

Held, further, that any "impossibility to make payment" must be established and not merely alleged. The appellant failed to prove that repayment of the money to the respondent was "impossible" as opposed to inconvenient. D In any event, impossibility resulting from the act of one of the parties

to a contract does not dissolve the contract and its obligations. Rather, it leaves the party whose act created the impossibility liable for the consequences that flow from it.

Held that the acts complained of did not qualify as *vis maior* or *casus* E *fortuitus*. The defence of supervening impossibility was not available to appellant which was under no obligation to comply with a directive given without lawful statutory authority.

Judgment of Bere J in *China Shougang Intl v Standard Chartered Bank Zimbabwe Ltd* 2011 (2) ZLR 456 (H) confirmed. F

Cases referred to

ABC Bank v Mackie Diamonds S-23-13

Absa Bank Ltd v Intensive Air (Pty) Ltd & Ors 2011 (2) SA 275 (SCA)

Bob's Shoe Centre v Heneways Freight Services (Pty) Ltd 1995 (2) SA 421 (A)

Burg Trailers SA (Pty) Ltd v Absa Bank 2004 (1) SA 284 (SCA) G

Foley v Hill (1848) 2 HL Cas 28; 9 ER 1002

Ormerod v Deputy Sheriff, Durban 1965 (4) SA 670 (D)

Peters, Flamman and Co v Kokstad Municipality 1919 AD 427

Standard Bank of South Africa v Echo Petroleum CC 2012 (5) SA 283 (SCA) H

Ziyambi JA

Legislation A

considered Exchange Control Regulations 1996 (SI 109 of 1996), ss 35(1), 37 & 40

Case information

A P de Bourbon SC, for the appellant

T C Masawi, for the respondent

Judgment

B **Ziyambi JA**: Standard Chartered Bank Zimbabwe ("the appellant") or ("the bank") is a commercial bank registered and operating in Zimbabwe. The respondent is a company duly incorporated in terms of the laws of Zimbabwe and was carrying on business in Redcliff, Zimbabwe. It is a foreign investor whose specific purpose was the refurbishment of the blast furnaces of a C Zimbabwean steel manufacturing company popularly known as Zisco Steel. In October 2007, the respondent held two accounts with the Kwekwe branch of the appellant. As at 9 October 2007, there was, in the two accounts, an aggregate credit balance of US$47 739.86.

In terms of a directive issued by the Reserve Bank of Zimbabwe (referred to D herein as "the RBZ") sometime in October 2007, the appellant transferred, to the RBZ, the total credit balance of US$47 739.86 from the two accounts. The directive does not form part of the record but it is common cause that it was purportedly issues in terms of s35(1) of the Exchange Control Regulations 1996 (SI 109 of 1996) ("the Regulations"). When the respondent demanded E payment to it of the monies deposited in the accounts, the bank refused to pay. It claimed that the intervention of the RBZ had rendered it impossible for it to comply with its contractual obligation to make payment to the respondent.

The respondent applied to the High Court for an order compelling payment. It alleged that the monies were wrongfully and unlawfully debited from its F account without its consent and approval. It claimed that in terms of the law of banking, the bank was contractually bound to repay the credit balances on demand.

The bank contended, in its defence, that upon receiving the directive by the RBZ, the funds held in the respondent's accounts ceased to be the property G of the bank and became that of the RBZ. It was contended further that the intervention of the RBZ constituted an "Act of State" and, therefore, a supervening impossibility which discharged the appellant from its obligations to the respondent.

The learned judge granted the application. It is against his judgment that H the bank now appeals.

Ziyambi JA

The main issue which falls for determination in this appeal is whether the A bank is liable to pay to the respondent the aggregate amount of US$47,739.86 transferred by it to the Reserve Bank.

The law

The general rule relating to deposits made in a bank account by a customer is that the money becomes the property of the bank, which can use such deposit B as it pleases, so long as it pays to the depositor, on demand, the equivalent of the amount deposited in the account. In *Standard Bank of South Africa v Echo Petroleum CC* 2012 (5) SA 283 (SCA) at para 27 it was said:

> "The general rule is that moneys deposited into a bank account fall into the ownership of the bank. The resulting credit belongs to the customer, the bank having a contractual obligation to pay the customer on demand and to honour C cheques validly drawn on the account to the extent that it stands in credit."

See also *ABC Bank v Mackie Diamonds* S-23-13: *Foley v Hill* (1845) 2 HL Cas 28.

The legal relationship between a bank and its customer whose account is in credit with it is that of debtor and creditor. Although the customer "deposits" D money to the credit of his account with the bank, the transaction is not that of *depositum*, but of loan. See *Burg Trailers SA (Pty) Ltd v Absa Bank Ltd* 2004 (1) SA 284 (SCA) at 284G; *Ormerod vs Deputy Sheriff, Durban* 1965 (4) SA 670 (D) at 673C-H; *Absa Bank Ltd v Intensive Air (Pty) Ltd & Ors* 2011 (2) SA 275 (SCA).

If this legal position is followed to its logical conclusion then the deposits E were the property of the bank and what the bank paid to the RBZ was its own money. That the bank parted with the deposits in the account was of no import to the respondent whose right to be paid the equivalent of the deposits, on demand, remained unaffected by the bank's dealings therewith. The transfer to the RBZ, in terms of its directive, did not, therefore, extinguish the bank's F contractual obligation to make payment to the respondent.

The defence

The bank contends that it is discharged from its contractual obligations to the respondent by reason of a supervening impossibility otherwise known as *vis maior* or *casus fortuitus*, namely the RBZ directive. In support of its stance G it relies on the judgments in *Peters, Flamman & Co v Kokstad Municipality* 1919 AD 427 and *Bob's Shoe Centre v Heneways Freight Services (Pty) Ltd* 1995 (2) SA 421 (A). The brief facts of the *Peters, Flamman* case, as summarised in R H Christie *The Law of Contract in South Africa* 3 ed at pp 524-525, are that the appellant firm was contracted to light the streets of Kokstad for a period of years. During the currency of the contract, in H

Ziyambi JA

A wartime, the partners were interned as enemy aliens and their business wound up under the relevant war legislation. The Municipality's claim for damages for breach of contract and forfeiture of the firm's plant under a clause of the contract was rejected by the Appellate Division. At p 435 of the judgment of the court, Solomon ACJ remarked as follows:

> "… nor is it necessary to consider generally what are the circumstances in which B it can be said that a contract has become impossible of performance. For the authorities are clear that if a person is prevented from performing his contract by *vis maior* or *casus fortuitus* under which would be included an Act of State as we are concerned with in this appeal , he is discharged from liability."

In the *Bob's Shoe Centre* case *(supra)* the appellants were contracted to clear and deliver a consignment of shoes to the respondent's factory in the C city. A fire consumed the warehouse where the shoes were warehoused. The shoes were destroyed and it became impossible to complete performance of the contract.

Clearly the facts of both these cases are distinguishable from those *in casu.* The appellant herein has not shown that for some reason beyond its control, D it cannot, from its resources, repay the debt. It has not proved impossibility. It goes without saying that in order for its defence to succeed the appellant must do more than merely allege impossibility. The impossibility must be proved, that

is, it must be clear from the evidence that performance is impossible, not merely undesirable or uneconomical. See Christie *op cit* at p 525.

In any event, it would appear that where a ministerial directive is given E without statutory authority, obedience thereto will not qualify as a *vis maior* or *casus fortuitus*. The appellant has submitted that it was obliged to follow the RBZ's directive and cites s 40 of the Regulations. It alleges that it did not oppose the directive because of "its fear of the RBZ" which, in terms of s 37 of the Regulations, has the power to revoke its licence. As the respondent F submitted, the directive was issued without statutory authority.

It was *ultra vires* the provisions of s 35 of the Regulations which grants no authority to the RBZ to confiscate deposits in the accounts of customers of the bank. The correctness of this submission emerges quite clearly from a reading of the section which provides as follows:

"35. Authorised G **dealers and other persons to comply with directions**

(1) Authorised dealers and foreign exchange bureaux de change 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 terms on which they are to exchange foreign currency for Zimbabwean H currency;

Ziyambi JA

(c) the offer of foreign currency in their possession for sale to the Reserve A Bank.

(2) Persons concerned with –

(a) the keeping of any register in Zimbabwe; or

(b) the payment of capital moneys, dividends or interest in Zimbabwe;

shall comply with such directions as may be given to them by an exchange B control authority in relation to any function conferred or imposed on them by or under these regulations."

Not only was the directive in violation of s 35 of the Regulations but the bank had the option, if so minded, of resorting to the provisions of s 37 of the Regulations which provide for adequate opportunity to be given to the dealer concerned to make representations before any punitive measures C were taken, as well as to the safeguards provided in s 40. Both statutory provisions are set out below:

"**37. Penalties for failure by authorised dealers to comply with regulations or directions**

(1) Subject to this section, if an exchange control authority is satisfied that an D authorised dealer has –

(a) contravened any provision of these regulations; or

(b) failed to comply with any order or direction with which it is its duty to comply;

the exchange control authority may direct the authorised dealer to cease all dealings in foreign currency , or such dealings as the exchange control authority E may specify, for such period not exceeding twelve months as the exchange control authority may specify in the direction.

(2) Before giving a direction in terms of subsection (1), the exchange control authority shall give the authorised dealer concerned an adequate opportunity to make representations in the matter."

"**40. Orders** F

(1) Subject to subsection (3), the Reserve Bank may make orders for all or any of the following purposes –

(a) to protect or improve the value of Zimbabwean currency;

(b) to bring about and preserve stability in the currency market in Zimbabwe;

(c) to prescribe any matter which in terms of these regulations is required or G permitted to be prescribed or which, in the Reserve Bank's opinion, is necessary or convenient to be prescribed in order to give effect to these regulations.

[Subsection (1) substituted by s. 3 of SI 258A, with effect from the 21st November, 1997.]

(2) Orders made under subsection (1) may provide for – H

Ziyambi JA

(a) the A manner in which authorised dealers shall conduct their business for the purposes of these regulations; . . .

(3) Orders made under subsection (1) shall not have effect until they have been approved by the Minister and published in the *Gazette*."

At the hearing of the appeal, Mr *de Bourbon* conceded that the RBZ directive was *ultra vires* of the provisions of s 35(1) of the Regulations. Paragraph (c), it will be seen, deals with the offer of *foreign currency in their possession for sale to the RBZ.* He submitted, however, that the defence of supervening impossibility was available to the bank even where the directive was unlawful. I disagree.

In Christie *loc cit* the following observation is made by the author:

> "The limits of *vis maior* and *casus fortuitus* have not been authoritatively defined for the purposes of this branch of the law, but it is clear from *Peters, Flamman*, where the internment and winding up were carried out under statutory authority, that any similar act of state would qualify. Legislation subsequent to the making of the contract, making performance illegal either absolutely or without a specified consent which has been refused, will also qualify, as will refusal of a statutory consent, but *not obedience to a ministerial directive given without statutory authority*. For the purposes of this branch of the law there is no necessity to distinguish between vis *maior* and *casus fortuitus* ,which between them include any happening, whether due to natural causes or human agency, that is unforeseeable with reasonable foresight and *unavoidable with reasonable care*" (emphasis is mine).

And on p 528:

> "Self-created impossibility, that is, impossibility resulting from the act of one of the parties, does not discharge the contract but leaves the party whose act created the impossibility liable for the consequences. This will be so whether the impossibility is complete or partial, and whether or not the act that causes the impossibility is wrongful."

I respectfully associate myself with those views. The acts complained of by the bank do not qualify as *vis maior* or *casus fortuitus* and do not absolve the bank from compliance with its contractual obligation to the respondent.

Conclusion

As has been shown above, the credit balance in the respondent's account is a debt that the appellant owes to the respondent. The appellant has placed no evidence before the court which would establish that it has become impossible for it to make payment of its debt. Its contention is that, having made payment to the RBZ in terms of its directive, it no longer has the respondent's money in its possession and is consequently discharged from its obligation to make payment upon demand by the respondent.

2013 (2) ZLR p392

Ziyambi JA

The contentions by the appellant run contrary to the established principles of banking law, namely, that the deposits became the bank's property. It seems that what the appellant's defence boils down to is that it ought not to be expected to pay in these circumstances. But as has been demonstrated above, the dealings by the appellant with the deposits in the accounts, namely, the payments to the Reserve Bank of Zimbabwe, were made at its own risk and did not affect its obligation in law to pay its debt to the respondent on demand.

The appeal is accordingly dismissed with costs.

Garwe JA and Hlatshwayo JA concurred.

Gill, Godlonton & Gerrans, appellant's legal practitioners

Masawi & Partners, respondent's legal practitioners

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Document 47 of 79

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2013/Volume 2/GOODLIVING REAL ESTATE (PVT) LTD & ANOR v LIN 2013 (2) ZLR 393 (S)

GOODLIVING REAL ESTATE (PVT) LTD & ANOR v LIN 2013 (2) ZLR 393 (S)

Citation	2013 (2) ZLR 393 (S)
Case No	Judgment No. S-61-13
Court	Supreme Court, Harare
Judge	Ziyambi JA, Garwe JA & Patel JA
Heard	14 October 2013
Judgment	14 October 2013
Counsel	*L Uriri* with *T E Toto*, for the appellants *C W Gumiro*, for the respondent
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

C **Landlord and tenant** – *lease – sum paid to secure lease – payment of such sum a breach of Commercial Premises (Rent) Regulations 1983 (SI 676 of 1983) – landlord committing an offence in demanding such sum – sum refundable to prospective tenant*

Headnote

D The respondent entered into an agreement with the appellants for payment of what the parties termed "a commitment fee" in respect of commercial premises then undergoing renovations. A tendency has arisen in the housing market where prospective tenants seeking rental space in buildings where there is a high demand for such space are requested by the lessor to pay what is variably termed "a commitment fee", "goodwill E of the rental space" or "lease preference fees". The purpose of this fee is to enable the prospective tenant to be given first priority in concluding a lease agreement in respect of the premises once they are available for occupation. Without payment of such a fee, a prospective tenant would stand little, if any, chance of even being considered for possible F occupation of the premises.

The respondent paid a sum as a deposit to the second appellant, leaving a balance which was to be paid once the renovations were complete. Once the balance was paid, the parties were then to agree on the amount of rental payable per month. Having formed the opinion that he had been misled, the respondent decided to demand a refund of the sum of G the deposit. The appellant refused to refund the money, claiming that the respondent had been in breach of the terms of the agreement. The respondent then instituted proceedings for the recovery of the amount in question. The court *a quo* found that no agreement had been reached that the deposit would be non-refundable and that the appellants had H been unjustly enriched at the expense of the respondent. It ordered the

appellants to refund the deposit, together with interest and costs of suit. A The appellants then noted an appeal against that order.

Held, that in terms of s 19 of the Commercial Premises (Rent) Regulations 1983 (SI 676 of 1983), no lessor shall, in respect of commercial premises let or to be let by him, require or permit the lessee or prospective lessee of the premises to pay, in consideration of the grant, continuation or B renewal of the lease concerned, any bonus, premium or other like sum in addition to the rent, or any amount for negotiating the lease. Section 21 of the Regulations makes it clear that anyone

who receives payment in circumstances similar to those of this case cannot retain that payment. A breach of s 19 is an offence in terms of s 32. The clear intention of the legislature was to prohibit the tendency on the part of some landlords to C take advantage of desperate tenants seeking to rent accommodation by demanding, over and above the amounts that a landlord may lawfully demand from a lessee, such as rent and a security deposit, other amounts that are not permissible in terms of the Regulations. It is impermissible, and a breach of the law, for a landlord to demand payment of "a D commitment fee", or "goodwill", or "a lease consideration fee" or any other fee, by whatever name, which amounts to a bonus or premium or a consideration for negotiating the lease. This provision has been part of our law for a long time.

It must be noted that a security or good tenancy deposit does not constitute a prohibited payment in terms of s 19. This is clearly recognised in s 20 of E the Regulations, which provides that only such deposit must be refunded to the lessor within 14 days of the termination of the lease in question.

Cases referred to

S v Fraser Partners (Pvt) Ltd & Anor 1971 (2) RLR 26 (A); 1972 (1) SA 408 (RA) F

Legislation considered

Commercial Premises (Rent) Regulations (S.I. 676 of 83) s 19, 20, 21(2), 32 & 34 G

Case information

L Uriri with *T E Toto*, for the appellants

C W Gumiro, for the respondent

Judgment

Garwe JA: After hearing counsel, this court was of the unanimous decision that the appeal had no merit and consequently dismissed it with costs. It was H

Garwe JA

A indicated at the time that the full reasons for the decision would be made available in due course. These are they.

The background to the dispute giving rise to the appeal is as follows. In March 2010, the respondent entered into an agreement with the appellants for payment of what the parties termed "a commitment fee" in respect of B premises undergoing renovations at stand Number 151 Mbuya Nehanda Street, Harare. It appears from the papers that a tendency has arisen in the housing market where prospective tenants seeking rental space in buildings where there is a high demand for such space are requested by the lessor to pay what is variably termed "a commitment fee", "goodwill of the rental space" or "lease preference fees". The purpose of such a fee is to enable the C prospective tenant to be given first priority in concluding a lease agreement in respect of the premises once they are available for occupation. Without payment of such a fee, a prospective tenant would stand little, if any, chance of even being considered for possible occupation of the premises.

In terms of the agreement entered into between the parties, the respondent D agreed to pay the total sum of $35 000 as "goodwill" in respect of the premises in question. It is common cause that the premises in question were undergoing renovations. The respondent paid the sum of US$10 000 as a deposit to the second appellant on 11 March 2010, leaving a balance of $25 000 which was to be paid once the renovations were complete. Once E the balance of the $25 000 was paid, the parties were then to agree on the amount of rental payable per month.

Having formed the opinion that he had been misled, the respondent decided to demand a refund of the sum of $10 000. The appellant refused to refund the money, claiming that the respondent had been in breach of the terms of F the agreement. The respondent then instituted proceedings for the recovery of the amount in question. A joint pre-trial conference minute drafted by the parties identified five issues for trial. At the conclusion of the trial that followed, the court *a quo* found that no agreement had been reached that the sum of $10 000 would be non-refundable. The court further

found that the appellants had been unjustly enriched at the expense of the respondent and G consequently ordered the appellants to refund the sum of $10 000 together with interest and costs of suit. The appellants then noted an appeal against that order.

At the hearing of the appeal before us, the attention of counsel for the appellants was drawn to the provisions of s 19 of the Commercial Premises H (Rent) Regulations (SI 676 of 1983) ("the Regulations"). Neither counsel

Garwe JA

for the appellants nor the respondent had, it would appear, been aware of A the provision. That section provides:

> **"19 Payment of bonus, premium et cetera**
>
> No lessor shall, in respect of commercial premises let or to be let by him, require or permit the lessee or prospective lessee of the premises to pay, in consideration of the grant, continuation or renewal of the lease concerned, any bonus, premium B or other like sum in addition to the rent, or any amount for negotiating the lease."

Faced with the clear language in s 19 of the above regulations, Mr *Uriri* for the appellant was forced to concede that most of the issues raised before the court *a quo* and in heads of argument before this court were irrelevant and that the payment of the sum of $10 000 to the appellants was illegal. That concession was, in the circumstances, most proper. C

The provisions of s 21 of the Regulations also reinforce the legislative intention that anyone who receives payment in circumstances similar to those of this case cannot retain that payment. Section 21 provides, in relevant part:

> **"21 Recovery of payments in excess of fair rent or in contravention of section 19** D
>
> (1) . . .
>
> (2)Where any payment has been made in contravention of the provisions of section 19, the lessee who made the payment may recover from the lessor who received the payment the amount thereof."

In addition, s 32 of the Regulations makes it a criminal offence for anyone to contravene s 19 of the Regulations and provides for a fine or imprisonment E or both. Section 34 allows a court to order a refund following a conviction for a contravention of s 19.

The clear intention of the legislature was to prohibit the tendency on the part of some landlords to take advantage of desperate tenants seeking to rent accommodation by demanding, over and above the amounts that a landlord F may lawfully demand from a lessee, such as rent and a security deposit, other amounts that are not permissible in terms of the Regulations. Put differently, it is impermissible and a breach of the law, for a landlord to demand payment of "a commitment fee", or "goodwill", or "a lease consideration fee" or any other fee, by whatever name, which amounts to a bonus or premium or a G consideration for negotiating the lease. That this provision has been part of our law for a long time is clear – see the decision of Beadle CJ in *S v Fraser Partners (Pvt) Ltd & Anor* 1972 (1) SA 408 (RA) at 409, in which a similar provision came up for consideration before the court.

For the avoidance of doubt, it must be noted that a security or good tenancy deposit does not constitute a prohibited payment in terms of s 19. This is H

Garwe JA

A clearly recognised in s 20 of the Regulations which provides that only such deposit must be refunded to the lessor within 14 days of the termination of the lease in question.

One further matter falls for determination and that is whether the second appellant is liable to pay the amount jointly and severally with the first B appellant.

Whilst it is correct that in the pleadings the appellants put in issue the liability of the second appellant, it having been the appellants' position that the second appellant had been a mere representative of the first appellant, it is clear that the issue was never really pursued nor was the court *a quo* asked to make a determination on it. The respondent's declaration made C it clear that payment of the sum of US$10 000 was sought against both appellants, jointly and severally, the one paying the other to be absolved. Despite the position seemingly adopted by the appellants in the

plea that the first appellant merely acted as an agent for the second appellant, the joint pre-trial conference minute signed by both parties identified a total of five D issues for determination at the trial. Whether both appellants were jointly and severally liable was not one of the issues identified for trial. As it so happened, during the trial proceedings, the court *a quo* confined its attention to the five issues that had been identified. At no stage was the court asked to make a determination on whether or not the second appellant was also liable.

E To now suggest, as has been done in the grounds of appeal, that the court *a quo* misdirected itself in holding that the liability of the two appellants was joint and several is not only unfair to the court *a quo* but also impermissible. A court cannot and should not be criticised for not making a decision on an issue that was never placed before it for determination. There is therefore no basis upon which the finding by the court *a quo* that both appellants were F liable can be impugned.

In any event, the acknowledgment of receipt issued to the respondent on payment of the sum of $10 000 clearly indicates the receiver as "Jerry Okeke" and that it was he who was to allocate the shop in question to the respondent. There is no suggestion on the receipt that the money was being G paid to the first appellant and that the second was a mere agent of the first. For this additional reason this court was of the view that no proper basis had been established for setting aside the finding by the court *a quo* that the liability of the appellants was joint and several.

In all the circumstances, therefore, the court was satisfied that there was no H merit to the appeal and accordingly dismissed the appeal with costs.

Garwe JA

ZIYAMBI JA and PATEL JA concurred A

Mwonzora & Associates, appellants' legal practitioners

Messrs Musariri Law Chambers, respondent's legal practitioners B

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Document 48 of 79

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Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2013/Volume 2/GURTA AG v GWARADZIMBA NO 2013 (2) ZLR 399 (H)

GURTA AG v GWARADZIMBA NO 2013 (2) ZLR 399 (H)

Citation	2013 (2) ZLR 399 (H)
Case No	Judgment No. HH-353-13
Court	High Court, Harare
Judge	Mathonsi J
Heard	12 September 2013; *CAV*
Judgment	16 October 2013
Counsel	*A Moyo* and *U Sakhe*, for the applicant *T Mpofu*, for the respondent
Case Type	Opposed application
Annotations	Link to case annotations

Flynote

Administrative law – *administrative decisions and acts – decision adverse to applicant – remedies available to person aggrieved – entitled to apply to High Court for relief – proceedings under s 4(1) of the Administrative Justice Act [Chapter 10:28] – how application to be made – not necessary* D *to seek review of administrative decision*

Constitutional law – *Constitution of Zimbabwe 1980 – Declaration of Rights – s 24 – application to Supreme Court to declare legislation unconstitutional – High Court having no jurisdiction to entertain such application – application commencing before promulgation of 2013* E *Constitution but continuing afterwards – application to be dealt with under procedure obtaining at time application commenced*

Headnote

The applicant was a company incorporated in Switzerland. The respondent was the administrator of SMM Holdings (Pvt) Ltd, an entity under reconstruction. He was appointed in 2004, on the day a reconstruction F order was issued in relation to SMM Holdings. As administrator, the respondent entered into an agreement of purchase and sale with the applicant in October 2009, in terms of which he sold certain chrome mining claims belonging to SMM. The respondent complied with all the procedural requirements, including securing the authority of the Minister of Justice and Legal Affairs, to sell and transfer the mining G location and was duly paid the purchase price. Although the mining claims were subsequently registered in the name of the applicant, which even commenced operations, the mining location was soon claimed by a third party, who used every means at his disposal, including enlisting the services of the police to arrest the applicant's employees on site, H approaching the High Court laying claim to the mining location and

generally preventing the applicant from enjoying the benefit of what A it had purchased.

Believing that SMM was in breach of the sale agreement, in particular the warranty against eviction, the applicant approached the respondent with a view to reaching an out of court settlement, but this approach was rebuffed. The applicant then applied to the respondent in terms of B s 6(b) of the Reconstruction of State-Indebted Insolvent Companies Act [*Chapter 24:27*], seeking his leave to commence legal proceedings against SMM for the cancellation or confirmation of the cancellation of the sale agreement and a refund of the purchase price. The respondent ignored this application. The applicant then applied to the High Court for an order declaring s 6(b) to be in contravention of s 18 of the Constitution C of Zimbabwe 1980 and therefore null and void; alternatively, that it be granted leave, in terms of s 6(b), to institute proceedings against SMM to claim payment of the purchase price, together with interest and costs of suit. The alternative application was made in terms of s 4(1) of the Administrative Justice Act [*Chapter 10:28*], the applicant arguing that D the respondent's failure to consider the application for leave and to make a decision as an administrative authority amounted to a breach of s 3 of the Act. The applicant supported its request for the court to grant leave on the basis that not only was the court armed with all the facts to enable it to make that decision, but also that the respondent appeared to have taken a position not to grant leave and was unlikely to alter his position. E

The respondent opposed the application, objecting to the applicant bringing a constitutional challenge to the High Court instead of the Constitutional Court (then the Supreme Court). He also took the view that the question of whether s 6 of the Reconstruction Act violated s 18 of the 1980 Constitution was now *res judicata*, having been decided by the Supreme Court in F 2011. The respondent also questioned the regularity of the application which, he argued, should have been brought by way of a review.

The application itself was brought under the provisions of the 1980 Constitution, which was in place at the time of filing the application in February 2013. Subsequent to that the 2013 Constitution was promulgated on 22 May 2013 although all of its provisions did not come G into operation until 22 August 2013 (the effective date) which was the date of the assumption of office by the President elected in terms of the new Constitution.

Held, that in terms of para 18(8) of the Sixth Schedule to the 2013 Constitution, any pending constitutional case in which argument from the parties had not been heard before the publication

date must be transferred H

2013 (2) ZLR p401

A to the Constitutional Court. As the application was commenced on 1 February 2013, it could, in terms of para 18(9), be continued as if the new Constitution had been in force when the application was filed but using the procedure that was applicable before 22 August 2013. However, the provisions of the new Constitution conferring jurisdiction on the High Court in constitutional matters did not apply to the present B case. Para 18(9)(a) made it clear that the procedure to be followed is the procedure that was applicable to this case immediately before the effective date. What should be followed therefore is the procedure in terms of the old system. Procedurally, the High Court, composed as it is of a single judge, could not strike down current legislation, which was C a preserve of a full bench of the Supreme Court in terms of s 24(4) of the former Constitution. Reference to the Supreme Court only in s 24 of that Constitution was a deliberate limitation of the inherent jurisdiction of the High Court. While the High Court can, in the exercise of its inherent jurisdiction, issue declaraturs, but the law forbade the issuance of such declaraturs in constitutional matters and specifically limited the D power to strike down existing legislation to the Supreme Court sitting as a constitutional court. The newly found jurisdiction bestowed on all courts by the new Constitution did not come into it because the matter had to be determined in terms of the procedure that obtained prior to the effective date.

E *Held*, further, that the Supreme Court had previously considered the constitutionality of s 16 *vis-à-vis* s 18 of the Constitution. Although the approach adopted by the applicant *in casu* was different from what was before the court in that case, that did not detract from the reality that the matter was considered. As to whether the highest court would be willing to reconsider the issue, that was is a matter for that court to decide.

F *Held*, further, that the respondent, as administrator of a company under reconstruction, was an administrative authority in terms of s 2 of the Administrative Justice Act. Only in his opposing affidavit did the respondent come out openly to say that he would not grant leave because the applicant had no cause of action on the merits. It was clear from his deposition that not only did he assume the obviously biased view that G the applicant had no case against him and therefore could not sue him or SMM, but also that he arrived at that position prematurely and without regard to due process, in that his "final position" was achieved months before an application for leave was actually made. The respondent was pre-occupied with his own defence in the intended suit and not with H considerations of fairness and according the applicant the opportunity

2013 (2) ZLR p402

to present his case before an impartial court. The respondent inevitably A fell into the trap of self-preservation. An administrative authority is required by s 3 of the Act to act lawfully, reasonably and in a fair manner. Section 4 of that Act authorises any person aggrieved by the failure of an administrative authority to comply with s 3 to apply to the High Court for relief. The section made no reference to a review application. If the B legislature had desired to provide for a remedy of review, it would have specifically said so. It however elected to create a statutory remedy, in terms of which a party is entitled to approach the High Court by application where the administrative authority has come short.

Held, further, that while it is rare that the court would be justified in usurping the decision making function of the administrative authority, there are C situations where the court might take such action. These are: (a) where the end result is a foregone conclusion and it would be a waste of time to refer the matter back; (b) where further delay could prejudice the applicant; (c) where the extent of bias or incompetence is such that it would be unfair to the applicant to force it to submit to the same D jurisdiction again; and (d) where the court is in as good a position as the administrative body to make the decision. Although some of the requirements might be said to be mutually exclusive, all of them existed here. The applicant should be granted leave to sue SMM.

Cases referred to E

Affretair (Pvt) Ltd & Anor v MK Airlines (Pvt) Ltd 1996 (2) ZLR 15 (S)

African Resources Ltd & Ors v Gwaradzimba NO & Ors 2011 (1) ZLR 105 (S)

Guwa & Anor v Willoughby's Investments (Pvt) Ltd 2009 (1) ZLR 380 (S)

Makromed (Pvt) Ltd v Medicines Control Authority of Zimbabwe 2011 (1) ZLR 324 (H) F

MDC & Anor v Chinamasa & Anor NNO 2001 (1) ZLR 69 (S)

Nyamandhlovu Farmers' Assn v Min of Lands & Anor 2003 (1) ZLR 185 (H)

Legislation considered G

Administrative Justice Act [*Chapter 10:28*], ss 2 (definition of "administrative authority"), 3(1) & 4(1)

Constitution of Zimbabwe 1980, s 24

Constitution of Zimbabwe 2013, s 171(1)(c); Sixth Schedule, para 18 High Court Act [*Chapter 7:06*], s 14

Reconstruction of State-Indebted Companies Act [*Chapter 24:27*], s 6(b) H

Case information

A *A Moyo* and *U Sakhe*, for the applicant

T Mpofu, for the respondent

Judgment

Mathonsi J: Eduardo Couture made the following seminal remarks in an article published in (1950) 25 *Tulane Law Review* 7, which the full bench of the Supreme Court in *MDC & Anor v Chinamasa & Anor NNO* 2001 (1) ZLR 69 (S) B at 79A-C cited with approval:

> "The facts tell us that when a plaintiff wants to instigate a suit he can do so although the defendant does not want him to do so, nor even the judge. This is a fact derived from legal experience, from the life of law.
>
> Those who have been able to see this fact in historical perspective, and have C noted its slow but steady growth, have realised that the law has proceeded in this direction from necessity, not from expediency. Primitive man's reaction to injustice appears in the form of vengeance, and by 'primitive' I mean not only primitive in a historical sense, but also primitive in the formation of moral sentiments and impulses. The first impulse of a rudimentary soul is to do justice by his own hand. Only at the cost of mighty historical efforts has it been possible to supplant in the human soul the idea of self-obtained justice by the idea of D justice entrusted to authorities.
>
> A civil action, in final analysis, then, is civilisation's substitute for vengeance. In its present form, this civilised substitute for vengeance consists of a legal power to resort to the court praying for something against the defendant. Whether the claim is well founded or not, is a totally different, and indifferent, fact".

E The applicant is a company incorporated in terms of the laws of Switzerland. The respondent is the administrator of SMM Holdings (Pvt) Ltd, an entity under reconstruction, he having been appointed on 6 September 2004, the day a reconstruction order was issued in relation to SMM Holdings (Pvt) Ltd ("SMM").

F In pursuance of his duties as the appointed administrator of SMM, the respondent entered into an agreement of purchase and sale with the applicant on 9 October 2009 in terms of which he sold certain chrome mining claims belonging to SMM known as Mashava Area "E" for a sum of US$4 350 000. The respondent complied with all the procedural requirements, including securing the authority of the Minister of Justice and Legal Affairs to sell and G transfer the mining location and was duly paid the purchase price.

Although the mining claims were subsequently registered in the name of the applicant which even commenced operations, the mining location was soon claimed by a third party, one Takundwa Mjumi, who used every means at his disposal, including enlisting the services of the Zimbabwe Republic Police H to arrest the applicant's employees on site, approaching this court laying a

claim to the same mining location and generally preventing the applicant A from enjoying the benefit of what it had purchased.

Believing that SMM was in breach of the sale agreement, in particular the warranty against eviction it having failed to obtain value despite having paid the full purchase price, the applicant says it

opened lines of communication with the administrator with a view to reaching an out of court settlement, B but this was rebuffed. When that effort failed, the applicant applied to the administrator in terms of s 6(b) of the Reconstruction of State-Indebted Insolvent Companies Act [*Chapter 24:27*] ("the Reconstruction Act") by letter dated 3 August 2012 written by its legal practitioners, seeking the administrator's leave to commence legal proceedings against SMM for the C cancellation or confirmation of the cancellation of the sale agreement and a refund of the purchase price.

That application was met with a deafening silence from the administrator, who did not see the wisdom of responding to the application in any form. Despondent and bereft of any sense of solution, the applicant approached this court by court application filed on 1 February 2013 seeking an order in D the following terms:

> "IT IS ORDERED THAT:
>
> 1. Section 6(b) of the Reconstruction of State Indebted Insolvent Companies Act [*Chapter 24:27*] be and is hereby declared to be in contravention of s 18 of the Constitution of Zimbabwe and is therefore null and void. E
> 2. Alternatively, the applicant be and is hereby granted leave, in terms of s 6(b) of the Reconstruction of State Indebted Insolvent Companies Act, to institute any action or proceedings in any court or tribunal of competent jurisdiction in Zimbabwe against SMM Holdings (Private) Limited (under reconstruction) to claim payment of US$4 350 000 or part thereof together with interest at the prescribed rate of 5 per cent per annum and costs of suit F or any other relief available to the applicant at law.
> 3. The respondent be and is hereby ordered to pay the costs of this application only in the event of it opposes (*sic*) this application".

In its founding affidavit deposed to by Gianluigi Ghezzi, the chairman of its board of directors, the applicant craved for a *declaratur* that s 6(b) of the G Reconstruction Act is unconstitutional and therefore unlawful, null and void and of no force or effect by reason that it is not in keeping with the spirit of the old Zimbabwe Constitution, in that it denies it access to the courts, especially as it arrogates the authority to grant or deny leave to sue a company under reconstruction upon the same administrator who controls it and enters into agreements on its behalf with the transacting public. H

Mathonsi J

A In the applicant's view, the effect of s 6(b) is to deprive a party wishing to sue, of the right of recourse to courts of law, in that this can only be done with the leave of the administrator who is an interested party, having accumulated obligations on behalf of the company under reconstruction. This is particularly so in light of the fact that the Act does not even accord a B potential litigant any right of appeal against the administrator's decision to deny leave to sue. In so doing, the applicant argued, the section takes away one's constitutional right to protection of the law and access to the courts. In the alternative, the applicant applied in terms of s 4(1) of the Administrative Justice Act [*Chapter 10:28*] for leave to sue SMM, as the respondent's failure to consider the application for leave and to make a decision as an C administrative authority amounts to a breach of s 3 of the Act. The applicant supported its request for the court to grant leave in respondent's stead on the basis that not only is the court armed with all the facts to enable it to make that decision, but also that the respondent appears to have taken a position not to grant leave and is unlikely to alter his position.

D The respondent has opposed the application, objecting to the procedure adopted by the applicant of bringing a constitutional challenge to this court instead of the Constitutional Court (then the Supreme Court). In addition, the respondent took the view that the question of whether s 6 of the Reconstruction Act violates s 18 of the old Constitution is now *res judicata*, it having been E decided by the Supreme Court in 2011. The respondent also questioned the regularity of the application which, in his view, should have been brought by way of a review as s 4 of the Administrative Justice Act is:

> "a codification of an established common law provision for the review of administrative authorities' actions".

What I am required to decide therefore is whether this court has jurisdiction F to strike down current legislation; whether the constitutional issue of whether s 6(b) of the Reconstruction Act has already

been decided by the Constitutional Court and is therefore *res judicata*; and finally whether the applicant is entitled to leave to sue the respondent.

I propose to tackle the issue of jurisdiction first. That question has been G complicated slightly by the coming into effect of a new constitution of Zimbabwe on 22 August 2013. The application itself was brought under the provisions of the old Constitution, which was in place at the time of filing the application in February 2013. Subsequent to that the Constitution of Zimbabwe Amendment (No. 20) Act 2013 was promulgated on 22 May H 2013, although all of its provisions did not come into operation until 22

August 2013 (the effective date) which was the date of the assumption of A office by the President elected in terms of the new Constitution. The fate of constitutional matters pending in court at the time of the coming into effect of the new Constitution is dealt with in the 6th Schedule to the new Constitution. Paragraph 18(1) of the 6th Schedule defines a pending constitutional case as: B

> "(a) an appeal, application or reference in which an alleged contravention of the Declaration of Rights contained in the former constitution is in issue; or
>
> (b) any case in which a constitutional matter, as defined in s 332 of this Constitution, is in issue;
>
> and which, immediately before the publication date, is pending before the Supreme Court of Zimbabwe constituted under the former constitution". C

In terms of para 18(8), any pending constitutional case in which argument from the parties has not been heard before the publication date must be transferred to the Constitutional Court. These are matters which were pending before the Supreme Court which should simply be transferred to the Constitutional Court. D

The present case is governed by para 18(9) which provides:

> "All cases, other than pending constitutional cases, that were pending before any court before the effective date maybe continued before that court or the equivalent court established by this Constitution, as the case may be, as if this Constitution had been in force when the cases were commenced; but –
>
> (a) the procedure to be followed in those cases must be the procedure that was E applicable to them immediately before the effective date; and
>
> (b) the procedure referred to in subparagraph (a) applies to those cases even if it is contrary to any provision of Chapter 4 of this Constitution".

Mr *Moyo* for the applicant submitted that, as the application was commenced on 1 February 2013, it may be continued as if the new Constitution had been in force when the application was filed, but using the procedure that F was applicable before 22 August 2013. Mr *Mpofu* for the respondent agreed with that interpretation, but added the rider that prior to 22 August 2013, this court did not have jurisdiction to strike down current legislation. In his view, it was upon a realisation that this court did not have jurisdiction, that the current Constitution has given it power in s 171(1)(c) which provides: G

> "The High Court may decide constitutional matters except those that only the Constitutional Court may decide".

I do not agree with Mr *Moyo* that the provisions of the new Constitution conferring upon this court jurisdiction in constitutional matters apply to the present case. This is because para 18(9)(a) of the 6th Schedule makes it clear that the procedure to be followed is the procedure that was applicable H

A to this case immediately before the effective date. What should be followed therefore is the procedure in terms of the old regime.

I agree with Mr *Mpofu* that procedurally this court, composed as it is of a single judge, could not strike down current legislation, which was a preserve of a full bench of the Supreme Court in terms of s 24(4) of the former B Constitution. Mr *Moyo* urged me to dissociate myself from the judgment of Ndou J, relied upon by Mr *Mpofu*, in *Nyamandlovu Farmers Association v Minister of Lands & Anor* 2003 (1) ZLR 185 (H), mainly because it was a decision of a single judge of this court and not two. I am unable to do that as I agree with the pronouncement of Ndou J at 191G and 192 A-E that:

> "In our case, it is clear that our Supreme Court sits as a constitutional court. When C it does so, its composition is prescribed. It is only when it is so composed that it is in a position to deal with constitutional matters. In my view, reference to the Supreme Court in s 24 is consistent with the latter sitting as a constitutional court. With respect to Gillespie and Devittie JJ (who decided in *S v Chakwinya* 1997 (1) ZLR 109 (H) and *S v Kusangaya* 1998 (2) ZLR 10 (H) that this court had jurisdiction) reference to the Supreme Court alone in s 24 is a deliberate D limitation of the inherent jurisdiction of the High Court. It is consistent with making constitutional matters the domain of the Supreme Court sitting as a constitutional court. Section 24 does not mention the Supreme Court *ex abundante cautela*. It does so by design. Neither is it a procedural mechanism. The jurisdiction of this court in constitutional matters is deliberately limited thereby. This is consistent with the creation of a special dispensation to deal with constitutional matters as E evinced by the fact that these matters are considered so fundamental that they can only be considered by the highest court in the country exercising original jurisdiction. When the matter ends up in the Supreme Court, there is provision for a special composition to deal with it".

In my view, that conclusion by Ndou J is consistent with that of the Supreme Court in *Guwa & Anor v Willoughby's Investments (Pvt) Ltd* 2009 (1) ZLR 380 (S) F at 383D that:

> "The High Court, on the other hand, has jurisdiction to hear all matters except where limitations are imposed by law. In other words, whilst the Supreme Court may do nothing that the law does not permit, the High Court may do anything that the law does not forbid".

It occurs to me that this court can, in the exercise of its inherent jurisdiction G reposed to it by s 14 of the High Court Act [*Chapter 7:06*] issue *declaraturs*, but the law forbids the issuance of such *declaraturs* in constitutional matters and specifically limited the power to strike down existing legislation to the Supreme Court sitting as a constitutional court. The newly found jurisdiction bestowed by the new Constitution does not come into it because we are H proceeding in terms of the procedure that obtained prior to the effective date.

Mathonsi J

I conclude therefore that this court lacks jurisdiction. Mr *Moyo* urged of me A the decision to refer the matter to the Constitutional Court for a determination of the constitutional issue. To me, that is a fall-back position informed by desperation which does not appear in the application. It is an afterthought. I proceed to consider the next issue relating to whether the constitutionality of s 6 of the Reconstruction Act has been determined by the Supreme B Court sitting as a Constitutional Court. In *African Resources Ltd & Ors v Gwaradzimba NO & Ors* 2011 (1) ZLR 105 (S), the Supreme Court considered the constitutionality of that section from the point of view of the conferment on the administrator of the control and management of the company and the possession of all its assets. It drew the conclusion at 124E that:

> "There is nothing in s 6 of the Act that contravenes s 6 or s 18 of the Constitution". C

Clearly, therefore, the court considered the constitutionality of s 16 *vis-à-vis* s 18 of the Constitution, the same attack which the applicant has subjected the section to. I agree that the angle adopted by the applicant *in casu* is different from what was before the court in that case, but that does not detract from the reality that the matter was considered. As to whether the highest court D would be willing to reconsider the issue is a matter for that court to decide. I am fortified in that position by the fact that I have already concluded that this court cannot deal with the constitutional leg of this application. Finally, I turn to the application for leave to sue. It cannot be disputed that, once appointed as administrator of a company under reconstruction, the E administrator is an administrative authority which, in terms of s 2 of the Administrative Justice Act is:

> ". . . any person who is –
>
> (a) an officer, employee, member, committee, council, or board of the state or a local authority or parastatal; or
>
> (b) a committee, or board appointed by or in terms of any enactment; or F
>
> (c) a Minister or Deputy Minister of the State; or
>
> (d) any other person or body authorised by any enactment to exercise or perform any administrative power or duty;
>
> and who has the lawful authority to carry out the administrative action concerned".

In terms of s 6(b) of the Reconstruction Act, once a reconstruction order is G issued by the Minister of Justice, no action or proceeding can be proceeded with or commenced against the company under

reconstruction except by the leave of the administrator and subject to such terms as he may impose. It was in line with that provision that the applicant applied to the respondents for leave to bring legal proceedings in pursuance of the sale agreement of the parties. The administrator, as I have said, dithered and in the end did H

2013 (2) ZLR p409

Mathonsi J

A not deal with that application. It is only in his opposing affidavit that he has come out openly to say that he will not grant leave because the applicant has no cause of action on the merits as he is standing on firm ground having lawfully sold the mining location and given possession to the applicant. In para 18.2, the respondent stated:

> B "Annexure K (referring to the letter of Dube, Manikai & Hwacha dated 29 May 2012 which is in fact not annexure K to the applicant's founding affidavit but is erroneously marked 'B') being my legal practitioners' letter to applicant's legal practitioners, was really my final position on the matter at the relevant time. It was supported by an order of court and I do not believe that I did anything wrong nor do I believe SMM breached its contract with the applicant. In fact, 'Annexure 1' is itself evidence that the law recognises what I am saying now: C SMM gave vacant possession to applicant and Mujumi was an unauthorised third party to the agreement between the parties with no lawful right to the claims. The applicant should, in fact, institute proceedings against Takunda Mujumi and not myself or SMM."

Therein lies the trick and perhaps the biggest challenge with the provisions of D s 6(b) of the Reconstruction Act, which appear to permit an interested party to be the judge over his own case. What comes out from the above passage in the respondent's deposition is that not only did he assume the obviously biased view that the applicant had no case against him and therefore could not sue him or SMM but also that he arrived at that position prematurely and without regard to due process in that his "final position" was achieved months E before an application for leave which was only made on 3 August 2012. That final position was arrived at on 29 May 2012 and therefore preceded the application for leave. As contained in the letter from his legal practitioners to applicant's legal practitioners it was to the effect that –

> "We refer to the above matter and to your letter of 10 May 2010 and that of 4 F April 2012. Kindly accept our apology for failing to respond to your letters. We advise that our client has no other way of resolving the impasse expect (*sic*) by finalising the litigation matters with Mr Mujumi. We believe that our client will succeed in court".

In my view, this was self-serving and detached from the responsibility of considering the application for leave to sue which was made by the applicant. G The respondent was pre-occupied with his own defence in the intended suit and not with considerations of fairness and according the applicant the opportunity to present his case before an impartial court or tribunal of competent jurisdiction. The respondent, inevitably fell into the trap of self preservation. As they say, "he that conducts his own defence has a fool for H a lawyer".

2013 (2) ZLR p410

Mathonsi J

Now s 3(1) of the Administrative Justice Act sets out the responsibilities of A an administrative authority. It provides:

> "An administrative authority which has the responsibility or power to take any administrative action which may affect the rights, interests or legitimate expectations of any person shall –
>
> (a) act lawfully, reasonably and in a fair manner; and B
>
> (b) act within the relevant period specified by law or, if there is no such specified period, within a reasonable period after being requested to take the action by the person concerned; and
>
> (c) where it has taken the action, supply written reasons therefor within the relevant period specified by law or, if there is no such specified period within a reasonable period after being requested to supply reasons by the C person concerned".

Section 4 of that Act authorises any person aggrieved by the failure of an administrative authority to comply with s 3 to apply to this court: *Makromed (Pvt) Ltd v Medicines Control Authority of Zimbabwe* 2011 (1) ZLR 324 (H) at 327E. I must add that so fundamental are the rights to administrative justice that they have now been elevated to constitutional rights in s 68 of D the current Constitution.

It is those rights to administrative justice that the applicant has sought to enforce in the second leg of this application. Mr *Mpofu* for the respondent protested that a wrong procedure was employed, as s 4 of the Administrative Justice Act is an embodiment of common law grounds for review. For that E reason the applicant should have brought a review application in terms of Order 33 of the High Court Rules. I do not agree.

Section 4 allows an aggrieved party to seek recourse in this court. It makes no reference to a review application. I agree with Mr *Moyo* for the applicant that if the legislature desired to provide for a remedy of review in terms of Order 33, it would have specifically said so. It however elected to create a F statutory remedy in terms of which a party is entitled to approach this court by application where the administrative authority has come short.

In casu we have a situation in which the respondent entered into a sale agreement with the applicant involving a sum in excess of $4 million while acting on behalf of SMM. He was paid that sum but the applicant finds itself G without possession because of a conflicting claim of a third party. Years down the line, the issue remains unresolved and that is certainly not a temporary issue as alleged by Mr *Mpofu*. The applicant applied to the respondent for leave to sue which application was completely ignored, even though the respondent is tasked with the responsibility of determining such application. In fact the respondent has now emphatically stated that he will not grant H

2013 (2) ZLR p411

Mathonsi J

A leave because the applicant has no cause of action against him, a true case of pre-judging the matter. I accept that the applicant is indeed entitled to its day in court. It matters not that the respondent sees no merit in the case. Whether the case is well founded or not is neither here nor there, as civilisation dictates that the litigant must B be allowed to bring a civil action to protest its right. To deny a party that opportunity would be to expose the party to the impulses of a rudimentary soul, to resort to his hand in order to achieve justice.

The applicant has urged of me the grant of the leave to sue which should have been granted by the respondent mainly because the respondent is not C going to grant the leave, having already nailed his colours onto the mast, and in any event because I have all the facts with which to base such decision. While it is rare that the court would be justified in usurping the decision making function of the administrative authority, McNally JA set out four situations where the court might take such action in *Affretair (Pvt) Ltd &* D *Anor v MK Airlines (Pvt) Ltd* 1996 (2) ZLR 15 (S). These are:

1. where the end result is a foregone conclusion and it would be a waste of time to refer the matter back;
2. where further delay could prejudice the applicant;
3. where the extent of bias or incompetence is such that it would be unfair E to the applicant to force it to submit to the same jurisdiction again; and
4. where the court is in as good a position as the administrative body to make the decision.

In this case, although some of the requirements maybe said to be mutually exclusive, I am of the view that all of them exist. To my mind, it is a foregone F conclusion that the applicant should be granted leave, although the respondent thinks otherwise. The applicant has waited for leave for more than a year and further delay would be unfair to him. I have already expressed my suspicion of the existence of bias, the respondent being an interested party. In any event, I am in as good a position to make the decision as the respondent.

G Regarding the question of costs, the applicant has been partially successful, given that its main application for the declaration of s 6 as being unconstitutional has not found favour with me, while the alternative claim has. For that reason, I consider that it cannot recover all its costs. It has only made a case for 50 per cent of its costs.

H Accordingly it is ordered that:

2013 (2) ZLR p412

Mathonsi J

1. The application for a declaration that s 6(b) of the Reconstruction of State A Indebted Insolvent Companies Act [*Chapter 24:27*] is unconstitutional is hereby dismissed.

2. The alternative relief is hereby granted and accordingly the applicant is granted leave in terms of s 6(b) of the Reconstruction of State Indebted Insolvent Companies Act [*Chapter 24:27*] to institute any action B or proceedings in any court or tribunal of competent jurisdiction in Zimbabwe against SMM Holdings (Pvt) Ltd (under reconstruction), to claim payment of US$4 350 000 or part thereof together with interest thereon at the prescribed rate of 5 per cent per annum and costs of suit or any other relief available to the applicant at law.
3. The respondent shall bear 50 per cent of the applicant's costs of suit. C

Kantor & Immerman, applicant's legal practitioners

Dube, Manikai & Hwacha, respondent's legal practitioners

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Document 49 of 79

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STANBIC NOMINEES (PVT) LTD & ANOR v REMO INVESTMENT BROKERS (PVT) LTD 2013 (2) ZLR 413 (H)

Citation	2013 (2) ZLR 413 (H)
Case No	Judgment No. HH-354-13
Court	High Court, Harare
Judge	Mtshiya J
Heard	29 July 2013: *CAV*
Judgment	16 October 2013
Counsel	*T Magwaliba,* for the applicants *E Samukange,* for the respondent
Case Type	*Ex parte* urgent application
Annotations	No case annotations to date

Flynote

Practice and procedure – *Anton Piller order – what is – notice to other side not required – need for party against whom order is directed nevertheless to be cited – order not competent unless specific respondent cited – order* D *not binding on party not cited*

Headnote

The respondent obtained a loan from a company known as Interfin and pledged its shares as security. The respondent repaid the loan in full and then demanded the return from Interfin of its shares and certificates. E The shares and certificates were not returned. The respondent then filed an urgent *ex parte* application for an *Anton Piller* order. A provisional order was granted. The Deputy Sheriff was then instructed to execute the order against those holding the share and

certificates. An attempt to execute on the applicants failed because the applicants argued that the order was not binding on them since they were not cited in the *ex parte* F urgent application. They sought a declaratory order to that effect. They argued that they were not obliged to obey an order in which they were not cited. All they wanted was for the court to make a determination on whether or not the order granted to the respondent was binding on them when they were not cited as parties in the matter. Since the order G was one *ad factum praestandum* (that is, an order to do or, abstain from doing a particular act or to deliver a thing), it was imperative, in order for them to be bound by the orders obtained and sought to be enforced against them, that they be cited therein.

Held, an *Anton Piller* order is a modern legal remedy, devised to cater for modern problems in the prosecution of civil actions. The procedure H allows a party to make an *ex parte* application, without notice to the other

side, for the attachment and removal of documents or other evidence. A An applicant for an *Anton Piller* order must *prima facie* establish: (a) that he has a cause of action against the respondent which he intends to pursue; (b) that the respondent has in his possession specific and specified documents or things which constitute vital evidence in substantiation of the applicant's cause of action, but in respect of which the applicant B cannot claim a real or personal right; and (c) that there is a real and well-founded apprehension that this evidence may be hidden or destroyed or in some manner spirited away by the time the case comes to trial or to the stage of discovery. The order should be directed to a specific respondent, to whom notice is being denied until the search is effected. That is what brings about a need for the court to proceed with caution C and impose safeguards to protect the rights of the party against whom the relief is sought. Such a party (respondent) must be known and it can only be known through citation as a party to the proceeding(s). The respondent *in casu,* as contained in its founding affidavit, knew who it wanted to proceed against but decided to bring into the body of the order D the "parties to be searched". The respondent knew that the premises belonged to the applicants. It could not be denied that the effect(s) of the order had an adverse impact on the applicants' rights and interests (i.e. present and future). Accordingly, execution against them when they were not parties to the matter had no place in our law. This was not an academic exercise on the applicants' part. They had a right to have the E legal position pronounced in terms of the declaratory order they sought.

Cases referred to

Cooper v Leslie & Ors 2000 (1) ZLR 14 (H)

Dynamos Football Club (Pvt) Ltd v ZIFA & Ors 2006 (1) ZLR 346 (S) F

Ngulube v ZESA & Ors S-52-02

Legislation considered

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

Case information

T Magwaliba, for the applicants G

E Samukange, for the respondent

Judgment

Mtshiya J: On 5 April 2012 the respondents, under an *exparte* application, were granted an *Anton Piller* provisional order by this court. The terms of the interim relief were: H

Mtshiya J

"2. Respondents, A their officials, assigns or agents on whom service is effected in terms of this order are ordered to allow the Deputy Sheriff, Mr Charles Chinyama (the supervising attorney) together with Mr Jonathan Samukange or, failing him Mr Everson Samukange, the applicant's attorney including the applicant's officials to immediately enter the premises listed in paragraph 11 in the Founding Affidavit and any facilities and/or vehicles on such premises for the purposes of searching

for and delivering to the Deputy Sheriff all B the share certificates and any such documents listed in paragraph 5 of the founding affidavit and annexure "A" and such documents which any of the aforementioned persons reasonably believe to relate to the applicant.

3. Respondents, their officials, assigns or agents on whom service is effected in terms of this order are further ordered to permit the said persons to remain on the premises until the search is completed and if necessary to re-enter the C premises on the same or following day to complete the search.

4. The supervising attorney mentioned in paragraph 2 above, together with the Deputy Sheriff, shall make a list of the recovered and removed share certificates in terms of this order. A copy of this list shall be handed by the supervising attorney to the applicant's attorney and to the first respondent or any such officials representing the first respondent referred to in paragraphs D 2 and 3 above, if present, and a copy shall be retained by the Deputy Sheriff.

5. In the event any of the said share certificates or relevant documentation exist in computer readable form, The respondent and its official is ordered to forthwith provide the Deputy Sheriff with effective access to the computers and all necessary password to enable them to be searched and cause the listed items to be printed out, a printout of these items is to be given to the E Deputy Sheriff or displayed on the computer screen so that it may be read and copied by him.

6. The listed items taken into possession by the Deputy Sheriff pursuant to this order shall be retained by him until the court orders otherwise. Save as provided hereinafter no person shall be entitled to inspect any of the items taken into possession by the Deputy Sheriff nor shall any copies of such F documents be made: provided that pending the return day for the sole purpose of satisfying himself that the inventory correctly reflects the items seized. The first respondent and its attorney shall be entitled to inspect the items in the Deputy Sheriff's possession.

7. Applicant is directed to serve the court application in case number HC 3624/12 on the respondents within ten days from the date of this order and G if it fails without good reasons being shown on the return day to have filed and served such application by that date, the Sheriff shall return all the items immediately to the first respondent and in such event the court in its discretion shall make such order as it deems fit.

8. On the return day there shall be placed before the court the report of the supervising attorney with proof that a copy thereof has been served on the H applicant's attorney and on the first respondent or their attorney and an affidavit

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of the applicants attorney that the said action has been duly instituted and if A not the reason why this has not been done.

9. (a) Service of this order, together with the notice on the first respondent or the person responsible for the premises shall be effected and the content thereof shall be explained by the supervising attorney before the provisions of paragraph 2 are carried out.

(b) In addition to the served referred to in sub paragraph (a) above service B of the order together with the notice of motion, supporting affidavits and accompanying notice to respondent shall be effected by the Deputy Sheriff in accordance with the rules of the court no later than 48 hours after the Supervising Attorney has directed that the search is finished.

(c) The provisions of paragraph 2 and 3 of this order may only be carried out in the presence and under the supervision of the Supervising Attorney. C

10. Pending the finalisation of the applicant's claim against the respondents in case number HC 3624/12, the first respondent be and is hereby barred and interdicted from destroying, concealing in any way, cause to be shipped or flown our any of the documents relating to share and certificates belonging to the Applicant."

On 3 May 2012 the provisional order was amended as follows:- D

"The Provisional Order granted on 5 April 2012 is hereby amended by;

(i) deleting on paragraph 2 line 5, "paragraph 10-" and substituting it with "paragraph 11", and,

(ii) adding on paragraph 2, the list of the companies and premises to be searched as follows; E

Interfin Securities – 38 McChlery Avenue, Eastlea, Harare

Corpserve Private Limited – 2nd Floor, ZB Centre, Corner Kwame Nkrumah Avenue/First Street (formerly UDC Centre), Harare.

Kingdom Stockbrokers (Pvt) Ltd – 4th Floor Karigamombe Centre, Julies Nyerere Way/Samora Machel Avenue, Harare

Platinum Asset Management – 1st Floor, 5 Central Avenue, Harare F

Stanbic Bank Zimbabwe Custodial – 59 Samora Machel Avenue, Harare

Barclays Bank Zimbabwe Custodial – Birmingham Road, Harare and any other such addresses to which applicant's shares or subsequent shares are reasonably believed to be kept or hidden."

The above amendment was necessitated by a failure on the part of the Deputy G Sheriff to execute the order on the applicants.

The background to the above order is that, on a date not indicated in these papers, the respondent obtained a loan from Interfin Securities (Pvt) Ltd (Interfin) and pledged its shares as security. The respondent repaid the loan in full and then demanded the return from Interfin of its share certificates. The share certificates were not returned. The respondent then filed an urgent H

Mtshiya J

A *ex parte* application. The result was the above provisional order granted by this court. The Deputy Sheriff was then instructed to execute the order against those holding the share certificates. An attempt to execute on the applicants failed because the applicants argued that the order was not binding on them since they were not cited in the *ex parte* urgent application. That development led to this application wherein the applicants seek a declaratory B order in the following terms:

"IT IS ORDERED:

1. That the Provisional Order issued on 5 April 2012 as well as the Amended Provisional Order issued by this Honourable Court on 9 May 2012 under Case No. HC 36894/12 are not binding on the first and second applicants.
2. That the respondent shall pay the costs of this application."

C The parties to the *ex parte* urgent application appear on the provisional order. They do not include the applicants. However, paragraph 2 of the order makes reference to the founding affidavit in HC 3694/12 wherein, in para 11 of the affidavit, the following entities are listed:-

"(i) Interfin Securities
(ii) Corpserve D Private Limited .
(iii) Kingdom Stockbrokers (Pvt) Ltd
(iv) Platinum Asset Management
(v) Stanbic Bank Zimbabwe Custodial
(vi) Barclays Bank Zimbabwe Custodial and any other such addresses to which E Applicant's shares or subsequent shares are reasonably believed to be kept or hidden."

The amendment of the provisional order on 3 May 2012 was meant to incorporate the above listed entities. However, that incorporation did not amend the parties to the application. The parties remained as they were in the *ex parte* application.

F In its opposing affidavit, the respondent, in part, states:

"1. Relief sought incompetent

The applicants are seeking to review or appeal the provisional order in case no HC 3694/12 by applying for a declaratory order. The provisional order complained of categorically authorised the Deputy Sheriff to enter certain premises which included the applicants' premises. What the applicants are seeking now is to have G the provisional order varied through a declaratory order. This is incompetent. Applicants are seeking this same court to review its own order and the application should fail on this basis alone.

2. Applicants have dirty hands

The applicants' conduct is contemptuous and unethical. A litigant who defies a court order cannot be heard until is has complied with what the order says. H The applicants deliberately, in a bid to defeat the provisional order, caused the

Mtshiya J

transfer of Old Mutual shares through Corpserve (Pvt) Ltd, to a South African A company Peregrinne (Pty) Ltd and which shares were deposited with Kantor and Immerman on 16 May 2012.

More fundamentally, the respondent sought amendment to the order specifically to cover the applicants and it was this amendment which Applicant evaded. This conduct is unlawful and defeats the integrity of court orders. Applicants should B therefore be denied audience until they comply with the court order."

The applicants have ignored free legal counsel. The applicants, through their legal practitioners of record were hinted to make an application for joinder which application would not be opposed. The applicants did

not do so. It was not only legally impossible, but it is also a practical falsity, to believe that all the depositories of the respondent's shares could be cited with precision. The volatile nature of shares was also taken into account by His Lordship in granting c the order in HC 3694/12. This application is an attempt by the applicants to cover up for their disobedience of a valid court order. The court should proceed to deny the applicants audience until such time as they purge their contempt."

According to the respondent, at the time of the hearing of this matter the share certificates were no longer in the custody of the applicants and hence the submission that "the declaratory order sought is of an academic interest D to the applicants and no more than that." The respondent, relying on *Ngulube v ZESA & Ors* S-52-02 correctly spelt out the requirements for a declaratory order as follows:

"1. the applicant had to have an interest in an 'existing, future or contingent right or obligation'; E

2. the interest must not be an academic or abstract one;

3. there must be an interested person on whom the declaratory order would be binding;

4. the remedy is available at the discretion of the court and the applicant must satisfy the court that the case was a proper one"

The respondent went further to submit that; F

"12. The applicants did not comply with the order which required the search and seizure of shares and share certificates. The respondent, notwithstanding the applicants' disobedience of the order, have sought a confirmation of the court order from this Honourable Court. The applicants have disposed of the shares to a third party and there is nothing to be retrieved from them. The applicants defeated the court order. G

13. It is submitted that the relief of a declaratory order as espoused in the various court cases, is not available for parties seeking to make an academic or intellectual point. There must be some justifiable advantage. See in this regard *Barron v Greendale Town Management Board* 1957 (2) SA 521 (SR), *Musara v Zinatha* 1992 (1) ZLR 9 (H) and *Lupu v Lupu* 2000 (1) ZLR 120 (S)." H

2013 (2) ZLR p419

Mtshiya J

A The respondent prayed for the dismissal of the application with costs on an attorney-client scale.

On their part, the applicants justified their case by relying on s 14 of the High Court Act [*Chapter 7:06*] which provides as follows;

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

The applicants' position is that they were not obliged to obey an order in which they were not cited. All they wanted was for the court to make a determination on whether or not the order granted to the respondent was C binding on them when they were not cited as parties in the matter. The applicants submitted, in part, that:-

"10. From the foregoing it is clear that the court order obtained by the respondent in this matter was an order *ad factum praestandum*; that is an order to do or abstain from doing a particular act or to deliver a thing (see Herbstein and van Winsen *The Civil practice of the Superior Courts in South Africa* 3 ed at D p 653. Such an order by its nature can only be enforced against the particular respondent named in the court order and by no way can it be construed as an order affecting status and therefore an order or judgment *in rem*.

11. In view of the foregoing, it would have been therefore imperative in order for the applicants to be bound by the orders obtained and sought to be enforced E against them that they be cited therein. The failure to cite the applicants clearly means that the order obtained cannot be enforced against them. In *Rodgers & Ors v Muller and Ors* 2010 (1) ZLR 49 (H) this court ruled that r 87(1) of the High Court of Zimbabwe Rules 1971 did not absolve a litigant of the obligation to cite all the relevant parties. Patel J at 53B-C stated as follows:

> 'The discretion of the court in this regard must be exercised so as to F ensure that all persons who might be affected by its determination of the issues in dispute be afforded the opportunity to be heard before that determination is actually made.'

The court therefore held in the matter that, the failure to cite the relevant minister was a fatal defect and the application in that matter should be dismissed simply on the basis of that preliminary issue."

G In essence, the applicants contend that there was no order to comply with and as such the issue of approaching the court with dirty hands does not come into play. The applicants neither deny nor confirm whether or not the share certificates are still in their custody. That, in any case, would be irrelevant to them since, in the absence of a court order, they could deal with the share H certificates without hindrance.

2013 (2) ZLR p420

Mtshiya J

In the headnote to *Cooper v Leslie and Ors* 2000 (1) ZLR 14 (H) the A following appears;

> "An *Anton Piller* order is a modern legal remedy devised to cater for modern problems in the prosecution of civil actions. The procedure allows a party to make an *ex parte* application, without notice to the other side, for the attachment and removal of documents or other evidence. It has its genesis in English Law. Originally, its use was confined to cases involving intellectual property, but has B since been extended to cover other civil cases. It has, after some initial reluctance and some contradictory judgments, been accepted by the courts of South Africa and should be accepted as part of the law of Zimbabwe.
>
> An applicant for an *Anton Piller* order must *prima facie* establish:
>
> 1. that he has a cause of action against *the respondent* which he intends to pursue; C
> 2. that *the respondent* has in his possession specific and specified documents or things which constitute vital evidence in substantiation of the applicant's cause of action, but in respect of which the applicant cannot claim a real or personal right; and
> 3. that there is a real and well-founded apprehension that this evidence may be hidden or destroyed or in some manner spirited away by the time the D case comes to trial or to the stage of discovery.
>
> The remedy may, if used indiscriminately, become an instrument of oppression, so the court must proceed with caution and impose safeguards to protect the rights of the party against whom the relief is sought. In exercising its discretion, the court must pay regard to the cogency of the *prima facie* case established with reference to the three items listed above; the potential harm that will be E *suffered* by the respondent if the order is granted, as compared to the potential harm to the applicant if it is not; and whether the terms of the order sought are no more onerous than is necessary to protect the interests of the applicant" (my own emphasis).

In his judgment in the *Cooper* case supra, Devittie J states:

> "There are two respects in which an *Anton Piller* order is unusual. Firstly, it is F akin to a search warrant, in that the plaintiff and his attorneys are authorised to enter the *respondent's premises* and to inspect them or remove documents or other goods. Secondly, no prior notice is given to the respondent" (my emphasis).

From the above it is, in my view, quite clear that the *Anton Piller* order should be directed to *a specific respondent* to whom notice is being denied until G the search is effected. That is what brings the need for the court "to proceed with caution and impose safeguards to protect the rights of the party against whom the relief is sought." Surely such a party (respondent) must be known and it can only be known through citation as a party to the proceeding(s). The respondent *in casu,* as contained in its founding affidavit, knew who it wanted to proceed against but decided to bring into the body of the order the H

2013 (2) ZLR p421

Mtshiya J

A "parties to be searched". The respondent knew that the premises belonged to the applicants (see para 1 of the opposing affidavit quoted herein). I am unable to accept that that was the citation expected by the applicants and envisaged in law. I am certain that, prior to the amendment, the respondent knew what the applicants wanted as reflected in one its letters.

B On 3 May 2012 the respondent's legal practitioners wrote to Hungwe J in the following terms:

> "At the hearing of the urgent application held on 4 April 2012 our Mr Samukange advised your Lordship that an application to amend the Anton Piller order had been made before Justice Patel. Justice Patel had issued the original provisional Anton Piller order. It has not been amended. A copy of the amended provisional C order is attached hereto.
>
> Our appreciation of the applicants' complaint against the original order is that *they had not been cited in the Provisional order*. This has since been rectified.
>
> Consequently the basis of the complaint has since been attended to by the amendment. We are copying this letter to all the parties affected" (my emphasis).

D In *Dynamos Football Club (Pvt) Ltd & Anor v ZIFA & Ors* 2006 (1) ZLR 346 (S) it was stated:

> "… It is trite that an order requiring the performance of acts which may be prejudicial to the interests of a person should not be made by a court of law when he is not a party to the proceedings and has not been heard on the matter."

E *In casu,* the applicants were being ordered to surrender share certificates and allow searches of their premises. No regard was being made to any possible contractual arrangements they might have had with other third parties. In light of the fact that I do not subscribe to the notion that the respondent's order amounted to a judgment *in rem*, I find the purported actions of the Deputy Sheriff unacceptable. To me this was an order between specific F parties and it applied only to those specific parties (i.e. the cited parties). This interpretation of the order does not in any way interfere with the order as granted by the court. There is therefore no merit in submitting that the application is intended to review or rescind the order. The applicants are far from saying so. It cannot be denied that the effect(s) of the order had G an adverse impact on the applicants' rights and interests (i.e. present and future). Accordingly, execution against them when they were not parties to the matter has no place in our law. I therefore do not hesitate in rejecting the submission that this is an academic exercise. The applicants have a right to have the legal position pronounced in terms of the declaratory order they seek.

H I therefore order as follows:-

2013 (2) ZLR p422

Mtshiya J

IT IS ORDERED THAT: A

1. The provisional order issued on 5 April 2012 as well as the amended provisional order issued by this Honourable Court on 3 May 2012 under case no. HC 3694/12 are not binding on the first and second applicants; and
2. The respondent shall pay the costs of this application. B

Atherstone & Cook, applicant's legal practitioners

Venturas & Samukange, respondent's legal practitioners C

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Document 50 of 79

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2013/Volume 2/CHIKWAVIRA v SHERIFF OF ZIMBABWE & ANOR 2013 (2) ZLR 423 (H)

CHIKWAVIRA v SHERIFF OF ZIMBABWE & ANOR 2013 (2) ZLR 423 (H)

2013 (2) ZLR p423

Citation	2013 (2) ZLR 423 (H)
Case No	Judgment No. HH-357-13
Court	High Court, Harare
Judge	Dube J
Heard	30 May 2013; *CAV*
Judgment	16 October 2013
Counsel	*T Magwaliba*, for the applicant *D Ndawana,* for the respondent

Case Type Civil application

Annotations No case annotations to date

Flynote

Practice and procedure – *execution – sale – advertisement of sale – date of advertisement – date in relation to date of sale – no minimum period stipulated in Rules – need for sale to be properly advertised – purpose of advertisement – requirement to describe property adequately – failure* D *to mention important features of property – advertisement inadequate – sale set aside*

Headnote

The applicant sought to have the sale in execution of his dwelling house set aside. His grounds were that the sale was improperly conducted and E that the property was sold for an unreasonably low price. With regard to the first ground, he argued that the dates on which the property was advertised were too close to the date of the sale, resulting in many people who would have been prospective purchasers failing to come to inspect the property and thus did not take part in the auction. The only person that inspected the property and subsequently bought it was the second F respondent, who was the only bidder. He further argued that the property was inadequately and misleadingly described in the advertisement. Among other things, the number of bedrooms was understated; a second five-bedroom house on the property was described simply as a "cottage"; there was no mention of the fact that there were two boreholes and two G water tanks in the property; and there was no mention of a large fowl run.

Held, that a court will not lightly set aside a judicial sale which has been confirmed in terms of r 360 of the High Court Rules 1971, as this may discourage people from participating in such sales. The onus rests upon an applicant who wishes to set aside a judicial sale, in terms of r 359(1) of the Rules, to show that the sale was improperly conducted or that the H property was sold at an unreasonably low price, or on any other ground.

Held, further, that r 352 places a duty on the Sheriff to advertise the property A at least once in the *Gazette* and once in a newspaper circulating in the district in which the property is situated. The sale was advertised on three separate occasions over a period of about 10 days. The rule does not specify when the advertisements must be made in relation to the sale date. It places a duty on the Sheriff to advertise only once. That was done. B

Held, further, that it is implicit from r 352 that the sale must be properly advertised. An advertisement which inadequately describes the property is no advertisement at all. It will fail to comply with the Sheriff's mandatory obligation. The purpose of properly describing the property is not merely to identify it. It is also to inform the public of what which is being sold, with the aim of attracting the interest of potential purchasers C to the auction, for it is in the interests of the judgment debtor, and probably in the interests of creditors, that the property to be sold should obtain as high a price as possible. In this case, a number of relevant features of the property were omitted. The size and improvements on a property have a bearing on the value of the property. In these days of erratic water supplies, it is important to inform interested parties of D the existence of supplementary sources and substitute water supplies in the form of boreholes. The existence of two boreholes on a property is likely to generate more interest in the property than where there is only one borehole. The objective of informing the public of what was being sold with a view to attracting the interest of potential purchasers E to the auction was not achieved. The provisions of r 352 are mandatory; a failure by the sheriff to describe the property adequately or properly invalidates the sale. The sale should therefore be set aside.

Held, further, that it was, accordingly, unnecessary to decide whether the price realised was unreasonably low. F

Cases referred to

Chizikani & Anor v CABS 1998 (1) ZLR 371 (S)

Lalla v Bhura 1973 (2) RLR 280 (G)

Mapedzamombe v Commercial Bank of Zimbabwe & Anor 1996 (1) ZLR 257 (S)

Messenger of the Magistrate's Court, Durban v Pillay 1952 (3) SA 687 (A) G

Legislation considered

Rules of the High Court 1971 (RGN 1047 of 1971), rr 352 and 359(1)

Case information

T Magwaliba, for the applicant

D Ndawana, for the respondent H

Dube J

Judgment

Dube J: This A is an application for the setting aside of the decision of the Sheriff of Zimbabwe ("the Sheriff") to confirm a sale in execution in respect of the Remainder of Lot 330 Block B Hatfield of Hatfield Estate, otherwise known as number 6 Wenlock Road, Hatfield, Harare .The application is brought in terms of Order 40 r 359(1) of the High Court Rules 1971.

The applicant is the owner of the property in issue. The first respondent B is the Sheriff of the High Court of Zimbabwe. The second respondent is Central Africa Building Society. The facts of this matter are summarised in the applicant's founding affidavit as follows: Sometime in August 2009 the applicant borrowed $45 000 from the second respondent, against security of a mortgage bond over the applicant's residential property registered in C favour of the respondent. The applicant failed to repay the loan. The second respondent sued the applicant and obtained a judgment from this court and a writ of execution was issued. The amount of the judgment debt was $49 858.57. The applicant's residential property was attached and the house subsequently sold by public auction for $81 000.The second respondent was declared the purchaser. The applicant filed objections which were dismissed D by the Sheriff. On 3 May 2011 the Sheriff confirmed the second respondent as the highest bidder at $81 000. The applicant seeks an order settling aside the sale and an order that the Sheriff be directed to conduct another sale in execution.

The applicant objects to the sale on the basis that the sale was improperly E conducted and, further, that the property was sold for an unreasonably low price. The applicant takes issue with the fact that the property was advertised from 22 February 2011 to 2 March 2011.He contends that this period was too close to the date of the sale, resulting in many people who would have been prospective purchasers failing to come to inspect the property and thus did not take part in the auction. The only person that inspected the property F and subsequently bought it is the second respondent. It was the only bidder.

The applicant further asserts that the property was inadequately and misleadingly described in the advertisement. The applicant submitted that the advertisement stated that the property was held under Deed of Transfer number 1793 when that is the mortgage bond number. The main dwelling G house is described as having three bedrooms, whereas it has five bedrooms. That the following description of the house was omitted:

1. all rooms are carpeted
2. there are floor tiles in all the bathrooms, passages, kitchen and pantry.
3. there are two boreholes and two water tanks in the property and not one of each as mentioned in the advertisements
4. there H is a big fowl run with a capacity to hold 1000 chickens

---

Dube J

5. there is a second house on the property. A

The applicant stated that there is a second house on the property with five bedrooms and not three. There is no cottage as advertised. The applicant contends that the advertisement was inadequate as

it omitted to refer to matters which had a direct bearing on the value of the property and that this potentially affected the interest which prospective purchasers could have B developed.

The applicant further avers that the price at which the property was sold was unreasonable and substantially lower than the market price. The applicant engaged his own valuators who placed the market value of the property at $140 000 and $105 000 as the forced sale value. The applicant contends that the purchase price of $81 000 is unreasonably low in relation to the forced C sale value as assessed by the independent valuators.

The second respondent is opposed to the application and asserts that all the formalities were complied with by the auctioneer. The second respondent's submissions may be summarised as follows. The sale was advertised three times. Rule 352 has no time specifications as to when such advert must D be made. The advertisements described the property and its location in detail .They contained sufficient information required to attract potential purchasers. The auctioneer relied on a report from the valuators pegging the market value of the house at $95 000 and the forced sale value at $67 000. The valuation by the applicant's valuators is inflated. The house was not sold for an unreasonably low price. The debtor was given an opportunity to E bring a buyer offering a higher purchase price and failed to do so and that the failure is due to the fact that there are no buyers in the market willing to pay the price suggested by the judgment debtor.

The grounds upon which applicant is entitled to have the sale set aside are listed in Order 40 r 359(1). F

Rule 359(1) reads as follows

> **"359. Confirmation or setting aside sale**
>
> (1)Subject to this rule, any person who has an interest in a sale in terms of this Order may request the Sheriff to set it aside on the ground that –
>
> (a) the sale was improperly conducted; or
>
> (b) the property was sold for an unreasonably low price; G
>
> or on any other good ground."

The courts will not lightly set aside a judicial sale which has been confirmed as this may discourage people from participating in judicial sales. In *Mapedzamombe v Commercial Bank of Zimbabwe & Anor* 1996 (1) ZLR 257 (S) at 260C-E Gubbay CJ stated as follows: H

Dube J

> A "Before a sale is confirmed in terms of r 360, it is a conditional sale and any interested party may apply to court for it to be set aside. At that stage, even though the court has a discretion to set aside the sale in certain circumstances, it will not readily do so. *See Lalla v Bhura* 1973 (2) RLR 280 (G) at 283A-B. Once confirmed by the sheriff in compliance with r 360, the sale of the property is no longer conditional. That being so, a court would be even more reluctant B to set aside the sale pursuant to an application in terms of r 359 for it to do so. See *Naran v Midlands Chemical Industries (Pvt) Ltd* S-220-91 (not reported) at pp 6-7."

The onus rests on the applicant to show that the sale was improperly conducted or that the property was sold at an unreasonably low price or any other ground.

The requirement to advertise the sale is provided for in r 352.The rule reads C as follows.

> **"352. Day and place for sale: appointment: advertisement: notice to holders of mortgage**
>
> The sheriff shall appoint a day and place for the sale of property, such day being, except by special leave of the court, not less than one month after service of the notice of attachment upon the execution debtor; and he shall cause the sale to D be advertised at least once in the *Gazette* and in a newspaper circulating in the district in which the property is situated and in such other manner as he may deem to be necessary. The sheriff shall also send to each holder of a mortgage over the property, by registered letter addressed to his last known address, or to his attorney, notice of the date and venue of the sale."

The rule places a duty on the Sheriff to advertise the property at least once in E the *Gazette* and once in a newspaper circulating in the district in which the property is situated. The sale was advertised on three separate occasions being, 23, 27, and 28 February 2011, over a period of about 10 days. The sale was conducted on 3 March. The rule does not specify when the advertisements must be made in relation to the sale date. Rule 352 places a duty on the F Sheriff to advertise only once. That was done.

Whether the advertisements were adequate and proper and sufficiently informed the public of the property being sold is the next question. What is implied from r 352 is that the sale must be properly advertised. In *Chizikani & Anor v Central African Building Society* 1998 (1) ZLR 371 (S) the court allowed an application to set aside a sale on the basis that the advertisements G were inadequate. Two advertisements were made in this sale. The first advertisement listed only the address of the property to be auctioned and the date of auction. A subsequent advertisement described the type of rooms available and gave the impression that there was one cottage instead of two. Gubbay CJ dealt with the question of the adequacy of advertisements and H at p 373 held that:

2013 (2) ZLR p428

Dube J

> "An advertisement which inadequately describes the property is no advertisement A at all. It will fail to comply with the Sheriff's mandate obligation. The purpose of properly describing the property is not merely to identify it. It is also to inform the public of what which is being sold, with the aim of attracting the interest of potential purchasers to the auction … for it is in the interests of the judgment debtor, and probably in the interests of creditors, that the property to be sold should obtain as high a price as possible". B

The court in that case remarked that what must be inserted in the advertisements are the main characteristics of the property. The court found that the advertisement of the sale was inadequate as it did not give sufficient details of the nature and characteristics of the property enabling potential purchasers to get a clear appreciation of the property. Gubbay CJ emphasized the need C for an advertisement in its description of the property, to state the address, size of the stand, type of improvements or buildings if any and any special privilege related to the property.

In this case a number of features of the property were omitted. The anomaly regarding the title deed is minor and not material and could not have affected D the outcome of the sale. The main house is described as having three bedrooms when it has five bedrooms. The advertisement gives out that there is a cottage, when there is in fact a second house with five bedrooms.There are two boreholes on the property. The advertisement only mentioned one borehole and did not indicate that these were fitted with tanks. The size and improvements on a property have a bearing on the value of the property. In E this day of irregular water supplies, it is important to inform interested parties of the existence of supplementary sources and substitute water supplies in the form of boreholes. The existence of two boreholes on a property is likely to generate more interest in the property than where there is one borehole. The chicken run with a capacity to carry one thousand chickens was not F highlighted.

There is no doubt in my mind that the advertisement was inadequate. I do not think that the objective of informing the public of what was being sold with a view to attracting the interest of potential purchasers to the auction was achieved. The purpose of advertising is to ensure that all interested G parties get to know of the sale. They must get sufficient notice of the sale. An advertisement in a sale in execution should give a full and complete description of the property concerned. I am not satisfied that this is the case here.

In the *Chizikani* case the court, following the South African Appellate Division in *Messenger of the Magistrate's Court, Durban v Pillay* 1952 (3) SA 678 (A), found that the provisions of r 352 are peremptory and entitle H

2013 (2) ZLR p429

Dube J

A the applicants to have the sale set aside .The term "shall cause the sale to be advertised" implies that the advertisement must be adequate and proper.

I am aware of the sentiments expressed in *Lalla v Bhura* 1973 (2) RLR 280, where the court remarked that:

> "One would have expected here that anyone interested in buying the property would not have been misled by the statement in the brochure, but would have B made his own enquiries."

This approach places a duty on potential buyer to go to the property and view the property. One has to consider that the provision is mandatory and that a failure by the sheriff to describe the property adequately or properly invalidates the sale. The application is allowed. It will not be necessary for the C court to decide whether the price at which the property was sold is reasonable.

In the result it is ordered as follows:

1. That the decision of the Sheriff for Zimbabwe handed down on 3 May 2011 under case No. SS17/2011 to confirm the sale in execution held on 4 March 2011 in respect of applicant's immovable residential property D be and it is hereby set aside.
2. That the Sheriff for Zimbabwe is hereby ordered and directed to conduct another sale in execution in terms of the rules of this court in relation to the applicant's immovable property which is presently under judicial attachment.
3. That E second respondent is ordered to pay the costs of this application.

Musendekwa-Mtisi, applicant's legal practitioners

F *Gill, Godlonton & Gerrans*, second respondent's legal practitioners

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Document 51 of 79

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2013/Volume 2/MUCHENJE & ORS v STUTTAFORDS REMOVALS (PVT) LTD 2013 (2) ZLR 430 (H)

MUCHENJE & ORS v STUTTAFORDS REMOVALS (PVT) LTD 2013 (2) ZLR 430 (H)

Citation	2013 (2) ZLR 430 (H)
Case No	Judgment No. HH-374-13
Court	High Court, Harare
Judge	Tsanga J
Heard	16 October 2013
Judgment	16 October 2013
Counsel	Ms *P Kashiri* for applicants *B Diza,* for the respondent
Case Type	Civil application
Annotations	No case annotations to date

Flynote

Arbitration – *award – registration of – need for award to sound in money before it can be registered – original award specifying six months' salary as damages, without stating amount – arbitrator subsequently approving amounts calculated by judgment creditors – document signifying such approval part of main award – not necessary that it comply fully with* D *requirements of article 31 of Schedule to Arbitration Act [Chapter 7:15] – failure by arbitrator to remit copy of award to Ministry of Labour – such failure not vitiating award*

Headnote

The applicants sought to register a quantified arbitral award for unlawful E retrenchment of the applicants by the respondent. In his award, the arbitrator ordered that each of the applicants be paid, as damages, an amount equivalent to six months' salary and benefits. He did not specify

the amount at the time he made his award. The applicants' legal practitioners proceeded to calculate what was due to each applicant and came up with precise figures as to how much was due and payable F to each in liquid terms. Forty days after the award was handed down, they sent to the arbitrator, and addressed to the respondent, a document entitled "Application for Quantification" detailing how much each was to be paid. The arbitrator endorsed, signed and dated the quantified document in these terms: "Approved as a correct quantification of the G award granted by me …"

The respondent opposed the application. The first ground was that the Arbitration Act [*Chapter 7:15*] makes no provision for the kind of application for quantification which was filed by the applicants with the arbitrator. They also argued that article 33 of the First Schedule to the Act, which allows for the correction of an award, requires that the H

A application for correction must be made within 30 days of the award. The second ground was that the arbitrator's approval of the quantification was not compliant with the requirements of Article 31, that an award must be in writing and signed by the arbitrator, stating the reasons on which it is based. It must also state its place and date of arbitration after which it ought to be delivered to each party. The "Application for B Quantification", it said, fell short of all of the above requirements. It is in the form of an endorsement to the award document, as opposed to being an award document that complied with those requirements. Thirdly, it was argued, the arbitrator had failed to comply with the requirements of s 5 of the Labour (Arbitrators) Regulations 2012 (SI 173 of 2012), C in that he had failed to remit a copy of his decision to the provincial office of the Ministry of Labour and Social Services within seven days of disposal of the matter, thereby vitiating the decision.

Held, that the application to the arbitrator was not one under article 33, which is for correction of errors in computation or typographical errors or errors of a similar nature. Since the arbitrator did not spell out any D curtailing time limits within which the applicants should have enforced the award, it could not be argued that they were out of time. Article 33 was a non-issue. Indeed, the respondent, as employer, could just as easily, of its own volition after the award was granted, have gone ahead to do the calculations of six months' salary and benefits for each applicant based on the award. If the parties agreed to the correctness of E such computations, that would have been the end of the matter.

Held, further, that in practice, when an award is submitted for registration in terms of s 98(14) of the Labour Act [*Chapter 28:*01], it should sound in money, either in the main or in the alternative, because jurisdictionally the determination as to which court to register the award in can realistically F only be one made with knowledge of the amount involved. The applicants were not seeking to introduce an alien document. The document in question was part and parcel of the arbitral award in that it gives the award the final push in the correct direction to the appropriate enforcing judicial forum, based on its amount.

G *Held,* further, that the arbitrator made one award which complied with the requirements of article 31. The document approving the application for quantification could not be seen as an entirely new award whose validity depended in its entirety on the observation of those requirements. A computation of what is due is part and parcel of a main award – a supporting, supplementary or back up document to the main award. As H such, it must be authentic in terms of the criteria set out in article 31;

---

but it is not the actual award itself, but its accompaniment. The original A award on its own was not registrable for enforcement purposes as it was not in liquid terms. The quantification was not a new award separate from the arbitration award. It gave precision to the outstanding claim so as to make it executable, given that the employer had not taken any steps to make a pay-out. As a general rule, where more than one interpretation B of an award is possible, an interpretation resulting in the award being effective is to be preferred to one rendering the award meaningless.

Held, further, that a valid award cannot be rendered invalid by virtue of events occurring subsequent to the making of the award. Common sense dictates that an arbitrator need not cross every "t" or dot every "i". To require absolute finality could delay completion of the arbitration and C unnecessarily increase costs of the proceedings.

Cases referred to

Amalgamated Clothing and Textile Workers Union of South Africa v Veldspun (Pty) Ltd 1994 (1) SA 162 (A) D

Conforce (Pvt) Ltd v City of Harare 2000 (1) ZLR 445 (H)

Dhlomo-Bhala v Lowveld Rhino Trust 2013 (2) ZLR 179 (H)

Interciti Property Referrals CC v Sage Computing (Pty) Ltd & Anor 1995 (3) SA 723 (W)

Kroon Meule CC v Wittstock 1999 (3) SA 866 (E)

NSSA v Chairman, NSSA Workers Committee & Ors 2002 (1) ZLR 306 (H) E

Mandiringa & Ors v NSSA 2005 (2) ZLR 329 (H)

Wood v Griffith (1818) 1 Swanston 43

Legislation considered

Arbitration Act [*Chapter 7:15*], First Schedule, arts 31 & 33 F

Labour Act [*Chapter 28:01*], s 98(14)

Labour (Arbitrators) Regulations 2012 (SI 173 of 2012)

Case information

Ms *P Kashiri* for applicants

B Diza, for the respondent

Judgment

Tsanga J: This is a case in which the sixteen applicants seek to register a G quantified arbitral award collectively amounting to US$26 352 for unlawful retrenchment by the respondent. The registration of the quantified award through a chamber application was challenged by the respondent who raised issues *in limine* on grounds that I will elaborate fully below. The genesis of the dispute is one that, in the context of economic challenges, has increasingly H

Tsanga J

A come to sound like a stuck record. The employees received letters of termination from the respondent, the employer, which cited "the hardships being faced". The respondent purported to terminate their employment on conditions which included three months' salary in lieu of notice.

The applicants challenged the termination as unlawful in a matter which was B referred to arbitration by the labour officer under a certificate of no settlement. Failure to settle was as a result of the respondent not attending two meetings called by the labour officer. The respondent, through correspondence, challenged the jurisdiction of the labour officer in the matter. The essence of the respondent's objection, also repeated to the arbitrator, was that the applicants had not exhausted internal procedures in terms of the Collective C Bargaining Agreement of the Transport Operating Industry's Code of Conduct, SI 67 of 2012. The respondent averred lack of jurisdiction to hear the matter but did however attend the arbitrator's hearing.

On the point of lack of jurisdiction, the arbitrator Mr Madhuku's finding was that the respondent's assertion was bad at law as codes of conduct apply D in matters of misconduct. In the case before him, the issue was not one of misconduct but whether or not there had been unlawful retrenchment. He found that the retrenchment was indeed unlawful, as the employer had not followed the requisite procedures. Because he had not done so, the purported retrenchments were unlawful. In light of hardships on employers, E the arbitrator concluded that reinstatement was not a remedy in this case and neither would an award of damages beyond six months be reasonable. He accordingly made the following award on 14 March 2013, which reads in the operative part as follows:

(a) That each of the sixteen employees be paid as damages, an amount equivalent to six months' salary and benefits.

(b) That F each party (claimants as one) pays 50 per cent of the costs of arbitration.

Following the this determination, the applicants' legal practitioners proceeded, on 24 May 2013, to calculate what was due to each applicant on the basis of six months and came up with concise figures as to how much was due and G payable to each in liquid terms. They sent to the arbitrator and addressed to the employer, a document entitled "Application for Quantification" detailing how much each was to be paid. The arbitrator endorsed, signed and dated the quantified document in his own handwriting on 27 May in the following terms:

> "Approved as a correct quantification of the award granted by me on 14 March H 2013."

Tsanga J

The document is duly stamped with his official stamp. The applicants thereafter A made a chamber application for its registration in terms of s 98(14).

The respondent filed an opposing affidavit to the registration of this quantified award. The matter became an opposed application. The respondent has raised two issues *in limine* upon which it has argued that the application should be dismissed with costs. It also argued that despite raising these B issues, the applicant had failed to address them. The first issue *in limine* is that the Arbitration Act [*Chapter 7:15*] makes no provision for the kind of 'application' which was filed by the applicants with the arbitrator – that is, the so called "Application for quantification". The respondent relies on art 33 of the First Scehdule to the Arbitration Act which states partly as follows:

> **"Corrections and interpretation of awards; additional award** C
>
> (1) Within thirty days of receipt of award , unless another period of time has been agreed upon by the parties –
>
> (a) a party with notice to the other party, may request the arbitral tribunal to correct in the award any errors in computation, any clerical or typographical errors, or any errors of a similar nature;
>
> (b) if so agreed by the parties, a party, with notice to the other, may request the D Tribunal to give an interpretation of a specific point or part of the award.
>
> If the arbitral tribunal considers the request justified, it shall make correction or give interpretation within thirty days of receipt of request. The interpretation shall form part of the award."

On the basis of the above, the respondent submits that all the Arbitration Act E allows for in art 33 (1) once the matter has been heard, is that, within 30 days of the award a party upon notice to the other may request the arbitral tribunal to correct the award and any errors in computation, any typographical errors or any errors of a similar nature. The respondent further put forward the argument that the application was also out of time, as 30 days had elapsed after the handing down of the award before the application was submitted. F The purported "Application for Quantification" was made 40 days after the hearing. In arguing that the application falls out of bounds they relied on *Conforce (Pvt) Ltd v City of Harare* 2000 (1) ZLR 445 (H).

In examining the above provisions in light of what the applicants put before the arbitrator, it is evident that theirs was indeed not one envisaged G by art 33. It was not an application for correction of errors in computation or typographical errors or errors of a similar nature. The applicant affirms as much and in fact states that it was never intended to be an application under this provision. In my view there is no need to labour this point with an inapplicable provision. Since the arbitrator did not spell out any curtailing time limits within which the applicants should have enforced the award, it H

Tsanga J

A cannot be argued that they were out of time. Article 33 is a non-issue here. Indeed, the respondent as employer could just as easily, of its own volition after the award was granted, have gone ahead to do the calculations of six months' salary and benefits for each applicant based on the award. If the parties agreed to the veracity of such computations, that would have been the end of the matter.

B The rationale for what they termed an "Application for Quantification" stems from the practice that for the award to be registrable it must sound in money.

Section 98(14) of the Labour Act [*Chapter 28:01*] states that:

> "Any party to who 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 C which would have had jurisdiction to make an

order corresponding to the award had the matter been determined by it, or, if the arbitral award exceeds the jurisdiction of any magistrate court, the High Court."

In *Mandiringa & Ors v NSSA* 2005 (2) ZLR 329 (H), Makarau J, as she then was, stated that the language in s 98(14) strongly suggests that the award submitted for registration in terms of the section should sound in money D either in the main or in the alternative for the reason that jurisdictionally the determination as to which court should register the award can only be realistically made on knowledge of the amount involved.

I therefore do not see how, in light of all the above, the applicants can be said to be seeking to introduce an alien document. The document in question E is part and parcel of the arbitral award in that it gives the award the "final push'' in the correct direction to the appropriate enforcing judicial entity based on its amount. This is particularly so where it has become necessary for the winning party to seek justice through its registration. In my view the first objection *in limine* takes us nowhere other than an unnecessary run around the mulberry bush. As such, the first point *in limine* is dismissed.

F This leads to the second objection *in limine,* which is that the document by the arbitrator is not registrable as it does not follow the requirements of the law in several respects. The respondent averred two primary defects: firstly that the application for quantification is defective in its failure to follow Article 31 of the Arbitration Act in terms of what the Arbitrator's award G must contain. Article 31 of the Act provides as follows:

"Form and content of award

(1) The award shall be made in writing and shall be signed by arbitrator or arbitrators . . .

(2) The award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is an award on agreed H terms under article 30.

2013 (2) ZLR p436

Tsanga J

(3) The award shall state its date and the place of arbitration as determined in A accordance with article 20(1). The award shall be deemed to have been made at that place.

(4) After the award is made, a copy signed by the arbitrators in accordance with paragraph (1) of this article, shall be delivered to each party".

The respondent's gripe is that the arbitrator's approval of the quantification is B not compliant with the above requirements that an award must be in writing and signed by the arbitrator, stating the reasons on which it is based. It must also state its place and date of arbitration after which it ought to be delivered to each party. The "Application for Quantification" is said to fall short of all of the above. It is in the form of an endorsement to the quantification document as opposed to being an award document that complies with the above. C

It is instructive that art 31 refers throughout to 'award' in the singular and to what the arbitrator must do with the "award" in order for it to be compliant with the above provisions. In my view, the arbitrator made one award on 14 March which, it is not disputed, complies with the above. The application for quantification cannot in my opinion be seen as an entirely new award whose D validity depends in its entirety on the observation of the above technicalities. A computation of what is due is part and parcel of a main award. I would venture to describe it as a supporting, supplementary or back-up document to the main award. As such, there is no denying the need for it to be authentic in terms of the criteria spelt out above. But it is not the actual award itself but its accompaniment. The respondent accepts wholeheartedly that the E primary award is perfectly in order in terms of compliance with legal requirements. However, the respondent also acknowledges that on its own it is not registrable for enforcement purposes as it is not in liquid terms. Should its addendum that would make it registrable be forever banished and dismissed by this court on the grounds that it fails the test of compliance? It is said not to give a place of arbitration nor the reasons why it was made F outside the stipulated time frames. It is argued that these omissions do not fall in the realm of mere technicalities. I am of the view that they do. The arbitrator endorsed the quantification as an approved calculation of his award of 14 March. He attested to its veracity. He signed. He dated it. He stamped it. His principal award to which his endorsement refers is compliant in all G respects. The quantification is part of that award.

The respondent's objection is exactly that which he says it is not, i.e. a technical objection. There is, in my view, cogent support for the argument that the award made by the arbitrator on 14 March

already established substantial finality and that the quantification was not a new award separate from the arbitration award. The quantification should be viewed as seeking to give H

2013 (2) ZLR p437

Tsanga J

A precision to the outstanding claim so as to make it executable given that the employer had not taken any steps to make a pay-out.

I am inclined to adopt an interpretation which gives effect to this supporting document as endorsed by the arbitrator as opposed to an interpretation that vitiates it. In this regard I find support in the case of *Interciti Property Referrals CC v Sage Computing (Pty) Ltd& Anor* 1995 (3) SA 723 (W) at 727 where B Zulman J took the approach that where more than one interpretation of an award is possible, an interpretation resulting in award being effective is to be preferred to one rendering the award meaning less. He further went on to cite with approval at 728B the *dictum* by Lord Chancellor Eldon in *Wood v Griffith* (1818) 1 Swanston 43 as being still applicable today where he said:

> C "It is extremely clear that every award must be certain and final; but it has, particularly in more modern time, been considered the duty of the court, in construing an award, to find that it is certain and final; and instead of leaning to a construction, which in effect would destroy nine tenths of the awards made, if possible to put one consistent sense on all the terms."

In *Dhlomo-Bhala v Lowveld Rhino Trust* 2013 (2) ZLR 179 (H) Mafusire D J dealt, amongst other objections to the registration of an award, with protestations with a certification document attached to the back of the arbitral ward. He made the following pertinent remark at 193D:

> "I am prepared to condone the lack of precision in the certification of the arbitral award. I think that where a party has so substantially complied with the requirements of the law as the applicant has done in this case and where there E is no discernible prejudice to the other party, it 'would make justice turn on its head' to deny relief in such circumstances. I dismiss the respondent's ground of objection on this point."

In *NSSA v Chairman, NSS A Workers Committee & Ors* 2002 (1) ZLR 306 (H) at 314 Smith J, albeit with reference to a principal award, expressed F great reluctance to nullify an award. As he put it:

> "I consider it would go against the spirit of UNCITRAL Model Law to hold that if an award did not comply with all requirements of art 31, it was a nullity. That would mean that if the arbitrator did not state the date of the award or place of arbitration, the award would be a nullity. That in my mind would be too formalistic an approach. Likewise, I cannot accept that because art 32 provides G that the arbitral proceedings are terminated by the final award, the court cannot thereafter order that the arbitrator must do a particular thing to ensure compliance with article 31. If an arbitrator has failed to state the date or place of arbitration, and it is important that that be done, why the arbitrator should not be permitted to remedy the omission."

The arbitrator's award is also deemed to be non-compliant with s 5 of SI H 173 of 2012 which reads as follows:

2013 (2) ZLR p438

Tsanga J

> "Every Arbitrator shall – A
>
> (a) remit a copy of their decision to the provincial office of the Ministry of Labour and Social Services within seven days of the disposal of the matter*;*
>
> (b) maintain a record of cases he or she has handled for a period of five years subsequently to the disposal of the matter.
>
> (c) remit quarterly a register of the cases on hand and their status to the provincial B office of the Ministry of Labour and Social Services."

The respondent argues that the arbitrator did not remit a copy of the decision to the Ministry of Labour within seven days of the matter. It is not argued that his principal award was not remitted and in fact the respondent states it is only that which is valid. I have already expressed my view of the intertwining C relationship between the award and its supporting documents.

In *Kroon Meule CC v Wittstock* 1999 (3) SA 866 (E) Erasmus J observed that a valid award cannot be rendered invalid by virtue of events occurring subsequent to the making thereof. The respondent concedes that the award made by the arbitrator on 14March is perfectly valid. On p 874F of his D judgment Erasmus J further went on to state as follows:

> "Common sense dictates that an arbitrator need not cross every 't' or dot every 'i' in the dispute. To require absolute finality could delay completion of the arbitration and unnecessarily increase costs of the proceedings."

I hasten to add that, where the matter has been effectively arbitrated upon, E issues are clear and new disputes are not merely crafted for the simple purposes of delay or frustration of the other party, the court in such cases must necessarily be guided by the need to be swift and effective agents of justice. In *Amalgamated Clothing and Textiles Workers Union v Veldspun (Pty) Ltd* 1994 (1) SA 162 (A) at 169H Goldstone JA stated that courts should "deprecate conduct by a party to an arbitration who does not do all F in his power to implement the decision of the arbitrator promptly and in good faith". The court has to be mindful of the high costs to applicants who have a valid claim, that can arise from ceaseless 'avoidance of compliance' inspired litigation. Lengthy delays remain a root cause of dissatisfaction with the legal process and it is our duty as courts to refuse to play unnecessary G games that lead to such situations.

In the final result I make an order in the following terms:

1. The certified arbitral award issued by Arbitrator Madhuku in favour of the applicants on 14 March with its supporting quantification approved by him on 27 May, is hereby registered as an order of this court; H

Tsanga J

2. The A respondent is hereby ordered to pay the sum of US$26 352 to the applicants in terms of the approved quantification of the arbitral award by the arbitrator.
3. The respondent shall pay the costs of this application.

B *Thondhlanga and Associates*, applicants' legal practitioners

Mtetwa Nyambirai, respondent's legal practitioners

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Document 52 of 79

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MAHLANGU v DOWA & ORS 2013 (2) ZLR 440 (H)

Citation	2013 (2) ZLR 440 (H)
Case No	Judgment No. HH-359-13
Court	High Court, Harare
Judge	Mathonsi J
Heard	24 September 2013; *CAV*
Judgment	23 October 2013
Counsel	*E T Matinenga*, for the plaintiff First, second, third and fifth defendants in default *T Magwaliba*, for the fourth defendant
Case Type	Opposed application

Annotations No case annotations to date

Flynote

Practice and procedure – *interrogatories – when may be granted – defendant not answering claim in his plea and refusing to furnish any useful particulars when requested – plaintiff's entitlement to information to enable him to prepare adequately for trial* D

Headnote

The plaintiff was a senior legal practitioner and a partner at a leading law firm. He had sued the first two defendants, who were police officers, the third defendant who was the Commissioner-General of the ZRP, the fourth defendant, who was the Attorney-General, and the Co-Ministers of Home Affairs for damages and compensation, plus interest and costs. E He had been consulted in his capacity as a legal practitioner by a person who sought his professional legal advice. In pursuance of that, he had addressed a letter to the Attorney-General, in which he advised him that not only had his client not been validly subpoenaed as a prosecution witness in a trial which was pending, but also that his client was not going to render any evidence relevant to the prosecution case in that trial. F The Attorney-General instructed the Commissioner-General to arrest and detain the plaintiff on a charge of interference with the administration of justice. The plaintiff was then arrested by the first defendant, acting on the orders of the second, third and fourth defendants, without a warrant of arrest and detained for over 24 hours. The arrest without warrant G was wrongful, unlawful and contrary to s 13 of the 1980 Constitution of Zimbabwe, because the first defendant did not hold a reasonable suspicion that an offence had been committed but merely acted on the unlawful orders of the second defendant, who acted on unlawful orders of the third defendant, who had in turn acted on the unlawful instructions or orders of the fourth defendant. None of the defendants exercised the H

A discretion required by law or exercised it improperly and in so doing they acted in breach of the law and maliciously.

The Attorney-General pleaded to the summons. The plaintiff requested particulars from the Attorney-General to enable him to prepare for trial, probably because of the Attorney-General's failure to say anything useful in his plea. In that request the plaintiff put specific and direct questions, B which did not yield any useful outcome. He then brought an application in terms of r 191 of the High Court Rules, seeking leave to administer interrogatories. He argued that the particulars he had requested could not be left for cross examination at the trial, as alleged by the Attorney-General, as he was entitled to them in preparation for trial. He maintained C that the interrogatories were relevant to the matters in issue between the parties. The Attorney-General maintained that the interrogatories were not necessary and that the procedure of interrogatories had fallen into disuse.

Held, that to say that the procedure for interrogatories had fallen into disuse, when it remained in the rules, could not be taken seriously. While r 191 is seldom employed – mainly because litigants usually find it easier D to proceed in terms of r 143 and request discovery, thereby making it unnecessary to employ the procedure provided for in r 191 – here, the plaintiff had first proceeded under r 143 route but came away empty handed because the Attorney-General did not co-operate.

Held, further, that the relief sought by way of interrogatories is discretionary E in nature, but that does not detract from the fact that a party to an action has a right to interrogate his opponent on matters which are relevant to an issue in which such party bears the onus of proof. The remedy provided for in r 191 has no counterpart in South African procedure, coming as it does from English law. The right to interrogate is not confined to the facts directly in issue, but extends to any facts the existence or non- F existence of which is relevant to the existence or non-existence of the facts directly in issue. Interrogatories are admissible, not only for the purpose of supporting the applicant's case, but also for the purpose of impeaching or destroying his opponent's case.

Held, further, that the basic difference between interrogatories and commissions *de bene esse* is that, while in the latter case general evidence G is required, in the former certain specific questions are formulated for the purpose of being put to the witness by the commissioner.

Held, further, that a litigant is entitled to information from his adversary which will enable him to adequately prepare for trial and should not be put in the position of preparing for trial in the dark. The issue of H what informed the decision of the Attorney-General to act as he did

in giving directions to the Commissioner-General terms of s 76(4a) of A the 1980 Constitution, what he told the Commissioner-General, and whether the latter reported back to him and the contents of such report, were legitimate subjects for interrogation. Other than to say that he requested the Commissioner General to investigate and report to him, the Attorney-General's plea did not set out any facts that could be used B to resolve the matter between the parties. It purposely avoided delving into the facts of the matter and left the plaintiff extremely embarrassed as to the evidence he had to meet at the trial.

Held, further, that the authorities made it clear that pretty nearly anything that is material to the issue between the parties may be asked and that interrogatories are admissible for supporting the plaintiff's case and also C for impeaching or destroying his opponent's case. A very senior legal practitioner was arrested while discharging his duties. The details of what prompted that arrest were fair targets of interrogation in preparing for trial.

Cases referred to

Serfontein & Anor v Irvine 1979 RLR 510 (A) D

Timsecurity (Pvt) Ltd v Castle Hotel (Pvt) Ltd 1972 (1) RLR 155 (A); 1972 (3) SA 112 (RA)

Legislation considered

Constitution of Zimbabwe 1980, s 76(4a) & (7) E

High Court Rules 1971 (RGN 1047 of 1971), rr 143 & 191

Case information

E T Matinenga, for the plaintiff

First, second, third and fifth defendants in default

T Magwaliba, for the fourth defendant F

Judgment

Mathonsi J: This is an application made in terms of r 191 of the High Court Rules 1971 for leave to administer interrogatories in a matter in which the plaintiff, a senior legal practitioner and a partner at the law firm of Gill, Godlonton & Gerrans in Harare, has sued the first defendant, a detective inspector in the Zimbabwe Republic Police ("ZRP"), the second G defendant, a detective chief inspector in the ZRP, the third defendant who is the Commissioner-General of the ZRP, the fourth defendant, who is the Attorney-General of this country and the Co-Ministers of Home Affairs, cited as fifth defendants for damages and compensation in the total sum of US$400 000. He also seeks interest on that sum at the prescribed rate and costs of suit on the scale of legal practitioner and client. H

Mathonsi J

A The suit arises from the arrest of the plaintiff on 2 November 2009 at the offices of Gill, Godlonton & Gerrans and his subsequent detention at Harare Central Police Station until his release by a magistrate on bail the following afternoon. The application is opposed by the fourth defendant only as the other defendants have not seen the need to oppose the application despite service of the application upon their legal practitioners on 18 August 2011. B One can only assume that their silence means acquiescence and that they will happily respond to the interrogatories.

On 12 April 2010, the plaintiff issued out summons against the defendants aforesaid and in his declaration he averred that during October 2009 he was consulted in his capacity as a legal practitioner by one Michael Peter C Hitschman who sought his professional legal advice. In pursuance of that, he had addressed a letter, attached to the declaration, to the fourth defendant in his official capacity as the Attorney-General, in which he advised him that not only had Hitschman not been validly subpoenaed as a witness in a trial which was pending but also that Hitschman was not going to render any evidence relevant to the prosecution case in that trial. He backed that D opinion with an affidavit sworn to by Hitschman, which was attached to the letter in question.

The plaintiff averred further that, upon receipt of that letter, the fourth defendant had forwarded it to the third defendant with instructions for the arrest and detention of the plaintiff on a charge of interference with the E administration of justice. He was then arrested by the first defendant acting on the orders of the second, third and fourth defendants without a warrant of arrest and detained as aforesaid, only to be released on bail on the afternoon of 3 November 2009. The arrest without warrant was wrongful, unlawful and contrary to s 13 of the former Constitution of Zimbabwe because the first defendant did not hold a reasonable suspicion that an offence had been F committed but merely acted on the unlawful orders of the second defendant, who acted on unlawful orders of the third defendant, who had in turn acted on the unlawful instructions or orders of the fourth defendant. None of the defendants exercised the discretion required by law or exercised it improperly and in so doing they acted in breach of the law and maliciously.

G The plaintiff stated further that his detention was wrongful and unlawful because there were no grounds for it.

All the defendants are contesting the suit. In his plea filed on 27 May 2010, the fourth defendant stated:

> "The fourth defendant pleads as follows to the plaintiff's claim:
>
> 1. The H plaintiff's claim is excepiable (sic)

Mathonsi J

The plaintiff has failed to set out the following material averments with A regard to its claim against the fourth respondent (*sic*):

1.1 when the alleged instructions were issued.

1.2 how they were issued?

1.3 the basis upon which it is alleged that the instructions were an order for 'arrest' and 'detention'. B

2. Pursuant to the alleged instructions of the fourth defendant the plaintiff has failed to set out a basis upon which the actions of the first, second and third defendants can be linked or connected to the fourth defendant such as to establish liability on the part of the fourth defendant.

2.1 plaintiff does not allege or aver that:

2.1.1 that the alleged instructions were unlawful C

2.1.2 that the fourth defendant was not entitled to issue such instructions in view of the provisions of section 7b of the Constitution of Zimbabwe.

2.1.3 that the first, second and third defendants acted on those instructions unlawfully.

3. Ad paragraph 1-6 D

No issues

4. Ad paragraph 7

No basis has been set out for liability to plaintiff in the personal capacity of the fourth defendant.

4.1 It is not alleged that the defendant had no lawful authority under section E 76(4) (a) of the Constitution of Zimbabwe.

4.2 It is not alleged that the fourth defendant has a personal interest or was motivated by other personal considerations beyond mere exercise of duty.

5. Ad Paragraph 8 & 9

Fourth defendant has no knowledge of this. F

6. Ad Paragraph 10,11 &12

The fourth defendant acted in terms of s 76(4)(a) of the constitution of Zimbabwe and merely requested the third defendant to investigate and report to him.

6.1 it is denied that fourth defendant issued instructions for the arrest of plaintiff G

6.2 it is further denied that fourth defendant instructed the detention of the plaintiff.

7. Ad Paragraph13,14,15,16,17 & 18

The fourth defendant is not responsible for the actions of first, second and third defendants as these derive their mandate from the Constitution separately and independent of the fourth defendant. H

2013 (2) ZLR p445

Mathonsi J

8. The A arrest and detention of the plaintiff would have been on the basis of the opinions formulated by the first, second and third defendants for which the fourth defendant is neither responsible nor answerable.

9. The fourth defendant has no knowledge of damages suffered by plaintiff and puts plaintiff to the strictest proof thereof."

The record that has been placed before me does not show that a pre-trial B conference took place and what transpired at that conference. Suffice to say that the plaintiff requested particulars from the fourth defendant to enable him to prepare for trial probably stung by the fourth defendant's failure to let out anything useful in his plea. In that request, the plaintiff put specific and direct questions to the fourth defendant which did not yield any useful C outcome. The request for particulars for trial reads:

"In order to enable the plaintiff to prepare for trial, the fourth defendant is required to provide the following particulars within 10days of service of this request upon him in terms of r 143.

1. At what time on 2 November 2009 did the fourth defendant first receive and read the letter which is attached to the declaration?

2. At D what time on 2 November 2009 did the fourth defendant forward the letter of 2 November 2009 attached to the declaration to the third defendant?

3. When forwarding the letter attached to the declaration to the third defendant, did the fourth defendant give any instructions in writing or make any request in writing? If so, a copy of such instructions or request is required. If not, full details are required of any communications between the fourth defendant and E the third defendant regarding the letter, that took place on either 2 November 2009 or 3 November 2009.

4. In so far as the fourth defendant alleges that he acted in terms of s 76(4a) of the Constitution of Zimbabwe, the fourth defendant is required to give full details as to the basis upon which he reached the opinion stipulated by that F section before referring the letter to the third defendant.

5. What criminal offence or alleged or suspected criminal offence did the fourth defendant require to be investigated by the third defendant?

6. Did the third defendant report to the fourth defendant as required by s 76(4a) of the Constitution of Zimbabwe? If so, the date of such report is required to be stated.

7. Was G any such report in writing? If so, a copy thereof is required. If not, full details are required as to the contents of the report and the manner in which it was made.

8. The fourth defendant is required to state in detail his knowledge of the plaintiff in his capacity as a legal practitioner as at 2 November 2009. Full details are required of any professional dealings between the plaintiff and H the fourth defendant prior to 2 November 2009."

2013 (2) ZLR p446

Mathonsi J

The fruit of the plaintiff's industry came in the following negativity filed by A the fourth defendant as further particulars on 27 September 2010:

"Please take note of the fourth defendant's further particulars.

1. Ad Paragraph 1-2

The particulars requested relate to matters of evidence.

2. Ad Paragraph 3

The information requested here is unnecessary for the purposes of the B plaintiff's preparation for trial. More importantly, it relates to matters that can be conversed through cross examination.

3. Ad Paragraph 4

The particulars requested relate to issues of law.

4. Ad paragraph 5

The fourth defendant merely requested the third defendant to investigate C and report back to him in terms of the law.

5. Ad paragraph 6,7 & 8

The particulars requested herein relates (*sic*) to matters of evidence."

The plaintiff's effort in terms of r 143 having left him rooted in the same place, he was probably despondent and without solution. He then brought this application in terms of r 191 seeking leave to administer interrogatories D arguing that the particulars he had requested cannot be left for cross-examination at the trial as alleged by the fourth defendant as he is entitled to them in preparation for trial. He maintained that the interrogatories are relevant to the matters in issue between the parties.

In his opposing affidavit, the fourth defendant maintained that the E interrogatories are not necessary and that "the procedure of interrogatories has fallen into disuse." He stated further at paras 8 to 11 of the affidavit that:

"8. Plaintiff is patently mistaken in its (*sic*) view that the interrogatories are of necessity to his preparation for trial. This is clearly a fishing expedition and an inquisitorial foray meant to gain undue insight into the strength of my defence. F

9. The further particulars sought by way of interrogatories disclose a *mala fide* attempt by applicant to harass and vex me. Sufficient particulars to enable the applicant to prepare for trail have been furnished. I am advised that it is inappropriate for the applicant to seek the furnishing of evidence through the avenue of interrogatories.

10. Furthermore, the information required by plaintiff through the interrogatories G is neither necessary nor relevant for the purpose of preparing for trial. The law only enjoins me to disclose the particulars that are being sought at the trial as they concern matters of evidence which have nothing to do with the plaintiff's pre-trial requirements.

11. In light of the foregoing, I submit that plaintiff is not entitled to the particulars sought via its (*sic*) numerous interrogatories as such particulars are not relevant at this juncture." H

2013 (2) ZLR p447

Mathonsi J

A The foregoing extract betrays some kind of misunderstanding of the procedure for interrogatories. To say that the procedure for interrogatories has fallen into disuse, when it remains in the Rules, cannot be taken seriously. It is true of course that r 191 is seldom employed, mainly because litigants usually find it easy to proceed in terms of r 143 and request discovery there by making it unnecessary to employ the procedure provided for in r 191. *In* B *casu*, I have already stated that the plaintiff went the r 143 route but came out very empty handed because the fourth defendant did not co-operate. He then sought sanctuary in r 191.

That rule provides for discovery by interrogatories in the following terms:

"(1) A party to a cause or matter may make a chamber application for directions C for an order –

(a) giving him leave to serve on any other party interrogatories relating to any matter in question between the applicant and that other party in the cause or matter; and

(b) requiring that other party to answer the interrogatories on affidavit within such period as may be specified in the order.

(2) A D copy of the proposed interrogatories in Form No.26 shall be served with the notice by which the application for such leave is made.

(3) On the hearing of an application under this rule, the judge shall give leave as to such only of the interrogatories as he considers necessary either for disposing fairly of the cause or matter or for saving costs; and in deciding whether to give leave the judge shall take into account any offer made by the party to be E interrogated to give particulars or to make admissions or to produce documents relating to any matter in question.

(4) A proposed interrogatory which does not relate to such a matter as is mentioned in subrule (1) shall be disallowed notwithstanding that it might be admissible in oral cross-examination of a witness."

Clearly the relief sought by way of interrogatories is discretionary in nature, F but that does not detract from the fact that a party to an action has a right to interrogate his opponent on matters which are relevant to an issue in which such party bears the onus of proof. The remedy provided for in r 191 has no counterpart in South African procedure, coming, as it does, from English law.

In upholding the decision of the General Division on the general principles G applicable to the court's discretion to grant or refuse interrogatories, in *Serfontein & Anor v Irvine* 1979 RLR 510 (A), Lewis JP stated at 514E-H and 515A-B:

> "The general principles applied are summed up in the passage in the judgement of Lord Esher in *Marriot v Chamberlain* (1886) 17 QBD 154 at 163.
>
> The relevant passage is quoted at p 71H of the judgment in the court *a quo* as H follows:

2013 (2) ZLR p448

Mathonsi J

> 'It does not, to my mind signify, in dealing with these questions, on whom A it lies to prove the facts with regard to which the interrogatory is put. These facts may be called part of the plaintiff's case, but if they are, I think the defendant has a right to interrogate with regard to them, because they are part of the plaintiff's case. The law with regard to interrogatories is now very sweeping. It is not permissible to ask the names of persons merely as being the witnesses whom the other party is going to call, and their names B not forming any substantial part of the material facts; and I think we may go so far as to say it is not permissible to ask what is mere evidence of the facts in dispute, but forms no part of the facts themselves. But with these exceptions it seems to me that pretty nearly anything that is material may now be asked. The right to interrogate is not confined to the facts directly in issue, but extends to any facts the existence or non-existence of which is relevant to the existence or non-existence of the facts directly in issue.' C
>
> I think, however, it is of importance to add a further well-established principle, not dealt with by Lord Esher in that passage which is that interrogatories are admissible not only for the purpose of supporting the applicant's case but also for the purpose of impeaching or destroying his opponent's case. See *Hennessy v Wright* (1890) 24 QBD 445 at 447 *per* Lord Esher in the opening sentence of his judgment. See also *Plymouth Mutual Co-operative and Industrial Society Ltd v* D *Traders' Publishing Association Ltd* [1906] 1 KB 403 at 416-7 *per* Stirling LJ."

Herbstein and van Winsen *The Civil Practice of the Superior Courts in South Africa* 3 ed also make the point that evidence can be elicited through interrogatories. At p 439-40 they state:

> "The basic difference between interrogatories and commissions *de bene esse* is that while in the latter case general evidence is required, in the former certain E specific questions are formulated for the purpose of being put to the witness by the commissioner. The conditions under which leave will be granted to take evidence by means of interrogatories and the method of, and the time for obtaining such leave are the same as in the case of a commission. The party applying for leave annexes to his application questions which he requires to be put to the F witness and the respondent is entitled to ask to put cross-interrogatories to the same witness in the form of set questions approved by the court granting leave."

I approach this matter from the premise that a litigant is entitled to information from his adversary which will enable him to adequately prepare for trial and should not be put in the position of preparing for trial in the dark. As stated by Macdonald ACJ in *Timsecurity (Pvt) Ltd v Castle Hotel (Pvt) Ltd* 1972 (1) RLR 155 (A); 1972 (3) SA 112 (RA) at 114H-115A: G

> "A litigant is entitled to know the case or defence he has to meet; not only to know whether he should admit or deny the particular allegation. He is entitled to be placed in the position of being able to decide whether to persist in his claim or defence. This aspect has, perhaps, not been sufficiently emphasized in the decided cases. A litigant must not be put in the embarrassing position of being forced to resort to a bare denial by the lack of particularity; a denial which, in H

2013 (2) ZLR p449

Mathonsi J

> A the light of particulars supplied at a later stage, he might well be obliged to withdraw, or qualify. He should be in a position honestly to deal with the matter and either to admit or deny an allegation in the light of the particulars furnished."

Mr *Matinenga*, who appeared for the plaintiff, strongly argued that the fourth defendant's presentation in all his pleadings, including the response to the request for further particulars for trial, shows that he is ducking and B diving in a manner suggestive of the fact that he does not take the exercise seriously at all. On the other hand, Mr *Magwaliba* for the defendant was firmly of the view that the interrogatory is not relevant to the issues for trial and contains matters in which the plaintiff has already pleaded existence of certain facts. To him the plaintiff is not entitled to inquisitively question C evidence outside a trial.

The plaintiff alleges that the fourth defendant set in motion the process which led to his arrest and detention after he had received a letter written to him by the plaintiff. The plaintiff alleges that the

conduct of the defendant was unlawful and wrongful and contrary to the provisions of the law. He further avers that the fourth defendant and the other defendants did not exercise the D discretion required of them by law or exercised it improperly. In doing that, the defendants were actuated by malice.

On the other hand, the fourth defendant denies those averments and has pleaded that he acted in terms of powers given to him in s 76(4a) of the former Constitution by merely requesting the third defendant to investigate E and report to him. The fourth defendant has refused to shed any more light as to whether the third defendant reported back to him as required by law and what was contained in that report. It is common cause that the letter which triggered the chain of events complained of was written on 2 November 2009 and delivered on the fourth defendant the same morning. Hours later F that day, the plaintiff was arrested and detained.

Section 76(4a) of the former Constitution provides:

> "The Attorney-General may require the Commissioner-General of Police to investigate and report to him on any matter which, in the Attorney-General's opinion, relates to any criminal offence or alleged or suspected criminal offence, and the Commissioner-General of Police shall comply with that requirement"

G In terms of s 76(7) the powers given to the Attorney General under subs (4a) are not subject to the direction or control of any person or authority but rest exclusively upon him.

In my view, the issue of what informed the decision of the fourth defendant to act as he did in terms of s 76(4a), what he told the Commissioner-General, H whether the latter did report back to him and the contents of such report are

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Mathonsi J

legitimate subjects for interrogation. In that regard interrogatories 1 to 5 are A relevant to the issue between the parties.

I agree with Mr *Magwaliba* that interrogatories 6 to 9 relate to questions of law, in particular the duties of a legal practitioner in relation to his client and professional responsibility in the attainment of justice. They do not necessarily achieve relevance in respect of the plaintiff's preparation for B trail. I would therefore disallow them.

What is germane to the facts in issue in this matter is the interaction between the fourth and third defendants, the fourth defendant having formulated the opinion in terms of s 76(4a) of the former Constitution that a criminal offence may have been committed by the plaintiff whether in penning the letter of 2 November 2009 or the affidavit of his client. For that reason, the plaintiff C is entitled to interrogate the fourth defendant in relation to his interaction with the Commissioner-General and ascertain what transpired. It should be borne in mind that the plaintiff has a right to information which is necessary for disposing fairly of some of the issues raised in the pleadings, the fourth defendant having lent heavily on the defence that he merely instructed the D Commissioner-General to investigate and nothing more.

It is in that light that interrogatories 10 to 32 should be examined. Other than to say that he requested the Commissioner-General to investigate and report to him, the fourth defendant's plea does not set out any facts that can be used to resolve the matter between the parties. It purposely avoids delving into the facts of the matter and leaves the plaintiff extremely embarrassed as to E the evidence he has to meet at the trial. It is crucial to note that in exercising the discretion reposed to me by r 191(3) the extent to which a party has given particularity is of material consideration. Lewis JP made the point in *Serfontein & Anor v Irvine (supra*) at 520E that:

> "In terms of r 191(3) the court, in the exercise of its discretion, has to consider F whether the interrogatories are 'necessary either for disposing fairly of the cause or matter or for saving costs', and if the disclosure would enable the defendant to make a tender and settle the matter out of court, then both these objects would be satisfactorily attained by the granting of the application."

Granted what is required of the fourth defendant in interrogations 10 to 32 is fairly detailed but it is all because the fourth defendant's pleadings have G bordered on bare denials which do not concern themselves with relevant facts in issue between the parties. The information that is required by the plaintiff is, in my view, relevant to the facts. I am also mindful of the fact the authorities make it clear that pretty nearly anything that is material to the issue between the parties may be asked and that interrogatories are admissible for supporting the plaintiff's case and also for impeaching or H

Mathonsi J

A destroying his opponent's case. A very senior legal practitioner was arrested while discharging his duties. The details of what prompted that arrest are fair targets of interrogation in preparing for trial.

I am fortified in that view by the realisation that where the fourth defendant is genuinely unable to answer the particular interrogatory he is entitled to B say so and move on.

I conclude therefore that the plaintiff is entitled to the order that he seeks against the fourth defendant with the exception of interrogatories 6 to 9 on the plaintiff's list. I have already stated that the other defendants have not opposed the application and I see no reason why the plaintiff should not be granted the relief that he seeks against them.

C In the result, I make the following order, that:

1. In terms of r 191 of the High Court Rules 1971, the first, the second, the third and the fourth defendants are directed to answer the interrogatories sought in respect of each such defendant on affidavit within a period of ten days from the date of this order.
2. In D respect of the fourth defendant, he shall answer the interrogatories directed to him except for interrogatories 6 to 9 on the list.
3. The costs of this application shall be costs in the main action.

Gill Godlonton& Gerrans, plaintiff's legal practitioners

E *Mutamangira & Associates*, fourth defendant's legal practitioners

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Document 53 of 79

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2013/Volume 2/MUGANO v FINTRAC & ORS 2013 (2) ZLR 452 (H)

MUGANO v FINTRAC & ORS 2013 (2) ZLR 452 (H)

Citation	2013 (2) ZLR 452 (H)
Case No	Judgment No. HH- 394-13
Court	High Court, Harare
Judge	Tsanga J
Heard	25 October 2013
Judgment	25 October 2013
Counsel	Mrs *D Muunganirwa,* for the applicant Ms *R Makamure,* for the first respondent
Case Type	Application for joinder
Annotations	No case annotations to date

Flynote

Practice and procedure – *parties – joinder – principles – joinder of third party – need for party to have direct and substantial interest in issues involved and in order which court may make – indirect interest insufficient*

Headnote

The applicant sought joinder of the first respondent, a registered trust called Fintrac, in a matter in which the applicant was being sued by the D second respondent for a debt arising out of inputs received from it in the form of seed potato, fertilisers and chemicals. The applicant was one of a group of 234 farmers in Nyanga who received these inputs from the second respondent. The grounds for seeking joinder were (a) that the matter in which he was being sued could not be resolved without E hearing the evidence of the first respondent, which, he alleged, initiated the relationship of all the parties involved in this matter. He claimed that the inputs were in fact received through the first respondent. His argument was that, at all material times, the farmers engaged with the first respondent through two of their employees; (b) the surety document that the applicant was alleged to have signed bore the signatures of the F first respondent's two employees as witnesses. The matter could thus not be heard without hearing their evidence as to when and where they witnessed his signature.

The first respondent objected to the joinder on the basis that it had no direct and substantial interest in the matter, neither did it have a legal interest. G It conceded that it indeed approached farmers in Nyanga, but said its role was strictly limited to offering assistance with technical support and identification of formal market linkages for their produce. This was in line with its organisational mandate.

Held, the right of a defendant to demand the joinder of another party and the duty of the court to order such joinder or ensure that there is a H

A waiver of the right to be joined, are limited to cases of joint owners, joint contractors and partners and where the other party has a direct and substantial interest in the issues involved and the order which the court may make. Such an interest is one in the right which is the subject matter of the litigation and not merely a financial interest which is only an indirect interest in such litigation.

B NGOs and charitable trusts such as the first respondent have come to play various types of developmental roles in their work with rural communities. The facts alleged by the applicant could be said to exemplify difficulties that arise when such developmental initiatives and projects are seen by the recipient communities as being initiated, influenced and driven C by outsiders, albeit with them as beneficiaries. There appears to have been some misunderstanding, at least on the part of the applicant and possibly the rest of the other farmers, regarding the transactional and negotiating roles and ultimate responsibility for risks. Although the first respondent conceded that it played a facilitative role, as communicator and facilitator, it shouldered some responsibility for poor communication D flows regarding the implications of its initiative. However, the facilitative role of the first respondent could not be said to amount to a legal interest in the matter, nor to having a direct and substantial interest in the contract that was subsequently entered into by the farmers with the second and third respondents in a manner that would require its joinder. There is E a need to distinguish between the type of legal interest that is required under the law to justify joinder and the type of mutual interest on the part of the applicant, the rest of the farmers, and the first respondent that stems from each of their activities. The kind of interest involved here is symbiotic in nature, as opposed to being one stemming from a E contractual relationship, joint ownership or legal partnership of those involved. The joinder sought by the applicant is premised on a contractual agreement to which the first respondent was not an actual party. The effect of joinder would be to bind the first respondent to the outcome of the litigation. Any pronouncement by the court in the main matter would have no bearing in the first respondent, as the first respondent G was not party to the contract.

Cases referred to

Amalgamated Engineering Union v Minister of Labour 1949 (3) SA 637 (A)

Rodgers & Ors v Miller & Ors 2010 (1) ZLR 49 (H)

H *Total Zim (Pvt) Ltd v Power Coach Express* 2010 (2) ZLR 1 (H)

United Watch & Diamond Co (Pty) Ltd and Others v Disa Hotels Ltd and Another 1972 (4) SA 409 (C)
A

Case information

Mrs *D Muunganirwa,* for the applicant

Ms *R Makamure,* for the first respondent

Judgment

Tsanga J: This is an application in which the applicant seeks joinder to case no. B HC 14134/12 of the first respondent, a registered trust called Fintrac. It is a matter in which the applicant (as defendant) is being sued by the second respondent, ZFC (as plaintiff), for a debt of US$58 034.45 for inputs received from it in the form of seed potato, fertilisers and chemicals some time in C December 2011. The applicant is one of a group of 234 farmers called Bende Farmers, in Nyanga, who received these inputs from the second respondent.

The applicant is being sued on the strength of a surety document which he purportedly signed on behalf of the group of farmers in which he is described as lead farmer. He denies binding himself as surety on behalf of the Bende group of farmers. He disputes ever signing the surety document and disagrees D that the signature on the document is his. He further states that each farmer was to repay, on an individual basis, an agreed amount into the second respondent's bank account, depending on how much had been received in terms of supplied inputs. He attached receipts showing the payment which he made for his share, which he says amounted to US$738.16 E

He has two primary reasons for seeking the joinder of the first respondent in this matter. The first is founded on his assertion that the matter in which he is being sued cannot be resolved without hearing the evidence of the first respondent. He alleges that it is the firstrespondent who initiated the relationship of all the parties involved in this matter. The applicant avers that F the inputs were in fact received through the first respondent. His argument is that at all materials times, the farmers engaged with the first respondent through their employees, Innocent Masiiwa and Moses Mutetwa.

The second reason for seeking joinder is stated to be that the surety document that the applicant is alleged to have signed, bears the signatures of the first G respondent's above-named two employees as witnesses. As such, the applicant argues that the matter cannot be heard without hearing their evidence as to when and where they witnessed his signature. The applicant argues that he will suffer prejudice if the first respondent is not joined as he will be forced to pay a debt which he does not owe. Furthermore, he maintains, through attached receipts, that he has paid his portion of the debt. H

Tsanga J

A The third respondent comes into the picture in that it guaranteed, as co-principal debtor with Seed Potato Co-op in collaboration with Bende Farmers the debt to second respondent. The debt guaranteed was then stated as $73 625.16.

The first respondent objects to the joinder on the basis that it has no direct and substantial interest in the matter and neither does it have a legal interest. It concedes that it indeed approached farmers in the Bende area of Inyanga, B but describes its role as having been strictly limited to offering assistance with technical support and identification of formal market linkages for their produce. This, it says, is in line with its organisational mandate and it quotes one of its main objectives as being to:

> "assist the development of the agricultural sector in Zimbabwe through increased C productivity, incomes and market linkages of small-holder farmers through access to new technologies and technical services."

The first respondent also admits to organising a bankers day in the Bende community where it invited various bankers to explain the services they offer to farmers. Amongst the banks was the

third respondent, Royal Bank. The first respondent further avers that the applicants chose to deal with the third D respondent and that it was the latter that contracted the second respondent to avail the inputs. It maintains that it is not privy to the nature of agreements entered into by and between the farmers and the second and third respondents. Regarding the signatures of its employees, the first respondent is of the view that any explanation, whatever it may be, can be obtained by having them subpoenaed as witnesses. It also states that the relief sought can be carried E into effect without joining it to the action.

In making the application for joinder, the applicant places reliance on r 85 of the High Court Rules 1971, which permits two or more persons to be joined together in one action as plaintiff or defendant, whether in convention or reconvention. This is where, if separate actions were brought by or against F each of them, as the case may be, the same common question of law or fact would arise in all the actions.

Both counsel for the applicant and counsel for the first respondent relied on overlapping cases in support of their contentions in their heads of argument. *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A) was cited by Mrs *Muunganirwa* in support of the argument that the first respondent G has an interest in the matter and should thus be afforded an opportunity to be heard as a result of that interest. Ms *Makamure,* for the first respondent, drew strength from this case to put forward two tests from the case. Firstly, whether a third party would have *locus standi* to claim relief concerning the same matter. Secondly, where as a result of non-joinder, any order of court H would be *res judicata* against the third party entitling him to approach the

court again, concerning the same subject matter, and possibly obtaining an A order irreconcilable with the order made in the first instance. She argued that the first respondent passed none of these tests.

Total Zimbabwe (Pvt) Ltd v Power Coach Express 2010 (2) ZLR 1 (H) was drawn on by the applicant to argue that joinder is necessary where there is a contractual bond between the applicant and a third party. Ms *Makamure* B relied on the case to argue that there were no such rights or obligations in the first respondent's relationship with the applicant. Both counsel also cited *Rodgers & Ors v Miller & Ors* 2010 (1) ZLR 49 (H) to argue that, though non-joinder is not fatal to the continuance of any matter, it does not absolve a litigant to cite relevant parties. Ms *Makamure* put the emphasis on the fact C that the parties so cited would have to be relevant.

In *United Watch & Diamond Co (Pty) Ltd and Others v Disa Hotels Ltd and Another* 1972 (4) SA 409 (C) Corbett J summarised the position on joinder emerging from various case law as follows:

> "It is settled law that the right of a defendant to demand the joinder of another party and the duty of the court to order such joinder or ensure that there is a D waiver of the right to be joined, (and this right and this duty appear to be co extensive) are limited to cases of joint owners, joint contractors and partners and where the other party has a direct and substantial interest in the issues involved, and the order which the court may make. In *Henri Viljoen (Pty) Ltd v Awerbuch Brothers* 1953 (2) SA 151 (O) Horwitz AJP analysed the concept of 'direct and substantial interest' and after an exhaustive view of the authorities, concluded E that it connoted … (see at p 169)
>
> > 'an interest in the right which is the subject matter of the litigation and not merely a financial interest which is only an indirect interest in such litigation'.
>
> He also reiterated the emphasis, in such cases where joinder is being sought, on the need for a *legal interest* in the subject matter of the action which stood to be affected by the judgement of the court." F

I now examine the facts before me in light of the law and legal authorities, commencing with the applicant's first set of reasons for seeking joinder. Essentially, these reasons touch on the direct and substantial interest of the first respondent as a consequence of its role in setting in motion the events that led to the contractual relationship between the applicant and the second G and third respondents. It is said that it is the first respondent who approach Royal Bank, the third respondent. It is also said that it is the first respondent who advised the farmers that they would repay by depositing the money in the second respondent's account. It is also said that it is the first respondent who played a crucial role in distributing the inputs, although this aspect was challenged, together with the rest of the averments, by the first respondent. H

Tsanga J

A There is no evidence at all from the facts and documents presented of a contractual link between the first respondent and the second or third respondents. The first respondent is not being sued at all by the second respondent in the matter. In our context, NGOs and charitable trusts such as the first respondent have come to play various types of developmental roles in their work with rural communities. The facts alleged by the applicant B ,in my view, can be said to exemplify difficulties that arise when such developmental initiatives and projects are seen by the recipient communities as being initiated, influenced and driven by outsiders, albeit with them as beneficiaries. There appears to have been some misunderstanding, at least on the part of the applicant and possibly the rest of the other farmers, C regarding transactional and negotiating roles and ultimate responsibility for risks. The first respondent does concede to having played what it terms as a "facilitative role", which the applicant views as having been more akin to "a major driving force" behind the whole initiative. To the extent that there appears to have been such misunderstanding first respondent cannot entirely plead "Teflon-like" qualities in the sense that nothing must stick to D it because of its mere facilitative role. As communicator and facilitator, it shoulders some responsibility for poor communication flows regarding the implications of its initiative.

However, the facilitative role of the first respondent cannot be said to amount to a legal interest in the matter nor to having a direct and substantial interest E in the contract that was subsequently entered into by the farmers with the second and third respondents in a manner that would require its joinder. I think in this regard there is a need to distinguish between the type of legal interest that is required under the law to justify joinder and the type of mutual interest on the part of the applicant, the rest of the farmers and the F first respondent that stems from each of their activities. The kind of interest involved here is symbiotic in nature, as opposed to being one stemming from a contractual relationship, joint ownership or legal partnership of those involved. No doubt if the project had been a success the first respondent would have capitalised on its facilitative involvement in the development sense of 'partnership.'

G The joinder sought here by the applicant is premised on a contractual nature to an agreement to which the first respondent was not an actual party. The effect of joinder would be to bind the first respondent to the outcome of the litigation. From a legal perspective I do not see anything in the facts that suggests that they were actual parties to the contract, in the sense that H requires them to be bound. Any pronouncement by the court in the main

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Tsanga J

matter would in my view, have no bearing on the first respondent. The legal A reality is that the first respondent is not a party to the contract.

The applicant also sought to join the first respondent on the grounds that its two employees would be able to explain the disputed document as to when it was signed, since they are said to be signatories there to in their capacity as witnesses. The first respondent has indicated its willingness to avail its B two employees as witnesses, as it is unable to deny whether or not they witnessed the document in question. It asserts, rightly in my view, that this can be done without the necessity of joinder.

Furthermore, since the applicant says that he never signed the surety document in question and that the signature is not his, I would imagine that the case calls for the need to have the expert opinion of an experienced document C examiner. Again, since all the persons that have signatures on that document are available, including the applicant, samples of their signatures using documents from before, during or after the alleged signing of the disputed document can presumably be obtained by such expert for comparative purposes. Such a procedure would not rest on joinder. D

For the reasons I have analysed above, I come to the conclusion that the application for joinder cannot succeed. The applicant's quest for joinder, though without legal merit, was not totally out of the ordinary bounds of reason. I say so given the misunderstandings that often arise in projects of this nature in rural communities, that are often seen by ordinary men and women as initiatives of outsiders. As such, as regards costs for this application, each E party is to bear its own costs.

The application for joinder is accordingly dismissed and each party to bear its own costs.

Sinyoro & Partners, applicants legal practitioners F

Kantor & Immerman, first respondent's legal practitioners

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Document 54 of 79

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2013/Volume 2/BARCLAYS BANK OF ZIMBABWE LTD v RESERVE BANK OF ZIMBABWE & ANOR 2013 (2) ZLR 459 (H)

BARCLAYS BANK OF ZIMBABWE LTD v RESERVE BANK OF ZIMBABWE & ANOR 2013 (2) ZLR 459 (H)

Citation	2013 (2) ZLR 459 (H)
Case No	Judgment No. HH-477-13
Court	High Court, Harare
Judge	Zhou J
Heard	29 October 2013
Judgment	29 October 2013
Counsel	*F Girach,* for the applicant *G N Mlotshwa,* for the first respondent No appearance for the second respondent
Case Type	Civil application
Annotations	No case annotations to date

Flynote

Practice and procedure – *parties – joinder – principles – joinder of third party – avoidance of multiplicity of actions dealing with same subject-matter and involving same evidence*

Practice and procedure – *prescription – under State Liabilities Act [Chapter D 8:14] – sixty day period – applicability – only applicable to claims for money or for delivery of goods – not applicable to claim for joinder – court's discretion to condone non-compliance with sixty day period – when discretion may be exercised*

Headnote

E The object of r 93 of the High Court rules 1971 (Sl 1047 of 1971), which sets out third party procedure, is to avoid multiplicity of actions dealing with substantially the same subject matter and largely involving the same evidence. The inconvenience of requiring the parties to prove the same facts over again is obviated, thereby saving time and mitigating expenses. The court has a discretion as to whether or not to order joinder. It will F generally order joinder of a third party if a *prima facie* case is shown, unless the joining of the third party will embarrass the plaintiff or there are special circumstances militating against such joinder.

The second respondent, the University of Zimbabwe, held a foreign currency account with the applicant, a commercial bank. In October 2007, the first respondent issued a directive in terms of which the applicant and G other authorized foreign exchange dealers were ordered to transfer to the first respondent all their corporate foreign exchange accounts and non-governmental

organisations' balances. In compliance with the directive, the applicant transferred to the first respondent the money held by it in the second respondent's account. In 2012, the second respondent issued H summons against the applicant for payment of the money which had been

held in its account. Thereupon, the applicant, having entered appearance A to defend the claim, sought the joinder of the first respondent in terms of r 93 of the High court Rules 1971, claiming that it was entitled to be indemnified by the first respondent. Resisting such joinder, the first respondent sought refuge in s 6(1) of the State Liabilities Act [*Chapter 8:14*], as read with s 63B of the Reserve Bank of Zimbabwe Act [*Chapter* B *22:15*], averring that it had not been given the required 60 days' notice of the application. The first respondent also argued that the application for joinder was prescribed, as a period in excess of three years had elapsed since the issue of its directive.

Held, that an application for joinder in terms of r 93 of the High Court Rules cannot be construed as a claim for money and, for that reason, fell outside C the ambit of s 6(1) of the State Liabilities Act.

Held, further, and in any event, s 6(3) of that Act provided for condonation of a failure to comply with s 6(1) thereof, if the court was satisfied that there had been substantial compliance therewith. *In casu* as, on the facts, the first respondent had suffered no prejudice by not being given 60 days D notice of the application, it was appropriate that condonation be granted.

Held, further, that the defence of prescription was not sustainable. What triggers an application for the joinder of a third party is the service of summons against a defendant (the applicant *in casu*). The application can only be made after the applicant has entered appearance to defend the claim instituted against it. From the time that the summons in the E main case was served and the applicant entered appearance to defend, a period of three years had not passed when the application for joinder was instituted. Thus the claim for joinder had not prescribed.

Case referred to

Building, Electrical and Mechanical Corporation (Salisbury) Ltd v F *Johnson* 1950 SR 142; 1950 (4) SA 303 (SR)

Legislation considered

High Court Rules 1971 (RGN 1047 of 1971), r 93

Reserve Bank of Zimbabwe Act [*Chapter 22:15*], s 63B G

State Liabilities Act [*Chapter 8:14*], s 6(1) and (3)

Case information

F Girach, for the applicant

G N Mlotshwa, for the first respondent

No appearance for the second respondent H

Judgment

A **Zhou J**: This is an application for the joinder of the first respondent as a third party in case no. HC 12970/12. The application was instituted in terms of Order 14 r 93 of the Rules of this court. The application is opposed by the first respondent. After hearing argument from counsel, I granted the relief sought with some amendments to the draft order and gave brief reasons. I indicated to the parties that my full written reasons would be given upon the B request of either party. The first respondent has written a letter requesting to be furnished with the written reasons for the decision. These are the reasons:

The applicant is a commercial bank incorporated and registered in accordance with the laws of Zimbabwe. The second respondent, the University of Zimbabwe, holds a foreign currency account with the applicant. The first C respondent is the central bank for Zimbabwe. It is established in terms of s 4 of the Reserve Bank of Zimbabwe Act [*Chapter* 22:15]. On 2 October 2007 and 3 February

2009 the first respondent issued two directives bearing reference numbers RI:303 and RK26, respectively. The directive referenced RI:303ordered the applicant together with other authorised dealers to, *inter alia*, lodge with and transfer to the first respondent all their corporate D foreign currency accounts and non-governmental organisations balances by close of business on 2 October 2007. In compliance with that directive, the applicant transferred to the first respondent the money held by it E in the second respondent's account. It maintained what is referred to as a "mirror balance", which essentially meant that it only had a record of the balance in the second respondent's account.

In 2012 the second respondent issued summons against the applicant for payment of the money which was held in its account. The action was instituted under case no. HC 12970/12. The second respondent claims a sum of US$6 475 968.14. Having entered appearance to defend the claim, the applicant instituted the instant application in terms of Order 14 r 93 of F the High Court Rules 1971 for the joinder of the first respondent as a third party in case no. HC 12970/12.

Rule 93 provides as follows:

> "Where in any action a defendant who has entered appearance claims as against any person not already a party to the action (in this Order called a third party) –
>
> (a) that G he is entitled to contribution or indemnity;
>
> (b) that he is entitled to any relief or remedy relating to or connected with the original subject matter of the action and substantially the same as some relief or remedy claimed by the plaintiff; or
>
> (c) that any question or issue relating to or connected with the said subject matter is substantially the same as some question or issue arising between H the plaintiff and the defendant, and should properly be determined, not only

> as between the plaintiff and the defendant, but as between the plaintiff and A the defendant and the third party, or between any or either of them;
>
> the defendant may make a court application to join that person as a third party in the action."

It has been held that the object of the third party procedure is to avoid multiplicity of actions dealing with substantially the same subject matter B and largely involving the same evidence. The inconvenience of requiring the parties to prove the same facts over again is obviated, thereby saving time and mitigating the parties' expenses. See *Building Electrical & Mechanical Corp (Salisbury) Ltd v Johnson* 1950 SR 142 at 148; 1950 (4) SA 303 (SR); also Herbstein & van Winsen, *The Civil Practice of the Supreme Court of South Africa* 4 ed, p 165. This court has a discretion as to whether or C not to order joinder. The discretion will, of course, be exercised judicially upon a consideration of the facts and circumstances of the case. The court will generally order joinder of a third party if a *prima facie* case is shown unless the joining of the third party will embarrass the plaintiff or there are special circumstances militating against such joinder: *Building Electrical* D *& Mechanical Corp (Salisbury) Ltd v Johnson (supra*).

The applicant contends that it is entitled to be indemnified by the first respondent for the amount being claimed against it by the second respondent. The applicant further states that the question or issue of its liability to the second respondent in case no. HC 12970/12 is substantially the same question or issue to be determined as between the applicant and the first and second E respondents.

In its opposition the first respondent objected *in limine* to its citation in the instant application on the ground that it should have been given notice of sixty days as required by s 6 of the State Liabilities Act [*Chapter 8:14*] as read together with s 63B of the Reserve Bank of Zimbabwe Act [*Chapter 22:15*]. F The first respondent also argues that it is immune from suits for "anything done in good faith and without negligence". It argues that the applicants must prove "beyond reasonable doubt" that it acted in bad faith and negligently. At the hearing of the matter Mr *Mlotshwa,* for the first respondent, raised the defence of prescription from the bar.

Section 63B of the Reserve Bank of Zimbabwe Act [*Chapter 22:15*] provides G as follows:

> "The State Liabilities Act [*Chapter 8:14*] applies with necessary changes to legal proceedings against the Bank, including the substitution of references therein to a Minister by references to the Governor."

Section 6(1) of the State Liabilities Act [*Chapter 8:14*] provides the following: H

Zhou J

"Subject A to this Act, no legal proceedings in respect of any claim for –

(a) money, whether arising out of contract, delict or otherwise; or

(b) the delivery or release of any goods;

and whether or not joined with or made as an alternative to any other claim, shall be instituted against –

(i) the B State; or

(ii) the President, a Vice-President or any Minister or Deputy Minister in his official capacity; or

(iii) any officer or employee of the State in his official capacity;

unless notice in writing of the intention to bring the claim has been served in accordance with subsection (2) at least sixty days before the institution of the C proceedings."

The applicant argues, in the main, that the notice requirement does not apply to an application for joinder in terms of the Rules. In the alternative, the applicant submits that in the event that it be found that the provisions apply, the court should exercise its powers in terms of s 6(3) of the State Liabilities D Act and condone the non-compliance with the notice requirement.

In my view, an application for the joinder of the first respondent as a third party brought in terms of Order 14 r 93 is not a claim for money. It therefore falls outside the ambit of s 6(1)(a) of the State Liabilities Act. The fact that the applicant claims an entitlement to contribution or indemnity does not transform the application for joinder into the claim for money. The averment E that the applicant is entitled to a contribution or an indemnity is necessary to sustain the application for joinder. The claim for a contribution or an indemnity is the subject of a different case, the main case (case no. HC 12970/12), in respect of which the joinder of the first respondent is being sought.

I therefore conclude that the objection *in limine* must fail. The application F is properly before this court.

Even if I were wrong in the above conclusion, it seems to me that this would be an appropriate case for condonation of the non-compliance with the requirement for notice. Section 6(3) of the State Liabilities Act provides:

"The court before which any proceedings referred to in subsection (1) are brought may condone any failure to comply with that subsection where the court is G satisfied that there has been substantial compliance therewith or that the failure will not unduly prejudice the defendant."

The first respondent suffers no prejudice by not being given 60 days' notice of the application for joinder. It is not the main claim. The instant application was filed on 23 January 2013, nine months ago. The first respondent has H had ample time before being served with the pleadings in the main action to

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undertake any investigations regarding the factual background to the proposed A claim against it. After all, it would be aware of the institutions from whose accounts balances were transferred to it pursuant to its directives. This is not a claim that arises from the conduct of some single official or employee in some remote part of the country. The claim arises from its directives which it readily admits were issued directing authorised dealers to transfer the B balances referred to above to it.

The issue of whether the first respondent is excused from liability on the ground that it acted in good faith and without negligence is for determination by the court when it enquires into the merits of the claim by the applicant against the first respondent. If that is the first respondent's defence to the C claim then it must be properly pleaded and established by evidence at the trial. For the purpose of this application the applicant need only satisfy the requirements of r 93. The applicant has discharged its onus in that respect.

The submission that the cause of action in the application for joinder has now prescribed must be rejected for two reasons. Firstly, it was only raised from the bar during argument. The first respondent's opposing papers do D not seek to rely on that ground. Secondly, and in any event, the defence of prescription is not sustainable on the facts of this matter. What triggers an application for the joinder of a third party is the service of summons against a defendant (the applicant *in casu*). The application can only be made after the applicant has entered appearance to defend the claim instituted against E it. From the time that the summons in the main case was served and the

applicant entered appearance to defend, a period of three years had not passed when the application for joinder was instituted. Thus the claim for joinder has not prescribed.

The draft order filed on behalf of the applicant does not require the applicant F to serve a statement of its claim on the first respondent but merely copies of the pleadings filed of record in the main case. There is a prayer for the first respondent to file its own pleadings in response to those pleadings. In my view, the proper order should include the filing by the applicant of its statement of claim against the first respondent. That is the claim which the G first respondent may then respond to.

In the result, it is ordered as follows:

1. That the first respondent be and is hereby joined as a third party in the proceedings in this court under HC12970/12.
2. The applicant herein shall file and serve on the first respondent as the third party in the proceedings aforesaid, copies of all the pleadings and H

Zhou J

A documents filed of record therein, together with any statement of its claim against the first respondent within ten days of this order.

3. Upon service aforesaid the first respondent herein, as the third party in the proceedings aforesaid, shall be entitled to file pleadings of its own within the normal period of time as prescribed by the Rules of this Honourable Court and the applicant and second respondent shall be B entitled to respond thereto in the usual manner.
4. The costs of this application shall be costs in the cause in HC 12970/12.

Scanlen & Holderness, applicant's legal practitioners

C *G N Mlotshwa & Co*, first respondent's legal practitioners

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Document 55 of 79

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CHIMAKURE & ORS v ATTORNEY-GENERAL 2013 (2) ZLR 466 (S)

Citation	2013 (2) ZLR 466 (S)
Case No	Judgment No. S-14-13
Court	Supreme Court, Harare
Judge	Chidyausiku CJ, Malaba DCJ, Ziyambi JA, Garwe JA & Cheda AJA
Heard	20 June 2010; *CAV*
Judgment	30 October 2013
Counsel	*I Chagonda*, for the applicants *T B Zvekare*, for the respondents
Case Type	Constitutional reference
Annotations	No case annotations to date

Flynote

Constitutional law – *Constitution of Zimbabwe 1980 – Declaration of Rights – s 20(1) – freedom of expression – permissible limitations on in interests of public safety and public order – any legislation affecting freedom of expression must full under one of such limitations – need for* D *proportionality between any limitations imposed and effect on freedom of expression– legislation prohibiting false statements with intent to undermine public confidence in law enforcement agency – legislation not requiring knowledge of falsity – not permissible to prohibit statements simply because they are untrue – any prohibition must relate to lawful conduct of law enforcement agency – draconian penalties provided –* E *further indication of lack of proportionality – need for person making statement to be aware that it is untrue*

Criminal law – *offences under Criminal Law Code – making false statement with intention of undermining confidence in law enforcement agency (s 31(a)) – provision in contravention of s 20(1) of Constitution of Zimbabwe* F *1980 – not a permissible derogation of right to freedom of expression*

Headnote

Section 31(a)(iii) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]" ("the Code") prohibits the publication or communication to any other person of a wholly or materially false statement with the intention, G or realising that there is a real risk or possibility, of undermining public confidence in a law enforcement agency, the Prison Service or the Defence Forces of Zimbabwe. The section does not require proof by the State that the false statement undermined public confidence in the security service institution concerned or that the accused had knowledge of the falsity of the statement. H

A The applicants were charged with contravening this provision. They were, respectively, a reporter for, the editor of and the publisher of a weekly newspaper. It was alleged that they had published a false statement, to the effect that a law enforcement agency abducted people during the period extending from 25 November to 13 December 2008 and that they published the statement with the intention of or realising that there was a real risk or possibility of undermining public confidence in the security service institutions. The issue of the constitutionality of the provision was referred to the Supreme Court by the presiding magistrate. The applicants argued that it contravened s 20(1) of the Constitution of Zimbabwe 1980. They accepted that the right to freedom of expression C is not absolute at all times and under all circumstances and that inherent in the exercise of the right to freedom of expression is a duty not to injure the rights of others or the public interests listed in s 20(2). They argued that the restriction imposed by s 31(a)(iii) of the Criminal Code was an impermissible legislative limitation of the exercise of freedom of expression.

D The background was that a few human rights activists and some members of a political party were abducted from different places at different times, following a number of bomb explosions around Harare. The identities of the abductors and places where the abductees were taken was kept secret. No-one knew what had happened to the people abducted. These E abductions were widely reported in the media. The question of who had kidnapped the people concerned became a matter of public discussion. The law enforcement agencies claimed that they had no knowledge of who the abductors were and what their motive was.

After 27 days, the victims appeared at various police stations in Harare and F later were charged with various security crimes. Indictments, lists of witnesses and summaries of their evidence were served on them. The witnesses were all members of law enforcement agencies. The applicants then published the article complained of. It stated that the Attorney-General's Office had "revealed the names of some members of Central Intelligence Organisation and the police who were allegedly involved G in the abduction of human right and MDC activists last November", and went on to name the members. The Attorney-General was of the view that the articles contained false statements about the involvement of the law enforcement agencies and its members in the abduction of the human rights activists and members of the political party. He concluded H that the articles contained statements which were materially false

and prejudicial to the State, and authorised the institution of criminal A proceedings against the applicants.

The applicants argued that, although the restriction was contained in a law passed by Parliament, the provision was not a rule of law because the essential elements of the crime did not define the scope of the prohibited acts in a language which was sufficiently clear and adequately precise. B They said that the phrase "real risk or possibility" used on s 31 of the Code referred to anything which could scientifically happen without it necessarily being probable. Similarly, the word "false" was wide enough in meaning to embrace a statement which was merely incorrect or inaccurate. It is always difficult to conclusively determine total falsity. With regard the undermining of public confidence, it was argued that C the concept of "public confidence" was nebulous and so susceptible of change as to render the offence unconstitutionally vague. It was almost impossible to measure "public confidence" in a public institution, as it depended on such factors as the political and economic conditions of a country at any given time.

The main question was whether this interference was permitted by s 20(2) D of the former Constitution, which permits freedom of expression to be restricted by or under a "law" that is made to protect certain specified objectives (e.g. public safety, public order, public health), but only if the restriction is "reasonably justifiable in a democratic society".

General considerations relating to freedom of speech E

Held, that there is one indivisible freedom for every individual and that is freedom from unwarranted interference by the Government. The fundamental rights protected by the Constitution and exercised by the individual are assertions against the State of different aspects of the freedom inherent in every individual as a human being. Freedom of expression asserts the autonomy of thinking, linguistic and communicative elements of the life of an individual and a thin slice of the universe of communication policy. Section 20(1) defines in broad terms the nature, content and scope of the cluster of rights the enjoyment of which is protected against interference by the Government under the principle of freedom of expression. Liberty of publishing or communicating one's G thoughts, ideas and information expressed in an oral, written or symbolic act to others is essential to the enjoyment of freedom of expression.

Held, further, that there are three dimensions to the process of the exercise of the rights guaranteed by s 20(1): an internal dimension (the formation and holding of opinion, ideas and information); a communicative dimension (the expression of opinion, imparting of ideas and information); and an H

A external dimension (the effect of opinions, ideas and information on the addressee or the audience i.e. on the rights of others or public interests listed in s 20(2)(a)). The guarantee of freedom of expression affects all three dimension, which constitute an indissoluble unit.

Held, further, that protection of the fundamental right to freedom of expression is based on the belief that man is an autonomous and rational agent B capable of acquiring knowledge which he uses to distinguish right from wrong. He is under a duty to promote the general welfare of the community to the extent that it is not injurious to his own lawful interests. Freedom of expression is defined not only in terms of the protection of the right to hold opinions but also to receive and impart ideas and C information without interference. What is protected by the right is not only the benefits of the communicative process but also the effects the dissemination of ideas and information has on the audience including public interests. The State may interfere with the exercise of freedom of expression only when the activity or expression poses danger of direct, obvious and serious harm to the rights of others or the public interests D listed in s 20(2).

Held, further, that the nature and scope of the rights guaranteed covers every activity which conveys or attempts to convey a message in a non-violent form. Freedom of thought means that the mind must be ready to receive new ideas, to critically analyse and examine them and to accept those E which are found to stand the test of scrutiny and to reject the rest. Any form of violence by which meaning is conveyed is an antithesis of freedom of expression. The purpose of the guarantee is to ensure that people can manifest and convey the meaning of their thoughts and feelings in non-violent ways without fear of censure.

Held, further, that publication or communication of a false statement to any F other person on any subject matter or topic in a non-violent form is an activity which conveys or attempts to convey

meaning. The protection provided by s 20(1) does not have regard to the truth or falsity of the meaning of the ideas and information published or communicated. The section is a value-free provision which does not recognise any basis for the test of truth. Truth is not a condition *sine qua non* of the protection of G freedom of expression. The content of a statement should not therefore determine whether it falls within s 20(1)'s protection. Freedom of expression finds its true meaning when its enjoyment is protected from interference by Government. The Constitution recognises the fact that people tell lies in a variety of social situations for different reasons. Lies H are not necessarily without intrinsic social value in fostering individual

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2013 (2) ZLR p470

self-fulfilment and discovery of truth. For that reason the Constitution A protects against State interference the rights of every person to speak or write and communicate or publish to others what he or she thinks. The only limitation on the "freedom" or "liberty" is the duty not to injure the rights of others or the collective interests listed in s 20(2)(a). It is the rights of others or the public interests and actual or potential harm B thereto that help to determine whether a restriction on the expression is valid. The fact that a person has told lies to others on any subject matter should not be of concern to the State. The Government is not a monitor of truth. What is protected is the indivisible freedom of everyone to speak, even when they may after they have done so be called liars. Anyone has a right to impart or receive ideas and information about the activities C of security service institutions, regardless of the falsity or truth of the message conveyed, provided no harm or real likelihood of harm to the rights of others or public interest results in breach of law. No exercise of the right to freedom of expression can, without more, be restricted on the ground that the message conveyed is false, offensive or not favourable. If expression has to be prohibited because of content, there has to be a D demonstrable direct and proximate causal link between it and actual or potential harm to a public interest listed in s 20(2).

Held, further, that s 20(2) prescribes strict requirements for any measure in the exercise of State power which has the effect of restricting the exercise of the right to freedom of expression. The recognition of the E power of Government to limit the exercise of freedom of expression is based on the concept of a free and democratic state based on the rule of law and on the possibility that freedom of any kind, even constitutional freedom of expression, could be abused for the purposes of harming the rights of others or public interest. The exercise of the power to limit the exercise of the right to freedom of expression is not only required F to be constitutionally justified. It is itself restricted by the principle of proportionality. It is only the prohibition of those acts in the exercise of freedom of expression shown to pose danger of direct, obvious, and serious harm to one or more of the public interests listed in s 20(2)(a) which is justifiable. G

Held, further, that in deciding whether a measure imposes restrictions on the exercise of freedom of expression the court examines its purpose or effect, not its objective. The applicants would have to show that (a) there was no rational connection between the restriction on the exercise of the right to freedom of expression and the objective sought to be achieved by the provisions of the statute; (b) even if there was a rational connection H

2013 (2) ZLR p471

A between the restriction on the exercise of freedom of expression and the objective pursued, there were other, less intrusive, means available which the legislature could have used to restrict the exercise of the right to freedom of expression to achieve the same objective; and (c) the effects of the restrictive measure so severely affected the right to freedom of expression that the legislative objective sought to be achieved was B outweighed by the restriction on freedom of expression.

Held, further, that the criterion of the proportionality test applicable will vary depending on the circumstances of each case. It is the duty of the court as guardian of the Constitution and fundamental human rights and freedoms to ensure that only truly deserving cases are added to the category of C permissible legislative restrictions of the exercise of the right to freedom of expression. It is a fundamental principle of constitutional law that any restriction which hinders the enjoyment of a fundamental right must be introduced by a legal provision. The grounds for the justification of the restriction must be found in the law by which it is imposed. This requirement is expressive of and consistent with the principle of the D rule of law. The "rule of law" is an indispensable principle on which any free and democratic society is based. It is an integral part of the vision and way of life in a free society. Where there is rule of law there is

peace, justice and freedom. Law plays its proper role only if it takes due account of all the three elements. It does not admit of the rule of man. No individual is above the law.

E *Was the restriction constituted by a "law"?*

Held, further, that s 20 requires that any restriction must be "contained in . . . any law" or "done under the authority of any law", that is, that the restriction must have all the universally recognised characteristics of a legal norm. *Prima facie*, the restriction was contained in a law because F it was provided for in s 31(a)(iii) of the Criminal Law Code.

Held, further, that the rationale underlying the principle of unconstitutional vagueness of a statute is that it is essential in a free and democratic society that people should be able, within reasonable certainty, to foresee the consequences of their conduct, in order to act lawfully. The second component of the doctrine is that, if arbitrary and discriminatory G enforcement is to be preventable, laws must provide explicit standards for those who apply them. The discretion of those entrusted with law enforcement should be limited by clear and explicit legislative standards. This is especially important in the use of criminal law, because people are potentially liable to deprivation of personal liberty if their conduct H is in conflict with the law. A vague law impermissibly delegates basic

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policy matters to policemen, prosecutors and judges for resolution on A an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application. While many laws are couched in terms which are to a greater or lesser extent vague, the standard required is sufficient clarity, not absolute clarity.

Held, further, that the words "real risk or possibility" in s 31(a)(iii) denote B a test to be used to establish a subjective state of mind accompanying the publication or communication of a false statement relating to the security service institution referred to in the provision. The requisite state of mind is related to the aim of the unlawful conduct and the real likelihood of it materialising. Whether there is a "real risk or possibility" of an event happening as a natural consequence of another is a question C of fact provable by evidence. The fact of a person having foresight from the circumstances of his own conduct of a "real risk or possibility" of an event happening as a natural consequence of what he is doing is a common feature of criminal offences. The concept of "realisation of a real risk or possibility" of the occurrence of a specific event as a consequence D of the proscribed conduct has been used in the definition of crimes for many years to denote a subjective state of mind of crimes to the extent that it has now acquired a special meaning in criminal law jurisprudence.

Held, further, that the truth or falsity of an alleged fact is a matter of evidence. Where there is no relationship of correspondence between the ideas or information imparted or received and reality the statement is false. To E say something has happened when it has not happened is a lie. A"false statement" of fact is a statement which is in "conflict with reality".

Held, further, that the words "public confidence" are not so vague as to escape definition by the courts. These words are to be interpreted in the context of the performance by a security service institution referred to in s 31(a)(iii) of functions in the exercise of the powers conferred on it F by the Constitution. Public confidence in that context refers to the trust reposed in the institution by the public. The basis of the trust is a belief that members of a security service institution will be able to execute their duties in accordance with the purposes for which the institution was established under the Constitution. G

Held, further, accordingly, that the restriction was contained "in a law", within the meaning of s 20(2) of the Constitution.

Did the restriction have a constitutionally permissible objective?

Held, that a law is not in contravention s 20(1) if the objective of its enactment is the protection of a public interest listed in s 20(2)(a). Interference with freedom of expression may only be justified if it pursues a legitimate H

A aim. The specific aims which must be pursued by a provision imposing restrictions on the exercise of freedom of expression and the legitimacy of them are pre-determined and established directly by the Constitution. The public interest here was that members of the

security service institutions referred to in s 31(a)(iii) be left to enjoy public confidence in the performance, according to law, of the functions for which they B were established. The list of the interests in s 20(2) is exclusive, in the sense that they are the only interests whose protection might justify a restriction on freedom of expression.

Held, further, that all the institutions referred to in s 31(a)(iii) were established by the Constitution for the specific purpose of enforcing laws for the C maintenance of public order and the preservation of the security of the State. An Act of Parliament governs each institution. Security service institutions are important national institutions which form part of the essential framework of a constitutional democracy. They are known and accepted by the public at large as being responsible for the defence of the country, preservation of public safety and maintenance of public peace D and tranquillity. An impression should not be created in the minds of the public that the exercise of the right to freedom of expression is not subject to the responsibility to keep peace and tranquillity. While there should be freedom of expression, in the exercise of the right, conditions should not be deliberately created for the undermining of the maintenance E of the public order or preservation of public safety. There is a direct and vital relationship between the exercise of freedom of expression and the preservation of public peace and tranquillity.

Held, further, that a law cannot be used to restrict the exercise of freedom of expression under the guise of protecting public order when what is protected is not public order. The maintenance of public order or F preservation of public safety is synonymous with the protection of fundamental human rights and freedoms. Public order is a concept used to describe the state of calm or even tempo of the life of the community brought about by laws enforced by the State. Order is the basic need in any organised society. It implies the orderly state of society or community in which people can peacefully pursue their normal activities of life. It G refers to the absence of acts which aim at endangering the safety of the lives and property, peace and tranquillity of the community. Whether an act is of a character that affects public order is a question of degree. It is not the quality of the act that matters but its potentiality. An act may in one context have effects that injure the individual only, whilst in H another the same type of act may have effects that endanger the peace

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and tranquillity of the community. What is clear is that the maintenance A of public order is equated with the maintenance of public peace and tranquillity. On the face of it, the specific purpose of s 31(a)(iii) is to protect public confidence in a security service institution referred to in the provision. It is protected from being undermined or the likelihood of being undermined by a false statement published or communicated B with the requisite state of mind. That would, however, suggest that public confidence in a security service institution is an end in itself equivalent to and as important as the public interests listed in s 20(2)(a) of the Constitution. Protection of public confidence in a security service institution is not one of the legitimate aims for the achievement of which permissible legislative limitation on the exercise of freedom C of expression can be imposed.

Held, further, that the proscription of the publication or communication of a false statement about lawful activities of a security service institution with the intention of undermining public confidence in that institution, is in the interests of public order or public safety when specific conditions D are met. It must be shown that public confidence in the institution is an essential element in the ability of the institution to efficiently and effectively secure the maintenance of public order or preservation of public safety. If it appears on the examination of the relevant factors that the intention is to establish a rule of conduct carefully designed to ensure that security service institutions are able to efficiently and E effectively secure the maintenance of public order or the preservation of public safety, then the legislation would be "in the interests of public order" or "public safety".

Held, further, that the interest of the public is not in the mere existence of a security service institution without reference to the manner in which F the exercise of its functions affects the enjoyment of their rights and freedoms. Members of security service institutions carry out their duties in the communities they serve. Public confidence is therefore the result of the knowledge by members of the public of the truth about the lawful activities carried out by members of the security service institution in securing the maintenance of public order or preservation of public safety. G It is the justified public confidence in the institution which s 31(a)(iii) protects. The efficient functioning of a security service institution is only valuable when it is in accordance with

the law and therefore based on truth. Public confidence may be undermined when the public know the truth about unlawful activities by members of the security service institutions, because unlawful activities by members of a security service H

A institution are inconsistent with the protection of fundamental human rights and freedoms. Public confidence in a security service institution is based on or linked to evidence of lawful activities by its members in securing the maintenance of public order or the preservation of public safety. It is not linked to the reputation of the institution.

B *Held*, further, that it is the duty of free media of communication to give accurate information to the public on unlawful activities of members of a security service institution. It is in the public interest that the media should be free to provide criticism of such conduct. On the other hand, there is danger of unjustified loss of public confidence in a security service institution if false statements about its lawful activities are C published. Such a false statement may lead to withdrawal of support for law enforcement. Publication or communication of altogether untrue statements which have been merely invented for the purpose of providing arguments for a campaign against a security service institution would be an abuse of the right to freedom of expression. The imposition of the restriction creates conditions in which the relationship between the D exercise of freedom of expression and justified public confidence for the achievement of public order or public safety can prevail. The provision thus met the "legitimate aim" test.

Was the restriction reasonably justifiable in a democratic society?

Held, further, that the law should not have the effect of overreaching and E restricting expression which is not necessary for the achievement of the objective concerned. For the provision to constitute protection of a public interest listed in s 20(2)(a), the restriction imposed on the exercise of freedom of expression must form a barrier between the proscribed acts and the public interest thereby breaking the chain of F causation of direct and proximate actual or likely harm on the public interest. There cannot be a pressing social need for the imposition of a restriction on the exercise of freedom of expression for the purpose of protecting a public interest when that interest is not under threat of direct and proximate harm from the exercise of freedom of expression. The Constitution forbids the imposition of a restriction on the exercise G of freedom of expression when it poses no danger of direct, obvious, serious and proximate harm to a public interest listed in s 20(2)(a). There must be a causal link between the prohibited conduct and the injury to be prevented. The sole motive of the State should be to ascertain that the protected interests of the community are respected by the individual or that a guarantee exists H that they will be respected. The purpose must be

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to ensure that people are able to make use of their right to freedom of A expression to full effect without damaging the public interest.

Held, further, that not every case of actual or potential harm on the public interests listed in s 20(2)(a) justifies the imposition of restrictions on the exercise of freedom of expression. If that were the case, the realm of freedom of expression as protected by the Constitution would eventually B shrink to zero. The exercise of the right to freedom of expression is not protected because it is harmless. It is protected despite the harm it may cause. A restriction is unlikely to be considered proportionate where a less restrictive, but equally effective, alternative exists. The means by which the restriction to the exercise of freedom of expression is imposed must be narrowly drawn and specifically tailored to achieve the objective C pursued by the legislation. The question is not whether the means the legislature employs to accomplish the end pursued are the wisest or the best. A restriction which is not rationally connected with the objective pursued is an unreasonable, unnecessary and arbitrary interference with the exercise of freedom of expression.

Held, further, that as a means of protecting the interests of public order D and public safety by the State, s 31(a)(iii) of the Code is problematic. It is not narrowly drawn and carefully tailored to achieve the objective pursued. Whilst placing substantial restriction on the basic right to freedom of expression, the effectiveness of the impugned statute in achieving the legislative purpose is in practice very uncertain. Public E order, public safety, defence and economic interests of Zimbabwe are interests specifically listed by s 20(2)(a) for the protection of which the imposition of a restriction on the exercise of freedom of expression may be justified. Public confidence in a security service institution is not one of those interests. As an end in itself, protection of public

confidence in F a security service institution cannot justify the imposition of a restriction on the exercise of freedom of expression, as part of the means of securing the maintenance of public order or preservation of public safety. For the protection of public confidence in a security service institution to have any connection with the legitimate aim of protecting the interests of public order and public safety, the false statement must relate to G the performance by the security service institution of its functions as defined by law.

Held, further, that the matter to which the false statement relates does not have to be a matter within the jurisdiction of a security service institution referred to in s 31(a)(iii) of the Criminal Code. The prohibition is not even limited to apply only to a publication or communication which reaches H

A a significant number of people. A conversation between two people in a private home would be covered. A statement which is suppressed because its content is intended to undermine public confidence in a security service institution may not in fact undermine the ability of the security service institution to efficiently and effectively secure the maintenance of public B order and preservation of public safety. It would be actual or likely harm to the public interest in the ability of the security service institution to efficiently and effectively perform the function of maintaining public order and preserving public safety which would justify the imposition of the restriction on the exercise of freedom of expression.

Held, further, that there was the problem of the use of the words "wholly" or C "materially" false. The word "wholly" suggests an intention to exclude a statement which is a "half-truth" because it is always also a "half-lie". The use of words "materially false" in the alternative undermines that conception. To say a statement is "materially false" is to say it is not "wholly false". False news that is harmless to the effectiveness of a security service institution in maintaining public order or preserving D public safety would be covered by the offence as long as it is accompanied by an intention to undermine public confidence in the security service institution. The provision has the effect of shielding the public interest from every possibility of harm, even harm which is only remotely possible. A remote possibility of harm to the maintenance of public order or preservation of public safety cannot be a reasonable basis for E the legislative imposition of a restriction on the exercise of freedom of expression. When the enforcement of the provisions of a criminal law can lead to conviction and punishment of a person, even in situations in which the harm intended to be prevented is a remote possibility, the reason for the law is lost. Prohibition of the exercise of freedom of F expression is a measure so stringent that it would be inappropriate as a means for averting a relatively trivial harm to society. Where the evil apprehended is not relatively serious, the fact that the exercise of freedom of expression is likely to undermine public confidence in a security service institution is not enough to justify its suppression.

G *Held*, further, that the provision also covers a person who, at the time he publishes or communicates a statement, sincerely believes that it is true, although it happens to be false. It is assumed in every case that the accused person had reasonable opportunity to investigate the accuracy of the statement and knowing that it was false, deliberately chose to publish it. This assumption ignores the fact that news media often work H in situations in which information changes fast, denying even the most

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responsible journalist time to verify the accuracy of the information A received. Knowledge is a different state of mind from intent. It refers to a conscious awareness of the existence of a thing, whilst intent refers to the purpose of an act. Whilst intent is associated only with the relevant consequences there is no knowledge associated solely with the relevant conduct. The knowledge element is important, because a B false statement may be deliberate, or it may originate from someone else with the accused person being a facilitator in publishing it, or it may be a result of interpretation of facts in a statement made by another person. A person who sincerely believes, at the time of publication of the statement, that it is true would not have the state of mind justifying the imposition of criminal liability. Liability must be based on the C notion of personal responsibility inherent in the concept of the exercise of freedom of expression. The State should not penalise people who make false statements in good faith about a matter of public concern, where the statement is published without knowledge of its falsity or without reckless disregard as

to whether the statement is false or not. D The statement must be a knowing or reckless falsehood.

Held, further, that a rational connection between the restriction and the objective pursued by the legislation would be one which incorporated the requirement of knowledge of the falsity of the statement as the element of the offence on the basis of knowledge of its effectiveness as part of measures for the protection of the interests in public order and public E safety, without the chilling effect on freedom of expression.

Held, further, that s 31(a)(iii) of the Code was particularly invasive because of the maximum penalty provided. A penalty of imprisonment up to 20 years for this offence was draconian and disproportionate to the harm against which the public interest in the ability of the institution to efficiently and effectively perform its functions was protected. The F constitutional principles of justice and a State governed by the rule of law presuppose that every penalty imposable must be proportionate to the legitimate aim pursued and the seriousness of the offence. The maximum penalty of imprisonment to which a person convicted of this offence is made liable did not meet this test. The only inference was that G the punishment was intended to have a chilling effect on the exercise of freedom of expression, as opposed to merely deterring the occurrence of the prohibited acts. Because of the severity of the deleterious effects of the level of the maximum penalty of imprisonment on the exercise of freedom of expression, the law was not justified by the objective it was intended to serve. The requirement that there must be a reasonable H

A relationship of proportionality between the means employed and the aim sought to be realised by the measure applied by the State in restricting the exercise of freedom of expression was not met.

Cases referred to

B *Aptheker v Secretary of State* 378 US 500 (1964)

Attorney-General v Morgan [1985] LRC (Const) 770

Bennett Coleman & Co Ltd & Ors v Union of India & Ors AIR 1973 SC 106

Capital Radio (Pvt) Ltd v Broadcasting Authority of Zimbabwe & Ors 2003 (2) ZLR 236 (S)

C *Castells v Spain* (1992) 14 EHRR 445

Chavunduka & Anor v Min of Home Affairs & Anor 2000 (1) ZLR 552 (S)

Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism: Advisory Opinion OC-5/85 of 13 November 1985 Series A No. 5

Elliot v Commr of Police & Anor 1997 (1) ZLR 315 (S)

D *Garrison v Louisiana* 379 US 64 (1964)

Ghosh v Joseph AIR 1963 SC 812

Gooding v Wilson 405 US 518 (1972)

Grayned v City of Rockford 408 US 104 (1972)

Hector v A-G of Antigua and Barbuda & Others [1991] LRC 237

E *Irwin Toy Ltd v Quebec (Attorney General)* (1989) 39 CRR 193 (SCC)

Mukoko v A-G 2012 (1) ZLR 321 (S)

Muller v Oregon 208 US 412 (1908)

In re Munhumeso & Ors 1994 (1) ZLR 49 (SC)

Naraindas v State of Madhya Pradesh [1974] 3 SCR 624

New York Times v Sullivan 376 US 254 (1964)

F *Nyambirai v NSSA & Anor* 1995 (2) ZLR 1 (S)

Palko v Connecticut 302 US 319 (1937)

Ramesh Thapper v State of Madras (1950) SCR 594

Ramji La Modi v State of Uttar Pradesh 1957 SCR 860

Rangarajan v Ram [1990] LRC 412

Reference re Criminal Code ss 193 and 195.1(1)(C) (1990) 48 CRR 1

G *Retrofit (Pvt) Ltd v PTC & Anor* 1995 (2) ZLR 199 (S)

R v Big M Drug Mart Ltd (1985) 18 DLR (4th) 321

R v Edwards Books & Art Ltd (1986) 28 CRR 1

R v Keegstra [1991] LRC (Const) 333 (Supreme Court of Canada)

R v Oakes (1986) 19 CRR 308 (Supreme Court of Canada)

H *R v Therens* (1985) 13 CRR 193

S v Tsvangirai 2001 (2) ZLR 426 (S) A

R v Zundel (1992) 10 CRR (Can SC) (2d) 193

Smyth v Ushewokunze & Anor 1997 (2) ZLR 544 (S); 1998 (3) SA 1125 (ZS)

Sunday Times v UK (1979-80) 2 EHRR 245

Superintendent Central Prison Fatehgarh v Ram Manohar Lohia 1960 SCR (2) 821 B

Terminiello v City of Chicago 337 US 1 (1949)

Texas v Johnson 491 US 397 (1989)

Thorgeirson v Iceland (1992) 14 EHRR 115

United Parties v Minister of Justice, Legal and Parliamentary Affairs & Ors 1997 (2) ZLR 254 (S)

Whitney v California 274 US 357 (1927) C

Legislation considered

Constitution of Zimbabwe 1980, ss 20 & 93(1)

Criminal Law (Codification and Reform) Act [*Chapter 9:23*], ss 15(1), 19 & 31(a)(iii) D

Case information

I Chagonda, for the applicants

T B Zvekare, for the respondents

Judgment

Malaba DCJ: This is a referral for determination of a question of validity of statutory provisions for the restriction of the exercise of freedom of expression E brought to the Supreme Court in terms of s 24(2) of the Constitution of Zimbabwe ("the Constitution"). The question is whether or not s 31(a)(iii) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] ("the Criminal Law Code") contravenes the declaration of the fundamental right to freedom of expression under s 20(1) of the Constitution. The section prohibits under threat of punishment the publication or communication to any other F person of a false statement with the intention or realising that there is a real risk or possibility of undermining public confidence in the law enforcement agency, the Prison Service or the Defence Forces of Zimbabwe.

The relief sought is a declaration to the effect that the section is unconstitutional and therefore null and void. G

The court apologises for the delay in giving judgment in this case. The delay has been caused by the fact that reasons for judgment in the case of *Mukoko v Attorney-General* 2012 (1) ZLR 321 (S) had to be given first. The facts of that case had a direct bearing on the circumstances in which the statements forming the subject matter of the charges which gave rise to the constitutional questions for determination in this case were published. The determination of H

Malaba DCJ

A the issues raised in the case of *Mukoko v Attorney-General* required time for research and reflection on the interpretation and application of the relevant law.

The constitutional question was raised by the applicants in criminal proceedings in the magistrates court. They were charged with having B committed the crime of publishing or communicating a false statement prejudicial to the State. Following their request the question was referred by the magistrate to the Supreme Court for determination in terms of s 24(2) of the Constitution.

The first and second applicants are the reporter and editor respectively of a weekly newspaper called "*The Independent*" ("the newspaper"). The C newspaper is published by the third applicant, a company incorporated in terms of the laws of Zimbabwe. They were jointly charged with the offence of publishing in the newspaper a false statement to the effect that the law enforcement agency abducted people during the period extending from 25 November to 13 December 2008. The allegation was that they published the D statement with the intention or realising that there was a real risk or possibility of undermining public confidence in the security service institution.

The period extending from 2 August to 20 November 2008 saw bombs being planted by saboteurs at CID Harare Central Police Station; Manyame River Bridge; Manyame Rail Bridge; CID Headquarters at Morris Depot and Harare Police Station. When the bombs exploded, extensive damage E was caused to the bridges and parts of the buildings such as the walls, doors and window panes.

From 25 November to 13 December 2008 a few human rights activists and some members of the MDC-T political party employed in the security department were abducted from different places at different times. The F identities of the abductors and places where the abductees were taken remained a closely guarded secret. Except for those who were involved in the planning and execution of the abductions no-one knew what had happened to the people abducted. As a result, fear for their lives gripped family members and relatives.

The cases of abduction were widely reported in the print and electronic G media. The question of who had kidnapped the people concerned became a matter of public discussion. The law enforcement agency, that is to say, the police and State security agents said that they had no knowledge of who the abductors were and what their motive was. The police said they were investigating what had happened with the view of apprehending the culprits H and accounting for the whereabouts of the victims. As the law enforcement

Malaba DCJ

agency denied having the abductees in its custody and without communication A from the persons concerned, family members and relatives could not invoke the legal remedy of *habeas corpus*.

On 22 December 2008, after 27 days of forced disappearance, the victims appeared at various police stations in Harare. They had been brought there by State security agents. These people were divided into two groups. The B first group was made up of seven people who appeared at the Magistrates Court at Rotten Row on 29 December 2008 in the case of the *S v Dhlamini and Six Others*. They were charged with the crime of insurgency, banditry, sabotage or terrorism in terms of s 23(1)(i) and (ii) of the Criminal Law Code. The allegation was that whilst acting in common purpose they planted and ignited the bombs that exploded at the police stations, Manyame River C Bridge and Manyame Rail Bridge.

The second group was made up of nine people who appeared at the magistrates court at Rotten Row on 14 January 2009 in the case of *S v Chinanzvavana and Eight Others*. They were charged with the crime of contravening s 24(a) of the Criminal Law Code. The allegation was that whilst acting in common D purpose, in the months of June and July 2008 they recruited or attempted to recruit or assisted in the recruitment of a former member of the Zimbabwe Republic Police to undergo military training in a neighbouring country in order to commit any act of insurgency, banditry, sabotage or terrorism in Zimbabwe.

On 31 December 2008 all the accused persons in the first case deposed to E affidavits in which they revealed that they had been forcibly abducted by State security agents and members of the police. They alleged in the affidavits that they were taken to Goromonzi Prison where they were held until they were released into the custody of the police.

In the affidavits deposed to on 31 December 2008 and 20 June 2009 Kisimusi F Emmanuel Dhlamini gave names of the State security agents and members of the police he alleged abducted him from home on 25 November 2008.

In the second case only, Jestina Mukoko raised the question of the violation of the fundamental right not to be subjected to torture, inhuman or degrading treatment. She requested the magistrate to refer the question to the Supreme G Court for determination. Reasons for judgment in *Mukoko v Attorney-General* 2012 (1) ZLR 321 (S) have since been given. There is uncontested evidence that Jestina Mukoko was abducted from her home at 4 a.m. on 3 December 2008 by State security agents.

On 6 April 2009 the respondent served indictments on Kisimusi Emmanuel Dhlamini and six others for trial at the High Court on 29 June 2009. The H

Malaba DCJ

A respondent gave notice in terms of s 110(6) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] that at the trial he intended calling the witnesses whose names he gave. A summary of what each witness would say at the trial was given. The witnesses were members of the law enforcement agency.

After perusing the indictment papers, and the notice the first applicant wrote B two articles which the second applicant edited and the third applicant published in the edition of the newspaper for the week beginning 8 May 2009.

The first article was on the front page. It was titled "ACTIVISTS'ABDUCTORS NAMED". The story was that:

> "The Attorney-General's Office revealed the names of some members of Central C Intelligence Organisation and the police who were allegedly involved in the abduction of human right and MDC activists last November."

At p 2 of the newspaper there was the second article. It was titled: "CIO POLICE ROLE IN ACTIVISTS' ABDUCTION REVEALED". Under the heading the article stated that:

> "Notices of indictments for some of the activists this week revealed the role the D CIO and the Police played when the activists were reported missing last year. A perusal of notices revealed that Assistant Director External in the CIO Retired Brigadier Asher Walter Tapfumanei, Police Superintendent Regis Chitekwe and Joel Tenderere, Detective Inspector Elliot Muchada and Joshua Muzanago, Officer Commanding CID. Homicide Crispen Makendenge, Chief Superintendent Peter Magwenzi and Assistant Commissioner Simon Nyathi were involved in E some of the abductees' cases."

The respondent was of the view that the articles contained false statements about the involvement of the law enforcement agency and its members in the abduction of the human rights activists and members of the MDC-T political party. He concluded that the articles contained statements which F were materially false and prejudicial to the State. The respondent authorised the institution of criminal proceedings against the applicants for contravening s 31(a)(iii) of the Criminal Law Code.

Section 31 falls in the category of offences under the heading: "Crimes against the State". Under the heading is found political crimes such as treason, G subversion of constitutional government, insurgency, banditry, sabotage or terrorism and recruiting or training insurgents, bandits, saboteurs or terrorists. Section 31(a)(iii) of the Criminal Law Code deals with consequences of the publication or communication of a false statement which harms or is likely to harm the interests of the State in the performance of its functions.

H The section reads:

Malaba DCJ

> **"31 Publishing or communicating false statement prejudicial to the A State**
>
> Any person who, whether inside or outside Zimbabwe –
>
> (a) publishes or communicates to any other person a statement which is wholly or materially false with the intention or realising that there is a real risk or possibility of –
>
> (i) inciting or promoting public disorder or public violence or endangering B public safety; or
>
> (ii) adversely affecting the defence or economic interests of Zimbabwe, or

(iii) undermining public confidence in a law enforcement agency, the Prison Service or the Defence Forces of Zimbabwe or

(iv) interfering with or disrupting any essential service; shall whether C or not the publication or communication results in a consequence referred to in subparagraph (i), (ii), (iii) or (iv) be guilty of publishing or communicating a false statement prejudicial to the State and liable to a fine up to or exceeding level fourteen or imprisonment for a period not exceeding twenty years or both."

The essential elements of the offence which the State must establish beyond D reasonable doubt are:

(1) that the accused published or communicated to another a statement;

(2) that the statement was wholly or materially false in meaning;

(3) that the accused intended to undermine public confidence in a law enforcement agency, the Prison Service or the Defence Forces of E Zimbabwe; or

(4) that the accused realised that there was a real risk or possibility of undermining public confidence in a security service institution referred to in para (3).

Section 31(a) (iii) of the Criminal Law Code is also important for what F it omits. It does not require proof by the State that the false statement undermined public confidence in the security service institution concerned. The State is not required to prove that the accused had knowledge of the falsity of the statement.

Section 34 forbids the institution or continuation of proceedings in respect of G the crime against any person without the authority of the Attorney-General except for purposes of remand.

The applicants challenged the constitutionality of s 31(a) (iii) of the Criminal Law Code on the ground that it contravenes s 20(1) of the Constitution which guarantees freedom of expression. The contention is that the provision is not saved by s 20(2). Section 20 of the Constitution provides: H

Malaba DCJ

"20 Protection A of Freedom of Expression

(1) Except with his own consent or by way of parental discipline, no person shall be hindered in the enjoyment of his freedom of expression, that is to say freedom to hold opinion and to receive and impart ideas and information without interference and freedom from interference with his correspondence.

(2) Nothing contained in or done under the authority of any law shall be held B to be in contravention of subsection (1) to the extent that the law in question makes provision –

(a) in the interests of defence, public safety, public order, the economic interests of the State, public morality or public health.

(b) . . .

(c) . . .

C except so far as that provision or as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society."

The applicants do not deny that the right to freedom of expression is not absolute at all times and under all circumstances. They accept that inherent in the exercise of the right to freedom of expression is a duty not to injure D the rights of others or the public interests listed in s 20(2) of the Constitution. They argue that the restriction imposed by s 31(a)(iii) of the Criminal Law Code is an impermissible legislative limitation of the exercise of freedom of expression.

The respondent urges the court to uphold the constitutionality of the provision. E He argued that should the court find that the provision contravenes s 20(1) of the Constitution it would be bound by the provisions of s 24(5) of the Constitution to issue a rule *nisi* to the Minister of Justice and Legal Affairs. In that event, the court would call upon the Minister to show cause why the provision should not be declared to be in contravention of s 20(1) of the Constitution and void before making a declaratory order to that effect. See F *In re Munhumeso & Ors* 1994 (1) ZLR 49 (SC); *Retrofit (Pvt) Ltd v PTC & Anor* 1995 (2) ZLR 199 (S); *S v Tsvangirai* 2001 (2) ZLR 426 (S).

There is one indivisible freedom for every individual and that is freedom from unwarranted interference by Government. The fundamental rights protected by the Constitution and exercised by the individual are assertions against the State of different aspects of the freedom inherent in every individual as G a human being. Freedom of expression asserts the autonomy of thinking, linguistic

and communicative elements of the life of an individual and a thin slice of the universe of communication policy.

Section 20(1) of the Constitution defines in broad terms the nature, content and scope of the cluster of rights the enjoyment of which is protected H against interference by the Government under the principle of freedom of

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2013 (2) ZLR p486

Malaba DCJ

expression. The respondent does not dispute the fact that liberty of publishing A or communicating one's thoughts, ideas and information expressed in an oral, written or symbolic act to others is essential to the enjoyment of freedom of expression.

There are in fact three dimensions to the process of the exercise of the rights guaranteed by s 20(1) of the Constitution. There is an internal dimension (the B formation and holding of opinion, ideas and information); a communicative dimension (the expression of opinion, imparting of ideas and information) and an external dimension (the effect of opinions, ideas and information on the addressee or the audience i.e. on the rights of others or public interests listed in s 20(2)(a) of the Constitution). The guarantee of freedom of expression C affects the holding sphere, the communicative sphere and the external sphere. The areas constitute an indissoluble unit.

Protection of the fundamental right to freedom of expression is based on the belief that man is an autonomous and rational agent capable of acquiring knowledge which he or she uses to distinguish right from wrong. He or she is under a duty to promote the general welfare of the community to the D extent that it is not injurious to his or her own lawful interests. Freedom of expression is defined not only in terms of the protection of the right to hold opinions but also to receive and impart ideas and information without interference. What is protected by the right is not only the benefits of the communicative process but also the effects the dissemination of ideas and E information has on the audience including public interests.

The State is placed under an enforceable fundamental obligation not to interfere with the exercise of freedom of expression. It may interfere only when the activity or expression poses danger of direct, obvious and serious harm to the rights of others or the public interests listed in s 20(2) of the F Constitution.

Ideas and information are the result, basis and means of cognitive interpretation by man of the real world around him or her. It is by imparting ideas and information he or she holds to others that an individual can let them know his or her thoughts on matters of private and public concern. In that way he or she is able to influence the attitude of others towards him or her. In that G regard freedom of expression consists of the right to express and convey one's conviction and opinion on any matter orally or by writing, printing or any other method addressed to the eyes and ears of other people.

It is by receipt of ideas and information imparted to him or her by others that the individual can become a social being. He or she would know whether his H

2013 (2) ZLR p487

Malaba DCJ

A or her view of the world is correct or wrong thereby attaining self-fulfilment, political or social participation and discovery of truth.

The nature and scope of the rights guaranteed covers every activity which conveys or attempts to convey a message in a non-violent form. Section 20(1) of the Constitution embraces all content of expression irrespective of the nature of the message sought to be conveyed. The right to freedom B of expression applies to ideas and information of any kind. Conduct which does not convey meaning or seeks to convey meaning in a violent form or manner does not fall within the protection. "Form" refers to the physical form including words in which the message is communicated and does not extend to content.

C A free person abhors violence perpetrated against him or her by others just as they also abhor violence perpetrated by him or her against them. Ideas and information are imparted and received for mental digestion and acceptance or rejection. Freedom of thought means that the mind must be ready to receive new ideas, to critically analyse and examine them and to accept those which are

found to stand the test of scrutiny and to reject the rest: *Naraindas v* D *State of Madhya Pradesh* [1974] 3 SCR 624 at 650. It is the battle of minds and the free debate of ideas and information that enjoy the benefits of the protection of freedom of expression. Any form of violence by which meaning is conveyed is an antithesis of freedom of expression. The purpose of the guarantee is to ensure that people can manifest and convey the meaning E of their thoughts and feelings in non-violent ways without fear of censure.

The Supreme Court of Canada determined the question of the scope of the guarantee of freedom of expression in *Irwin Toy Ltd v Quebec (Attorney General)* (1989) 39 CRR 193 (SCC). Writing for the majority, Dickson CJC said at 228-229:

> "'Expression' has both a content and a form, and the two can be inextricably connected. Activity is expressive if it attempts to convey meaning. That F meaning is its content. . . . Indeed, if the activity conveys or attempts to convey a meaning, it has expressive content and *prima facie* falls within the scope of the guarantee. Of course, while most human activity combines expressive and physical elements, some human activity is purely physical and does not convey or attempt to convey meaning . . . The content of expression can be conveyed through an infinite variety of forms of expression: for example the written or G spoken word, the arts and even physical gestures or acts. While the guarantee of free expression protects all content of expression certainly violence as a form of expression receives no such protection."

See also *R v Keegstra* [1991] LRC (Const) 333 at 350b (Supreme Court of Canada).

Publication or communication of a false statement to any other person on any H subject matter or topic in a non-violent form is an activity which conveys

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2013 (2) ZLR p488

Malaba DCJ

or attempts to convey meaning. The protection provided by s 20(1) of the A Constitution does not have regard to the truth or falsity of the meaning of the ideas and information published or communicated. Section 20(1) is a value free provision which does not recognise any basis for the test of truth. In other words truth is not a condition *sine qua non* of the protection of freedom of expression. This freedom applies to all expressions regardless B of their nature, content, quality or truth. The content of a statement should not therefore determine whether it falls within s 20(1) of the Constitution's protection: See *New York Times v Sullivan* 376 US 254 (1964) at 271-272.

Freedom of expression finds its true meaning when its enjoyment is protected from interference by Government. The Constitution recognises the fact that people tell lies in a variety of social situations for different reasons. Lies are C not necessarily without intrinsic social value in fostering individual self-fulfilment and discovery of truth. For that reason the Constitution protects against State interference the rights of every person to speak or write and communicate or publish to others what he or she thinks. These rights are part of the "freedom" or "liberty" guaranteed by the Constitution.

The only limitation on the "freedom" or "liberty" is the duty not to injure the D rights of others or the collective interests listed in s 20(2)(a) of the Constitution. In other words, the State through the exercise of legislative power may limit the individual's exercise of the right to freedom of expression if that were necessary for the protection of one or more of the public interests listed in s 20(2)(a) of the Constitution. E

It is, in short, not simply the falsity of the message of the verbal or non-verbal nature of expression which determines the validity of a restriction. It is the rights to others or the public interests and actual or potential harm thereto that help to determine whether a restriction on the expression is valid. See *Texas v Johnson* 491 US 397 (1989) at 407.

The fact that a person has told lies to others on any subject matter should F not be of concern to the State. Government is prohibited from appointing itself as a monitor of truth for people. They are able to do that for themselves through the free exchange of ideas and information on matters of public interest. People must not be denied the right to freely use speech or the press to silence each other and decide what views shall be voiced. What G is protected is really the indivisible freedom of everyone to speak even when they may after they have done so be called liars. Anyone has a right to impart or receive ideas and information about the activities of security service institutions regardless of the falsity or truth of the message conveyed, provided no harm or real likelihood of harm to the rights of others or public interest results in breach of law. H

2013 (2) ZLR p489

Malaba DCJ

A The principle of equality of treatment behind the right assures those who tell lies and those who tell the truth that the guarantee of the right to freedom of expression belongs to them together. They are assured that when they exercise it to harm the rights of others or public interest they will be treated the same in the eyes of the Constitution and the law. The liberty cannot be denied to some ideas and saved for others.

B The bedrock principle (to borrow the words of Justice Brennan in *Texas v Johnson supra* at p 414) of the guarantee is that no exercise of the right to freedom of expression can, without more, be restricted on the ground that the message conveyed is false, offensive or not favourable: *R v Zundel* (1992) 10 CRR (Can SC) (2d) 193 at 206. This rule against content-based C discrimination is truly, the cornerstone of contemporary free expression protection jurisprudence. If expression has to be prohibited because of content there has to be a demonstrable direct and proximate causal link between it and actual or potential harm to a public interest listed in s 20(2) of the Constitution. In other words the interest that is pursued by the constraint on the exercise of freedom of expression must be protected from harm regardless D of whether it can be violated through publication or communication of a true or false statement.

There would be no basis for holding that publication or communication of a false statement on any subject matter is not protected "expression" in light of the broad, generous and purposive interpretation of s 20(1) of the E Constitution adopted by the court in its case-law to give to individuals the full measure of the fundamental right. See *United Parties v Minister of Justice, Legal and Parliamentary Affairs & Ors* 1997 (2) ZLR 254 (S); *Smyth v Ushewokunze & Anor* 1997 (2) ZLR 544 (S); 1998 (3) SA 1125 (ZS).

Section 20(1) of the Constitution underscores the importance of freedom of expression in a free and democratic society, subject, of course, to s 20(2). F The overriding importance of the right has been widely recognised, for its own sake and as an essential underpinning of democracy and a means of safeguarding other human rights. It is the duty of the State in the exercise of collective power to act in terms of the principles of fundamental human rights and freedoms whilst advancing social justice.

G The court recalls what it said in *Chavunduka & Anor v Minister of Home Affairs & Anor* 2000 (1) ZLR 552 (S). Writing for the unanimous court Gubbay CJ said at 558C-G:

> "This court has held that s 20(1) of the Constitution is to be given a benevolent and purposive interpretation. It has repeatedly declared the importance of freedom of expression to the Zimbabwean democracy – one of the most recent H judgments being that of *United Parties v Minister of Justice, Legal and Parliamentary Affairs & Ors* 1997 (2) ZLR 254 (S)

2013 (2) ZLR p490

Malaba DCJ

> at 268C-F; 1998 (2) BCLR 224 (ZS) at 235I-J. Furthermore, what has A been emphasised is that freedom of expression has four broad special objectives to serve: (i) it helps an individual to obtain self-fulfilment; (ii) it assists in the discovery of truth, and in promoting political and social participation (iii) it strengthens the capacity of an individual to participate in decision–making; and, (iv) it provides a mechanism by which it would be possible to establish a reasonable balance between stability and social change. See, to the same effect, B *Thomson Newspapers Co v Canada* (1998) 51 CRR (2d) 189 (Can SC) at 237.
>
> Plainly embraced and underscoring the essential nature of freedom of expression, are statements, opinions and beliefs regarded by the majority as being wrong or false. As the revered Holmes J so wisely observed in *US v Schwimmer* 279 US 644 (1929) at 654, the fact that the particular content of a person's speech might 'excite popular prejudice' is no reason to deny it protection for 'if there C is any principle of the Constitution that more imperatively calls for attachment than any other, it is the principle of free thought – not free thought for those who agree with us but freedom for thought of that we hate'. Mere content, no matter how offensive cannot be determinative of whether a statement qualifies for the Constitutional protection afforded to freedom of expression. See *R v Keegstra* (1991) 3 CRR (2d) 193 (Can SC) at 286. Sixty years later in *R v Zundel* (1992) D 10 CRR (2d) 193 (Can SC) Madam Justice McLachlin expressed much the same sentiment as Holmes J."

Thomas Emerson in his article titled "*Toward a General Theory of the First Amendment*" 72 *Yale LJ* 877 (1963) notes at p 886 that:

> ". . . the theory of freedom of expression involves more than a technique for arriving E at better social judgments through democratic procedures. It comprehends a vision of society, a faith and a whole way of life. The theory grew out of an age that was awakened and invigorated by the idea of a new society in which man's mind was free, his fate determined by his own powers of reason and his prospects of creating

> a rational and enlightened civilization virtually unlimited. It is put forward as a prescription for attaining a creative, progressive, exciting and intellectually robust community. It contemplates a mode of life that, through F encouraging toleration, scepticism, reason and initiative, will allow man to realise his full potentialities. It spurns the alternative of a society that is tyrannical, conformist, irrational and stagnant."

Freedom of expression is described in Article 11 of the French Declaration of the Rights of Man and of the Citizen (1789) as "one of the most precious G rights of man". In *Palko v Connecticut* 302 US 319 (1937) at 327 Mr Justice Cardozo said it is "the matrix, the indispensable condition of nearly every other form of freedom". At its very first session in 1946 the United Nations General Assembly declared that "freedom of information is a fundamental human right and . . . the touchstone of all the freedoms to which the United Nations is consecrated": Resolution 59(1), 14 December 1946. H

Malaba DCJ

A Section 20(2) of the Constitution prescribes strict requirements for any measure in the exercise of State power which has the effect of restricting the exercise of the right to freedom of expression. The recognition of the power of Government to limit the exercise of freedom of expression is based on the concept of a free and democratic State based on the rule of law. This concept B is based on the possibility that freedom of any kind, even constitutional freedom of expression, could be abused for the purposes of harming the rights of others or public interest. The exercise of the power to limit the exercise of the right to freedom of expression is not only required to be constitutionally justified. It is itself restricted by the principle of proportionality.

The first thing the Constitution controls in the exercise by the Government C of the power to hinder the enjoyment of freedom of expression under the strict justificatory requirements of s 20(2) is the degree of interference. The interference imposed in terms of the impugned law must be limited to being a restriction or hindrance of the enjoyment of the exercise of the right to freedom of expression. There must be a limitation of acts by which the right C to freedom of expression is exercised.

It would not be an interference within the meaning of the Constitution if the measure adopted by the Government amounts to authorisation of the destruction or abrogation of the right to freedom of expression itself. To control the manner of exercising a right should not signify its denial or invalidation. E The right in the person is indivisible whilst its exercise can differ depending on the situation. The idea must be to harmonise the individual's pursuit of his or her ends with those of others. It is a power which must be exercised in a manner not inconsistent with the continued existence of the right.

Whilst non-interference with the enjoyment of the fundamental right is an obligation on the State, the imposition of restrictions on its exercise in terms F of s 20(2)(a) of the Constitution is not. It is optional. Not every instance of likely harm from expression and dissemination of ideas and information to a public interest listed in s 20(2) of the Constitution would justify the imposition of a restriction on the exercise of freedom of expression. If that were to be the practice the area of freedom of expression would be reduced to naught.

G It is only the prohibition of those acts in the exercise of freedom of expression by the speaker, writer, publisher, or actor shown to pose danger of direct, obvious, and serious harm to one or more of the public interests listed in s 20(2)(a) of the Constitution which is justifiable. The right to freely express one's opinion or ideas and information on any subject to others goes H together with the right to choose the effect one wants the communication or

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Malaba DCJ

publication to have on the listener or reader and the circumstances likely to A produce the strongest effect.

In deciding whether a measure imposes restrictions to the exercise of freedom of expression the court examines its purpose or effect. The court does not examine the measure at this stage for the purpose of ascertaining its objective. It does not make any reference to the consequences of the B prohibited activity. The court looks at what has been called the "facial" purpose of the legislative technique adopted by Parliament to achieve its ends. The question is whether or not the purpose or

effect of the provision is to restrict freedom of expression. In *Irwin Toy Ltd* supra at pp 232-233 Dickson CJC said:

> "If the government's purpose is to restrict the content of expression by singling out C particular meanings that are not to be conveyed, it necessarily limits the guarantee. If the government's purpose is to restrict a form of expression in order to control access by others to the meaning being conveyed or to control the ability of the one conveying the meaning to do so, it also limits the guarantee. On the other hand, where the government aims to control only the physical consequences of certain human activity, regardless of the meaning being conveyed, its purpose D is not to control expression."

See also *In re Munhumeso & Ors* 1994 (1) ZLR 49 (SC) at 62F; *Retrofit (Pvt) Ltd v PTC & Anor* 1995 (2) ZLR 199 (S) at 216C, *Bennett Coleman and Co Ltd & Ors v Union of India & Ors* AIR 1973 SC 106 at 118, *R v Big M Drug Mart Ltd* (1985) 18 DLR (4th) 321 at 374. E

In the case of s 31(a)(iii) of the Criminal Law Code not every publication or communication of a false statement about a security service institution is prohibited. It is only when the prohibited expression and dissemination of ideas and information are done with the specific intention or realisation that there is a real risk or possibility of undermining public confidence in a F security service institution that the crime is committed. The prohibition is not applicable for example, when a person publishes or communicates a false statement with the intention of inciting others to public disorder.

The effect is that the applicants are, or anyone else is, denied the right to impart the ideas and information in the form of a statement to other people if G the message is wholly or materially false. There is a specificity of the quality of the false statement in terms of consequences and the circumstances in which its publication or communication is prohibited as a crime. The other people would be denied the right to receive the statement because of the prohibition on the exercise of the right by the applicants to publish the ideas and information expressed in the statement. H

Malaba DCJ

A As long as the prohibition is extant the publication of a false statement with the requisite state of mind would offend against the provisions of s 31(a)(iii) of the Criminal Law Code. One of the effects of s 31(a)(iii) is to subject a person charged with the commission of the offence to criminal conviction and potential imprisonment. It is clear that the provision is a material interference by the State with the constitutionally guaranteed right to freedom B of expression by making publication or communication of a false statement with the requisite state of mind a punishable crime.

The holding brings into operation the application of the requirements of permissible legislative limitation of the exercise of freedom of expression. Is the interference with the exercise of freedom of expression justifiable under C s 20(2) of the Constitution? The decision whether or not to promote or protect a particular public interest by imposing restrictions on the exercise of freedom of expression is a political decision beyond the powers of judicial review.

When the Government decides to accomplish the policy objective by the imposition of restrictions on the exercise of the right to freedom of expression by means of criminal law with its attendant sanctions for disobedience it must D act lawfully. The Constitution imposes minimum standards of permissible legislative limitation of the exercise of freedom of expression which it requires the Legislature to strictly comply with. Violation of any of the principles constituting the permissible limit of interference with a fundamental right constitutes a violation of the right.

E The question whether a restriction satisfies all the mandatory requirements of permissible legislative limitation of the exercise of freedom of expression and therefore enacted as a valid law is a constitutional question the determination of which falls exclusively within the judicial power of review. The court is under an obligation to give full effect to the requirements in determining the question whether the limitation has not been shown to be arbitrary or F excessive.

Compliance by the Legislature with each of the requirements of permissible legislative limitation of the exercise of the right to freedom of expression was put in issue. The issues for determination are therefore these:

(1) Is the restriction on the exercise of the right to freedom of expression G imposed under s 31(a)(iii) of the Criminal Law Code contained in law?

(2) If the restriction is contained in law, does the provision have as its primary objective the protection of a public interest in one or more of the matters listed in s 20(2)(a) of the

Constitution?

(3) If the protection of a public interest listed in s 20(2)(a) of the Constitution H is the primary purpose of the legislation, is there a rational connection

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2013 (2) ZLR p494

Malaba DCJ

between the restriction on the exercise of the right to freedom of expression A and the objective pursued?

The onus of proving the assertions of fact in the issues listed above is on the State. The standard of proof is a preponderance of probabilities. If the answer to each question is in the affirmative, the onus shifts to the applicants. They bear the onus of showing on a preponderance of probabilities that the B legislation is not reasonably justifiable in a democratic society. This involves showing absence of a reasonable relationship of proportionality between the means used to impose the restriction on the exercise of the right to freedom of expression and the objective sought to be achieved. The purpose of the proportionality test is to strike a balance between the interests of the public and the rights of the individual in the exercise of freedom of expression. C

The applicants must establish the following facts arising from the application of the three criteria of the proportionality test:

(a) that there is no rational connection between the restriction on the exercise of the right to freedom of expression and the objective sought to be achieved by the provisions of the statute. D

(b) that even if there is a rational connection between the restriction on the exercise of freedom of expression and the objective pursued the means used to effect the connection do not impair the right to freedom of expression as little as possible. That would mean that there are other less intrusive means available which the legislature could have used to E restrict the exercise of the right to freedom of expression to achieve the same objective.

(c) that the effects of the restrictive measure so severely trench on the right to freedom of expression that the legislative objective sought to be achieved is outweighed by the restriction on freedom of expression.

The criterion of the proportionality test applicable will vary depending on the F circumstances of each case. See *R v Oakes* (1986) 19 CRR 308 at 336-337 (Supreme Court of Canada); *Nyambirai v NSSA & Anor* 1995 (2) ZLR 1 (S) at 13D-F; *Attorney-General v Morgan* [1985] LRC (Const) 770 at 797; *Capital Radio (Pvt) Ltd v Broadcasting Authority of Zimbabwe & Ors* 2003 (2) ZLR 236 (S) at 308A-B. G

In the determination of the issues raised, it is ever so important to bear in mind that, every new legislative restriction on the exercise of the right to freedom of expression, has the effect of reducing the existing realm of freedom of expression whilst adding to and expanding the area of governmental control of the exercise of the fundamental right. It is the duty of the court as guardian of the constitution and fundamental human rights and freedoms to ensure H

2013 (2) ZLR p495

Malaba DCJ

A that only truly deserving cases are added to the category of permissible legislative restrictions of the exercise of the right to freedom of expression.

The principles impose limitations on the restrictions imposable by the legislature on the exercise of freedom of expression. They are the standard according to which the legitimacy of any restriction on the exercise of freedom B of expression must be assessed. Every case must be decided in the context of a legal system with constitutionally entrenched human rights provisions binding the legislature, the executive and the judiciary. The approach is not that what Parliament has ordained goes but whether what Parliament has ordained is consistent with fundamental human rights and freedoms or violates C them as measured against the requirements of s 20(2) of the Constitution.

One is reminded of what Justice Brewer of the US Supreme Court said in *Muller v Oregon* 208 US 412 (1908) at 421. He said:

> "Constitutional questions, it is true, are not settled by even a consensus of present public opinion, for it is the peculiar value of a written Constitution that it places in unchanging form limitations upon legislative

> action, and thus gives a permanence D and stability to popular government which otherwise would be lacking."

The next matter which the Constitution controls is the origin and quality of the provision by which the restriction is imposed on the exercise of the right to freedom of expression. It requires that any interference with freedom of expression must be "contained in law". The legislature alone may specify E clearly and concretely in the law the actual limitations to the exercise of freedom of expression. If the restriction on the exercise of freedom of expression is imposed by a decision or action of the judiciary or the executive the decision or action must be under the authority of law. In the latter case the validity of the law itself is not in issue.

F Is the restriction on the exercise of freedom of expression imposed by s 31(a)(iii) of the Criminal Law Code "contained in law"? It is a fundamental principle of constitutional law that any restriction which hinders the enjoyment of a fundamental right must be introduced by a legal provision. The grounds for the justification of the restriction must be found in the law by which it is imposed. Fundamental rights and freedoms and other constitutional values G are protected by the fundamental law which is the supreme law of the land. Restrictions imposed on them must be consistent with the fundamental law otherwise they are void.

The requirement that the restriction on the exercise of the right to freedom of expression must be contained in law is expressive of and consistent with the principle of the rule of law. H The principle is to the effect that every

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Malaba DCJ

governmental action which adversely affects the legal situation of persons in a A free and democratic society must be justifiable by reference to an existing law.

No person shall be prevented in a free and democratic society from doing an act which is not prohibited by law at the time he or she does it. There cannot be a crime and punishment without law. What that means is that there must be first put in place a provision which meets all the characteristics of B a legal norm by which the conduct to constitute a crime is defined and in terms of which the State may then interfere with the exercise of the right. There must be an offence prohibiting and defining in clear and precise terms what conduct is a crime. To act without a legal basis is to act arbitrarily and therefore unlawfully.

The "rule of law" is an indispensable principle on which any free and C democratic society is based. It is an integral part of the vision and way of life in a free society. Where there is rule of law there is peace, justice and freedom. Law plays its proper role only if it takes due account of all the three elements. It does not admit of the rule of man. No individual is above the law. In other words, what is envisaged is "a government of laws and not D of men": *Bennett Coleman and Co Ltd & Ors v Union of India & Ors* AIR 1973 SC 106 at 150.

The words "contained in . . . any law" or "done under the authority of any law" used in s 20(2) of the Constitution have been given meaning similar to that given to such equivalent phrases as "provided by law", "in accordance with the law", "prescribed by law", "determined by law" and "in terms of law" E used in international human rights instruments and constitutions of other nations. In *Chavunduka & Anor supra* at 560F it was held that "the meaning of these phrases is substantially the same". They all refer to the legality of the positive law, that is to say the law which is binding on the executive and the judiciary. In fact the word "legality" is derived from the Latin word F "*legalis*", which means "in accordance with a law". The word "*legalis*" is in turn derived from *lex*, which means "law". See C R Snyman *Criminal Law* 2 ed (1989) p 29. The Constitution requires that the provision by which the restriction on the exercise of freedom of expression is to be imposed must have all the universally recognised characteristics of a legal norm.

In *R v Therens* (1985) 13 CRR 193, when interpreting the requirement of s G 1 of the Canadian Charter of Rights and Freedoms to the effect that a limit on the exercise of freedom of expression must be "prescribed by law", Brownridge JA said at p 216:

> "The requirement that the limit be prescribed by law is chiefly concerned with the distinction between a limit imposed by law and one that is arbitrary. The limit will be prescribed by law within the meaning of s 1 if it is expressly provided H

Malaba DCJ

A for by statute or regulation or results by necessary implication from the terms of the statute or regulation or from its operating requirements. The limit may also result from the application of a common law rule."

The applicants did not attack the restriction on the ground of the origin of the law making provision for its imposition. They accepted that the measure B is a product of the process and procedures for the exercise of the legislative powers by Parliament. They accepted that Parliament had the competence to legislate in respect of the subject - matter of the provision. *Prima facie*, the restriction is contained in law because it is provided for in s 31(a)(iii) of the Criminal Law Code.

The applicants attacked the quality of the law. There is no question of breach C of the rule of adequate accessibility. The law is published in a form accessible to those affected. The contention was that the provision is not a rule of law because the essential elements of the crime do not define the scope of the prohibited acts in a language which is sufficiently clear and adequately precise. A compliant law must, in accordance with the principle of legality, D enable a person of ordinary intelligence to know in advance what he or she must not do and the consequences of disobedience. This is the requirement of foreseeability of law.

It was argued that the restriction provided for cannot be regarded as "contained in law" because the means or concepts by which it is defined and imposed E suffer from the vice of unconstitutional vagueness. The sufficiency of the precision of the definition of the acts prohibited in the exercise of the right to freedom of expression is not considered at this stage. It will be considered when the question of the relationship of proportionality between the restriction and the objective pursued by the legislation is determined.

F Behind the requirement that restrictions on the exercise of the right to freedom of expression must be based in law lies an order of completeness allowing the complete extent of such restrictions to be identified on the basis of the interpretation of the provisions of the law. It is important that the concepts chosen to define the essential elements of the offence provide for the judiciary and the executive a workable means of enforcing the restriction.

G Mr *Chagonda* argued in support of the alleged unconstitutional vagueness of s 31(a)(iii) of the Criminal Law Code that the phrase "real risk or possibility" refers to anything which can scientifically happen without necessarily being probable. The contention was that people often act without considering the circumstances of their behaviour to identify the existence of the real risk or H possibility of an event occurring as a consequence of their conduct.

2013 (2) ZLR p498

Malaba DCJ

It was Mr *Chagonda's* submission that the use of the word "false" introduces A into the essential elements of the offence a concept which cannot describe the content of a statement with certainty. The argument was that the word "false" was wide enough in meaning to embrace a statement which is merely incorrect or inaccurate. He argued that it is always difficult to conclusively determine total falsity.

Mr *Chagonda* argued further that the concept of "public confidence" as the B prejudicial consequence to the state with which the offence deals, is nebulous and susceptible of change as to render the offence unconstitutionally vague. He said as the offence does not relate to undermining the authority of the institution concerned it becomes difficult to ascertain the level of public confidence in the institution at any given time. According to Mr *Chagonda*, C it is almost impossible to measure "public confidence" in a public institution as it depends on such factors as the political and economic conditions of a country at any given time.

The rationale underlying the principle of unconstitutional vagueness of a statute is clear. A law which does not meet the constitutional requirement D of legality cannot be saved by s 20(2) of the Constitution. It is essential in a free and democratic society that people should be able within reasonable certainty to foresee the consequences of their conduct in order to act lawfully. The fact that one can on a fair warning about what is criminal, dependably calculate action in advance is a very fundamental element of law, order and therefore peace. E

On the fair notice component of the rule against unconstitutional legislative vagueness, it is not enough that a person of average intelligence has had notice of the legislation. He or she must on reasonable examination of its provisions be able to appreciate that the law proscribes certain conduct and what that conduct is. F

The Constitution insists that laws must give people of ordinary intelligence a reasonable opportunity to know what is prohibited so that they may act lawfully. The assumption is that man is free to steer between lawful and unlawful conduct. Once a person has a fair notice of what conduct is lawful, he or she is able to order his or her actions together with others thereby giving rise to order and stability in society. G

The second component of the doctrine is based on the belief that if arbitrary and discriminatory enforcement is to be preventable laws must provide explicit standards for those who apply them. The discretion of those entrusted with law enforcement should be limited by clear and explicit legislative standards. This is especially important in the use of criminal law because people are H

2013 (2) ZLR p499

Malaba DCJ

A potentially liable to deprivation of personal liberty if their conduct is in conflict with the law.

A vague law impermissibly delegates basic policy matters to policemen, prosecutors and judges for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. So the B legislature is prevented from passing arbitrary and vindictive laws: *Grayned v City of Rockford* 408 US 104 (1972) at 108-109; *Reference re Criminal Code ss 193 and 195.1(1)(C)* (1990) 48 CRR 1 at 25.

In *Chavunduka & Anor supra* at 560G-561A Gubbay CJ quoted with approval from the *Sunday Times v United Kingdom* (1979-80) 2 EHRR 245 at 271 C (para 49) where the majority of the European Court of Human Rights said:

> "In the court's opinion, the following are two of the requirements that flow from the expression 'prescribed by law'.
>
> First, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly a norm cannot be regarded as a 'law' unless it is D formulated with sufficient precision to enable the citizen to regulate his conduct; he must be able – if need be with appropriate advice – to foresee to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its trail excessive rigidity and the law must be able to E keep pace with changing circumstances."

Many laws are inevitably couched in terms which are to a greater or lesser extent vague. Their interpretation and application in many cases are questions of practice by the courts. The standard is one of sufficient clarity. It is not one of absolute clarity. Mr *Chagonda* based his submissions on the need F to apply the standard of absolute clarity in the interpretation of the word "false" and the phrases "real risk or possibility" and "public confidence" used in s 31(a)(iii) of the Criminal Law Code. What degree of vagueness is acceptable largely depends on the circumstances.

A norm imposing restrictions on the exercise of the right to freedom of G expression will be unconstitutionally vague if it fails to provide a standard for legal debate and discussion as to whether a particular conduct is in violation of it or not.

Section 15(1) of the Criminal Law Code defines the subjective concept of realisation of a "real risk or possibility" of an event resulting from unlawful H conduct as consisting of two components:

2013 (2) ZLR p500

Malaba DCJ

> "(a) a component of awareness, that is, whether or not the person whose conduct A is in issue realised that there was a risk or possibility, other than a remote risk or possibility that –
>
> (i) his or her conduct might give rise to the relevant consequence; or
>
> (ii) the relevant fact or circumstance existed when he or she engaged in the conduct
>
> and B
>
> (b) a component of recklessness, that is, whether despite realising the risk or possibility referred to in paragraph (a) the person whose conduct is in issue continued to engage in that conduct."

The court respects the power of the legislature to define the terms it uses in a statute to make clear the meaning they should be given, consistent with the C rule of law principle. What is clear from the meaning the legislature intends the words to have in the context of s 31(a)(iii) of the Criminal Law Code, is what they denote. They denote a test to be used to establish a subjective state of mind

accompanying the publication or communication of a false statement relating to the security service institution referred to in the provision. The requisite state of mind is related to the aim of the unlawful conduct and the D real likelihood of it materialising.

The prohibition provided for by s 31(a)(iii) of the Criminal Law Code is not concerned with the way the statement is published or communicated. It is concerned with what is published or communicated, the purpose of its publication or communication and the effect the statement has or is likely E to have on the audience.

Whether there is a "real risk or possibility" of an event happening as a natural consequence of another is a question of fact provable by evidence. Whether or not an accused person had the requisite state of mind at the time he or she engaged in the prohibited conduct is a question to be determined by reference to the circumstances of the case. The circumstances would have been given F rise to by the conduct of the accused in publishing or communicating the false statement. The presumption is that a rational person will undertake an act or do a thing he or she knows is likely than not to produce the consequence he or she wants. He or she is likely to undertake an act when he or she foresees that the consequence is likely than not to flow from it. G

The fact of a person having foresight from the circumstances of his or her own conduct of a "real risk or possibility" of an event happening as a natural consequence of what he or she is doing is a common feature of offences created by criminal law. The concept of "realisation of a real risk or possibility" of the occurrence of a specific event as a consequence of the proscribed conduct has been used in the definition of crimes for many years. H

2013 (2) ZLR p501

Malaba DCJ

A It has been used to denote a subjective state of mind of crimes to the extent that it has now acquired a special meaning in criminal law jurisprudence. Courts are not unfamiliar with the requirements of the test for a subjective state of mind denoted by the words "real risk or possibility" used in a statute.

A statement is a means by which a person expresses to others by way of B spoken or written words or any other action a message about the relationship between what he or she thinks and the real world. Where the relationship is presented in terms of a correspondence between the idea or information imparted or received and reality or fact the statement is a true statement. What is reality or fact does not change. It may expand as more ideas or information about it comes to light. Reality defines the difference between C truth and falsity.

The truth or falsity of an alleged fact is a matter of evidence. Where there is no relationship of correspondence between the ideas or information imparted or received and reality the statement is false. To say something has happened when it has not happened is a lie. A statement is indeed defined by s 19 of the Criminal Law Code to mean "any expression of fact or opinion D whether made orally, in writing, electronically or by visual images". So a "false statement" of fact is a statement which is in "conflict with reality". It is a misrepresentation that what is stated or expressed is a fact. Difficulty of verification of the "falsity" or "truth" of a statement does not detract from the definitional clarity of the meaning of "false statement".

E The words "public confidence" are not so vague as to escape definition by the courts. As shall be shown later these words are to be interpreted in the context of the performance by a security service institution referred to in s 31(a)(iii) of the Criminal Law Code of functions in the exercise of the powers conferred on it by the Constitution. Public confidence in that context F refers to the trust reposed in the institution by the public. The basis of the trust is a belief that members of a security service institution will be able to execute their duties in accordance with the purposes for which the institution was established under the Constitution.

The contention that s 31(1)(iii) of the Criminal Law Code as it is framed is unconstitutionally vague as to fail the test of legality is clearly unsustainable. G Any man or woman of ordinary intelligence can foresee, to a reasonable extent, what conduct is prohibited by the statute and the consequences of committing the conduct.

The concepts of "false"; "real risk or possibility" and "public confidence" do not in themselves cause insurmountable problems of interpretation H when used in a statute. The meaning to be given to each word or phrase as

Malaba DCJ

used in s 31(a)(iii) of the Criminal Law Code is clear. What they describe A is adequately foreseeable. The interference the description of which they form a part has a legal basis. In that sense the restriction is contained in law within the meaning of s 20(2) of the Constitution.

The next matter the Constitution addresses is the objective the impugned legislation must pursue. Every legislation is animated by an object the B legislature intends to achieve: *R v Big M Drug Mart Ltd* (1985) 18 DLR (4th) 321 (Supreme Court of Canada) at 350. The constitution prescribes the interests a law which imposes restrictions on the exercise of the right to freedom of expression must have been enacted to protect if it is to be consistent with the purpose for which the fundamental right is guaranteed.

A law shall not be held, if all other requirements are met, to be in contravention C of the protection of the exercise of the fundamental right to freedom of expression if the objective of its enactment is the protection of a public interest listed in s 20(2)(a) of the Constitution. Interference with freedom of expression may only be justified if it pursues a legitimate aim. The reason is that freedom of expression is guaranteed by the Constitution so that it is D not exercised in a manner that is detrimental to the rights of others or the public interests listed in s 20(2)(a) of the Constitution. The public interest lies in the need for the individual to respect the interests listed when he or she exercises the right to freedom of expression.

The specific aims which must be pursued by a provision imposing restrictions E on the exercise of freedom of expression and the legitimacy of them are pre-determined and established directly by the Constitution. The interests to be protected and sufficiency of their importance are pre-determined. The legislature is bound under the principle of legitimacy by the higher norm to limit the exercise of the right to freedom of expression only for clearly defined purposes. The question in each case is whether the aim pursued by F the prohibition imposed by the impugned legislation is the protection of an interest directly related to or falling within the categories of the interests listed in s 20(2)(a) of the Constitution. It seems clear therefore that in assessing whether a restriction on freedom of expression addresses a legitimate aim both its purpose and its effect should be taken into account: *R v Big M Drug* G *Mart Ltd supra* p 3.

In ascertaining the objective of a statute the court construes the language used in the provision taking into account its subject matter, the reasons for and effects of the restriction imposed on the exercise of freedom of expression. In other words the court must look at the intention of Parliament. An object is the interest which the legislature intends to promote or protect by means H

Malaba DCJ

A of the prohibition by criminal law of expression causing or likely to cause harm to it. The public interest in this case is that members of the security service institutions referred to in s 31(a)(iii) of the Criminal Law Code be left to enjoy public confidence in the performance according to law of the functions for which the institutions were established.

B The object of a statute provides the ground for the justification of the prohibition of acts as a crime and the basis for a precise definition of the scope of the proscribed conduct. The words "to the extent that the law in question makes provision . . . in the interests of", mean that it must be shown that the primary purpose of creating the crime out of the expression and dissemination of the ideas and information accompanied by the requisite C state of mind was to protect one or more of the public interests listed in s 20(2)(a) of the Constitution.

The presumption is that legislative action is a rational process with ends to serve and reasons for its products. O W Holmes in his article titled "The Path of the Law" 10 *Harvard Law Review* 457 (1897) at p 469 put it thus:

> D "It is true that a body of law is more rational and civilized when every rule it contains is referred articulately and definitely to an end which it subserves, and when the grounds for desiring that end are stated or are ready to be stated in words."

The list of the matters which define the categories and nature of the objects of legislative protection which may justify the imposition of restrictions on E the exercise of freedom of expression is exhaustive. A restriction may in consequence constitute a breach of s 20(1) of the Constitution if its

purpose is not one of the legitimate aims listed. The pre-determination and direct establishment of the nature of the substance of the objective to be pursued limit the exercise of the legislative power as to the nature and scope of the F means to be used.

The Government has no power to create its own interests to protect by imposition of restrictions on the exercise of freedom of expression using criminal law. By defining the grounds on which limitations on the exercise of freedom of expression may be imposed the Constitution has made provision for the settlement of conflicts between the rights of the individual and the G exercise of State power so that the latter cannot relapse into arbitrariness. The list of the interests in s 20(2) of the Constitution is therefore exclusive in the sense that they are the only interests whose protection might justify a restriction on freedom of expression.

Is the purpose of the restriction to achieve one or more of the legitimate aims H specifically listed in s 20(2)(a) of the Constitution? The fact that s 31(a)(iii)

Malaba DCJ

of the Criminal Law Code mentions specifically the three security service A institutions is significant. It is not Government in general referred to but specific institutions. The subject-matter of the restriction of the exercise of freedom of expression must relate to the functioning of the particular institutions. In subjecting the exercise of freedom of expression to the statutory falsehood to provide immediate protection to public confidence in a security service B institution Parliament took into account the fact that public confidence in a public institution arises from and is directly related to the manner the institution performs its Constitutional functions.

The objective of protecting public confidence in a security service institution by prohibiting as a crime the acts of publishing or communicating a false statement with the intention or realising that there is a real risk or possibility C of undermining it must lie in the role public confidence plays in the exercise by the security service institution of its constitutional functions.

Mr *Zvekare* argued that the offence was created to make provision for the protection of public order and public safety. The parties were agreed that the words "in the interests of" used in s 20(2)(a) of the Constitution mean for the D protection of a public interest listed or an interest falling within the categories of the public interests listed therein. They differed on the question whether the aim pursued by s 31(a)(iii) of the Criminal Law Code is the protection of public order and/or public safety. Mr *Chagonda* argued that the restriction on the exercise of freedom of expression was imposed to protect the honour of the institutions referred to in the provision. It must be established as a fact E that the prohibition of the publication or communication of a false statement as a crime under s 31(a)(iii) of the Criminal Law Code is in the interests of the maintenance of public order and/or preservation of public safety.

It is common cause that, all the institutions referred to in s 31(a)(iii) of the Criminal Law Code are established by the Constitution for the specific F purpose of enforcing laws for the maintenance of public order and the preservation of the security of the State. An Act of Parliament relating to each institution defines the powers to be exercised, the procedures and conditions to be complied with in the proper exercise of the powers conferred on it in the performance of the functions for the achievement of the purposes of its G existence.

Section 93(1) of the Constitution provides for the establishment of a Police Force which, together "with such other bodies as may be established by law for the purpose, shall have the function of preserving the internal security of and maintenance of law and order in Zimbabwe". Under s 19 of the Criminal Law Code "a law enforcement agency" is defined to mean "the H

Malaba DCJ

A Police Force (including a member of the Police Constabulary as defined in s 2 of the Police Act) [Chapter *11:10*] or an intelligence service maintained by the government, or any agency assigned by an enactment to maintain and enforce the law".

Section 96(1) of the Constitution provides that for the purpose of defending Zimbabwe there shall be Defence Forces consisting of an Army, and Air Force B and such other branches, if any, of the Defence Forces as may be provided for by or under an Act of Parliament. Section 99(1) of the Constitution provides that there shall be a Prison Service for the administration of prisons in

Zimbabwe and for the protection of society from criminals through the incarceration and rehabilitation of offenders and their re-integration into C society.

It is clear from the relevant provisions of the Constitution that the institutions referred to in s 31(a)(iii) of the Criminal Law Code were established to serve specific needs of the community. Security service institutions are important national institutions which form part of the essential framework D of a constitutional democracy. They are known and accepted by the public at large as being responsible for the defence of the country, preservation of public safety and maintenance of public peace and tranquillity.

All criminal laws provide protection to public order and/or public safety. Justification under s 20(2) of the Constitution requires more than the general goal of protection from harm common to all criminal legislation. Interests E of public order or public safety are quite general in nature. It is therefore important to look at the role public confidence plays in the performance by the security service institutions of their functions and the impact on society of undermining or likelihood of undermining it. The reason for such an approach is that on its own public confidence in a security service institution F hardly qualifies as an interest whose protection would constitute a legitimate aim under s 20(2) of the Constitution.

The public has an interest in the maintenance of public peace and tranquillity and the preservation of public safety in accordance with the law. In an organised society, the presence of public order and public safety is a pre-condition for the enjoyment of freedom of expression. An impression should not be G created in the minds of the public that the exercise of the right to freedom of expression is not subject to the responsibility to keep peace and tranquillity.

A valid legislative restriction of the exercise of the right to freedom of expression should be as limited as the scope of the meaning of the public interest for the protection of which it is imposed. While it is intended that there H should be freedom of expression it is also intended that in the exercise of the

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right, conditions should not be deliberately created for the undermining of A the maintenance of the public order or preservation of public safety. There is a direct and vital relationship between the exercise of freedom of expression and the preservation of public peace and tranquillity.

Freedom of expression can only thrive in an orderly society. Fundamental rights have no real meaning if the State itself is in danger and disorganised. If B the State is in danger the liberties of the individual are themselves in danger. The very fact of belonging to a society ordered by law implies that the actions of the individual cannot be deployed absolutely in all direction without being contained within the limits imposed by community life. Section 20 (1) of the Constitution guarantees complete freedom of expression but it also makes C an exception in respect of breach of public order and public safety in s 20 (2)(a). As Mr Justice Jackson of the US Supreme Court once observed in *Terminiello v City of Chicago* 337 US 1 (1949) at 37:

> "The choice is not between order and liberty. It is between liberty with order and anarchy without either."

A law cannot be used to restrict the exercise of freedom of expression under D the guise of protecting public order when what is protected is not public order. This is because the maintenance of public order or preservation of public safety is synonymous with the protection of fundamental human rights and freedoms. The State cannot therefore violate fundamental human rights and freedoms under the cover of maintaining public order or preserving public E safety. It is always important to understand and appreciate the meaning of the concepts of public order and public safety. They describe the definitional balancing line between the exercise of the right to freedom of expression and the public interests for the protection of which the State may restrict the exercise of that right. F

Public order is a concept used to describe the state of calm or even tempo of the life of the community brought about by laws enforced by the State. Order is the basic need in any organised society. It implies the orderly state of society or community in which people can peacefully pursue their normal activities of life. It refers to the absence of acts which aim at endangering G the safety of the lives and property, peace and tranquillity of the community.

It is synonymous with the peace and tranquillity of the community. Public order does not in that limited sense refer to isolated acts which affect individuals leaving the tranquillity of the community

unaffected. Not every violation of law constitutes breach of public order. The isolated acts of violence may not affect the even tempo of the life of the community. H

2013 (2) ZLR p507

Malaba DCJ

A Public order excludes from its ambit the more serious offences which are against public safety and endanger the security of the State itself. It is clear from the juxtaposition of the different grounds in s 20(2)(a) of the Constitution on which the exercise of freedom of expression may be restricted that although they sometimes tend to overlap they are intended to exclude each other. Public order is therefore something which is demarcated from B the ground of public safety.

Whether an act is of a character that affects public order is a question of degree. It is not the quality of the act that matters but its potentiality. It is a matter of context. One act may in one context have effects that injure the individual only whilst in another context the same type of act may have C effects that endanger the peace and tranquillity of the community. What is clear is that the maintenance of public order is equated with the maintenance of public peace and tranquillity. See *Elliot v Commissioner of Police & Anor* 1997 (1) ZLR 315 (S) at 322E-H.

In *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism: Advisory Opinion* OC-5/85 of 13 November 1985 D Series A No. 5 para 66 the Inter-American Court of Human Rights stated that the term "public order" does not refer simply to the maintenance of physical order but also includes "the organisation of society in a manner that strengthens the functioning of democratic institutions and preserves and promotes the full realization of the rights of the individual".

E The argument that s 31(a)(iii) of the Constitution does not make provision in the interests of public order or public safety is based on the absence of express reference to public order or public safety in the terms of the statute. Unlike subparas (1) and (ii) which make express reference to the legitimate aims prescribed by s 20(2)(a) of the Constitution, subpara (iii) of s 31 (a) F of the Criminal Law Code makes reference to "public confidence" in the security service institutions.

On the face of it the specific purpose of the provision is to protect public confidence in a security service institution referred to in the provision. It is protected from being undermined or the likelihood of being undermined by a false statement published or communicated with the requisite state of G mind. That would, however, suggest that public confidence in a security service institution is an end in itself equivalent to and as important as the public interests listed in s 20(2)(a) of the Constitution.

The fact that the location of the offence in the Criminal Law Code suggests that it is intended to serve a political purpose requires that its objective be H closely scrutinised. Protection of public confidence in a security service

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2013 (2) ZLR p508

Malaba DCJ

institution is not one of the legitimate aims for the achievement of which A permissible legislative limitation on the exercise of freedom of expression can be imposed.

The Constitution does not require that a law restricting the exercise of freedom of expression must state in express terms that its objective is to protect the interest listed in s 20(2) of the Constitution. That it must have B that as its object is an obligation the breach of which affects the legitimacy of the legislative action and the legality of the provision in question. It is a matter the determination of which may call for construction of the provision in the light of its history and the circumstances of its enactment. In other words all relevant circumstances would have to be considered to determine the question whether the objective pursued by the legislation is one or more C of the legitimate aims listed in s 20(2)(a) of the Constitution.

The purpose for enactment of a provision of a law may be expressly stated by the terms of the provision or it may be implied by them. A law can be in the interests of public order or public safety without it being stated in so many words that it is for that purpose. The words "in the interests of . . ." in D s 20(2)(a) of the Constitution are of wide connotation. The words would cover legislation which expressly and directly purports to maintain public order or preserve public safety and one which does not expressly state the said purpose but leaves it to be implied therefrom. They would

also cover legislation which protects the exercise of functions for the purposes of maintaining public order or preserving public safety. E

In its plain terms, s 31(a)(iii) of the Criminal Law Code does not create a crime out of acts which breach public peace and tranquillity or public safety directly. Other provisions of the Criminal Law Code create and define such crimes. Section 31(a)(iii) creates a crime out of acts which have the effect of interfering with the ability of the security service institutions to prevent F occurrences of those offences which breach public order or endanger public safety directly.

As an offence against the State and not against public order or public safety, s 31(a)(iii) of the Criminal Law Code has as its primary objective the protection of the interests of the State from the consequences of the proscribed acts. Those are acts which undermine or are likely to undermine the ability of G the security service institutions to perform their functions efficiently and effectively in accordance with the law.

The words "in the interests of . . ." do not limit the provisions of the law to having to be for the protection of the public interest listed in s 20(2)(a) of the Constitution from consequences of acts which harm or are likely to harm H

2013 (2) ZLR p509

Malaba DCJ

A it to the exclusion of the public interest in its maintenance or preservation. In other words can it be said that a law the purpose of which is to protect the ability of the State to secure public safety and the maintenance of public order is not in the interest of these matters?

The proscription of the publication or communication of a false statement B about lawful activities of a security service institution with the intention of undermining public confidence in that institution, is in the interests of public order or public safety when specific conditions are met. It must be shown that public confidence in the institution is an essential element in the ability of the institution to efficiently and effectively secure the maintenance of public order or preservation of public safety. In that sense the words "in C the interests of public order" are of wider connotation than the words "for the maintenance of public order" or "for the preservation of public safety".

A law may not have been designed to directly maintain public order or preserve public safety in the sense of creating an offence against public order or public safety and yet it may have been enacted "in the interests" D of public order or public safety: *Ramji La Modi v State of Uttar Pradesh* 1957 SCR 860 at 866.

If it appears on the examination of the relevant factors that the intention is to establish a rule of conduct carefully designed to ensure that security service institutions are able to efficiently and effectively secure the maintenance of E public order or the preservation of public safety the legislation would be "in the interests of public order" or "public safety". It would be a limitation designed to ensure that the enjoyment of the right to freedom of expression does not prejudice the interest of public order or public safety.

Public confidence in a security service institution is a measure of the F expectation the public have that members of the institution concerned will act in accordance with the law. They are expected to do so in the exercise of functions to ensure the safety of lives and property, peace and tranquillity in the community. The measure of public confidence in the institution in the circumstances lies in the lawful acts done and expected to be done by the members of the institution in the exercise of the functions imposed on it for G the achievement of the purposes of its constitutional existence.

The interest of the public is not in the mere existence of a security service institution without reference to the manner in which the exercise of its functions affects the enjoyment of their rights and freedoms. The public interest is in ensuring that the exercise of freedom of expression does not H cause direct, serious and proximate harm to lawful performance by the

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2013 (2) ZLR p510

Malaba DCJ

security service institutions of the functions for which they were established A by the Constitution.

There is general recognition of the fact that members of security service institutions cannot operate in a vacuum. They carry out their duties in the communities they serve. Public confidence is therefore the result of the knowledge by members of the public of the truth about the lawful

activities B carried out by members of the security service institution in securing the maintenance of public order or preservation of public safety.

The knowledge of lawful activities of members of a security service institution is acquired from statements made directly by members of the institution to members of the public or from statements published through the print C and electronic media or communicated in private conversations. Where a statement about the lawful activities of members of the institution is true, the confidence of the public in the institution is enhanced. It is the justified public confidence in the institution which the provisions of s 31(a)(iii) of the Criminal Law Code protect. The efficient functioning of a security service institution is not valuable in itself. It is only valuable when it is in accordance D with the law and therefore based on truth.

No public confidence in an institution is maintainable on an inefficient and ineffective delivery of service. There cannot be public confidence in a public institution when its members under the pretext of exercising its powers act outside the law which the people through their representatives in Parliament E put in place. If the statements published or communicated show that the law enforcement agents are doing all that is required of them by the law to cut crime, public confidence translates into practical benefits to the institution in the execution of its functions. The public embrace the goals of the institution and voluntarily support it in the fight against crime. After all, peace or breach of it is a product of human behaviour. Peace starts with the people. They give F the police information necessary for the prevention of crime.

The proper exercise of freedom of expression can therefore build public confidence in the law enforcement agency in the interests of public order or public safety. The same principle would apply to the other security service institutions referred to in s 31(a)(iii) of the Criminal Law Code in the G exercise of the functions for which they are established by the Constitution. The indissoluble unit between the procedural or functionary aspects of the communicative process and the effects on the audience of the exercise of the right to freedom of expression is protected.

Where law enforcement agents enjoy public confidence, members of the public take part in the programmes involving the policing of streets and H

Malaba DCJ

A neighbourhoods. The participation by members of the public in self-policing programmes has the effect of ensuring accountability by the institution to the public. Democratic accountability brings about efficient and effective discharge of duties by the members of the institution. Participation by members of the public in the affairs of an institution, the activities of which affect their lives is one of the fundamental values of a democratic society. B All this guarantees justified public confidence in the institution.

As stated above, justified public confidence is confidence based on the knowledge of the truth of the lawful activities of members of the institution concerned in the exercise of the functions for which it is established by the Constitution. Public institutions are established under the Constitution as C part of the means by which a State governed by the rule of law protects and promotes the enjoyment of fundamental human rights and freedoms.

One who upholds the Constitution respects its institutions when their powers are exercised in accordance with the law. The protection of public confidence in the security service institutions is based on the acceptance of the fact D that the knowledge that members of the institutions act lawfully assures members of the public of the protection of their rights. The public have an interest in receiving accurate information on the activities of security service institutions relating to the maintenance of public order and the preservation of public safety.

Public confidence may be undermined when the public know the truth about E unlawful activities by members of the security service institutions. This is because unlawful activities by members of a security service institution are inconsistent with the protection of fundamental human rights and freedoms. It is clear that public confidence in a security service institution is based on or linked to evidence of lawful activities by its members in securing the F maintenance of public order or the preservation of public safety. It is not linked to the reputation of the institution as argued by Mr *Chagonda*. The reputation of the institution would also depend on the knowledge by the public of the lawful activities the members carried out in the discharge of its constitutional mandate.

The result of knowledge by members of the public of the truth of unlawful G activities by members of a security service institution would be the reduction of support by the community for programmes relating to the maintenance of public order or the preservation of public safety. Members of the public become reluctant to give information to members of the institution. They fear disclosure of their identities by unscrupulous law enforcement agents H to criminals who in turn may endanger their lives. As less information is

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2013 (2) ZLR p512

Malaba DCJ

given to law enforcement agents, more crimes are committed with fewer A criminals accounted for. Members of the public who lose trust in the ability of the law enforcement agency to protect them from criminals resort to self-help remedies thereby creating conditions of lawlessness. Some of them may end up taking into their own hands the punishment of what they conceive to be crimes. B

It is the duty of a free media of communication to give accurate information to the public on unlawful activities of members of a security service institution. It is in the public interest that the media should be free to provide criticism of such conduct. Indeed a democracy cannot exist without that freedom to put forward opinions about the functioning of public institutions. C

The concept of free and uninhibited expression and dissemination of opinion about the functioning of public institutions permeates all free and democratic societies. Not only do the media have the duty to impart such ideas and information concerning the activities of security service institutions relating to securing of the maintenance of public order or the preservation of public safety, the public have a right to receive the ideas and information. D

There is danger of unjustified loss of public confidence in a security service institution if false statements about its lawful activities are published or communicated with the deliberate intention or when realising that there is a real risk or possibility of undermining public confidence in it as a custodian of public order or public safety. It must not be forgotten that the concept of E limitation is inherent in that of right. Even without the necessity of criminal sanctions, freedom of expression imposes on the media the responsibility of ensuring, to the extent it is reasonably practicable to do so, the accuracy of the information conveyed to the public on matters of public concern.

Members of the public often do not take the trouble and time to verify the F truthfulness of information given to them. They act on it on the assumption that the publisher or speaker has taken the trouble to verify the accuracy of the information. In that regard they act on the assumption that what is reported or said is true.

There is a real danger that a false statement published or communicated to G members of the public about lawful activities of a security service institution in the maintenance of public order or preservation of public safety, may lead to withdrawal of support for law enforcement. There may be withdrawal of voluntary participation by communities in policing programmes involving their neighbourhoods. The result would be an increase in lawlessness and collapse of public order. H

2013 (2) ZLR p513

Malaba DCJ

A Section 31(a)(iii) deals with a situation where a person publishes or communicates a false statement with the intention that what is said or written be accepted as the truth. The intended result of the unlawful act is undermined confidence of the public in the ability of the security service institution to perform the functions of maintaining public order or preserving public safety. The person uses a false statement as a means of undermining public B confidence in the institution concerned because he or she is aware of the vital role public confidence plays in the efficient and effective performance of its functions.

Justified public confidence reposed in a security service institution as a result of the efficient and effective performance of lawful activities in the C maintenance of public order or the preservation of public safety would be known to exist by the speaker or publisher of a false statement before it is sought to be undermined.

It would be against the principle of the rule of law to allow the exercise of freedom of expression to falsely malign an institution in the proper D performance of its constitutional functions with a view to diverting it from properly discharging its mandate. While actions of members of security service institutions should be open to criticism and their work subjected to scrutiny and open debate, the

State should not allow public accusations of misconduct lacking legitimate cause. Publication or communication of altogether untrue statements which have been merely invented for the purpose of providing E arguments for a campaign against a security service institution would be an abuse of the right to freedom of expression: *Thorgeirson v Iceland* (1992) 14 EHRR 115 paras 79 & 81 (1990 Commission Report).

If unjustified loss of public confidence in a security service institution which would result from publication or communication of a false statement about F its lawful activities is prevented justified public confidence in the institution is protected. The prohibition and punishment of the acts concerned together with the accompanying state of mind have the effect of protecting the lawful activities of the security service institution by which it enforces laws that guarantee public order or public safety. That means that an important element in the maintenance of public order or the preservation of public safety is G secured.

By preventing unjustified loss of public confidence in a security service institution the law protects what secures public peace, safety and tranquillity. The objective of protecting public order or preserving public safety is in turn achieved. A democratic state system would be unthinkable without the H alignment and protection of the lawful activities of state administration which

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Malaba DCJ

in turn guarantee public order or public safety. Public order or public safety A is protected in an indirect manner by the prevention of the undermining of an element which is essential to its maintenance or preservation.

The impugned statute is based on the need to protect the institutions from the perversion which might result from the distortion of public confidence on which they depend for efficient and effective operations consistent with B the protection of fundamental human rights and the public interests listed in s 20(2)(a) of the Constitution. In that regard a strong case may be made that the institutions concerned which are charged with the responsibility of maintaining public order and preserving public safety have a right to justified public confidence reposed in them.

Members of the public must be able to rely on the security service institutions C carrying out their tasks effectively. They have a right not to be deliberately misinformed about the activities of the security service institutions in the discharge of the functions of maintaining public order or preserving public safety.

A provision which prohibits, under threat of punishment, any act the direct D effect of which is harm or likelihood of harm to the ability of an institution entrusted with the duty of maintaining peace and tranquillity to carry out its constitutional mandate, is a law "in the interests of public order" within the meaning of s 20(2)(a) of the Constitution. In *Ghosh v Joseph* AIR 1963 SC 812 at 814 the Supreme Court of India held that protection of discipline and E efficiency in the performance of functions by members of a public institution "may in a sense, be said to be related to public order".

In *Chavunduka's case supra*, the court held that a law which made it an offence to publish or communicate a false statement with the intention of causing alarm and despondency was a law enacted in the interests of public order. The reason was that the law was enacted on the basis of the fact that there F was a real danger of breach of peace. Members of the public who believed that the statement was true and felt alarmed and despondent as a result of the alleged failure of law enforcement agents to ensure peace and tranquillity in the community, could withdraw support for the law enforcement agency to the detriment of public order. G

Mr *Chagonda* strenuously sought to distinguish the effect of the provisions of the law in *Chavunduka's case* supra from those of s 31(1)(a)(iii) of the Criminal Law Code. The principle of prevention of actual or potential harmful effects on the maintenance of public order is the principle on which the reasoning and finding in that case were based. Its application to the facts of this case justifies the finding that the restriction imposed by s 31(a)(iii) of H

Malaba DCJ

A the Criminal Law Code on the exercise of the right to freedom of expression is in the interests of public order and the preservation of public safety.

The imposition of the restriction creates conditions in which the relationship between the exercise of freedom of expression and justified public confidence for the achievement of public order or public safety can prevail. The provision B meets the "legitimate aim" test. The purpose of protecting public confidence in a security service institution as a means of ensuring efficiency and effectiveness in the performance of its constitutional mandate falls within the scope of the legitimate aim of protecting the interests of public order and public safety within the meaning of s 20(2) of the Constitution: *Castells v Spain* (1992) 14 EHRR 445 paras 39 & 46.

C The next requirement relates to the relationship between the restriction on the exercise of freedom of expression by s 31(a)(iii) of the Criminal Law Code and the objective of protecting public order or preserving public safety. Once it is found that the primary purpose of interference by the State with the exercise of freedom of expression was to protect a public interest D listed in s 20(2)(a) of the Constitution the next question for determination is whether the provisions of the law put in place were carefully designed to achieve that objective only.

The question for determination is whether or not the restriction imposed by s 31(a)(iii) of the Criminal Law Code to the exercise of freedom of expression is rationally connected with the objective of protecting public order or E public safety. This precedent rule of legitimacy requires that a provision of law prohibiting conduct in the exercise of freedom of expression to protect a public interest must be a response to the effects of direct and proximate harm or likelihood of harm to the public interest. On the contention that the means used by s 31(a)(iii) of the Criminal Law Code to restrict the exercise F of freedom of expression are not proportionate to the objective pursued, Mr *Chagonda* was on firmer ground.

It is easy for Government to place a restriction of the exercise of a fundamental right within the requirement for adoption of a legitimate objective. It is for the court to ensure that the law was conceived and expressed solely to achieve that objective. The law should not in its design have the effect of overreaching G and restricting expression which is not necessary for the achievement of the objective concerned. The court applies the principle of proportionality to test the relationship between the restriction to the exercise of the right to freedom of expression and the objective pursued. The question is whether the restriction is necessary and proportionate to the objective pursued. Any H restriction to the exercise of the right to freedom of expression claiming

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Malaba DCJ

to be for the protection of any of the public interests listed in s 20(2)(a) of A the Constitution must meet strict requirements indicating its necessity and proportionality.

This part of the test presents a high standard to be overcome by the State seeking to justify the restriction: See *Thorgeirson v Iceland* (1992) 14 EHRR 843 para 63. It was held in that case that the necessity for any restriction must B be "convincingly established". The court must pay particular attention to the principles characterising a democratic society and the fundamental role which freedom of expression plays in such society. In order to permit the citizen to keep a critical control of the exercise of public power particularly strict limits must be imposed on interferences with the publication or communication of ideas and information which refer to activities of public institutions. C

The question to be determined in the application of the proportionality test is whether the means used by Government to restrict the exercise of freedom of expression are those which are suitable for the achievement of the legitimate objective pursued. The principle of proportionality is not explicitly mentioned in the Constitution. It forms an implicit standard gleaned from words such D as "to the extent that the law in question makes provision in the interests of . . ." in s 20(2)(a) of the Constitution and the general prioritisation of personal liberty over Governmental regulation.

Protection denotes provision of relief from an actual or potential burden or harm. For the provision to constitute protection of a public interest listed in s 20(2)(a) of the Constitution the restriction imposed on the exercise of E freedom of expression must form a barrier between the proscribed acts and the public interest thereby breaking the chain of causation of direct and proximate actual or likely harm on the public interest.

There cannot be a pressing social need for the imposition of a restriction on the exercise of freedom of expression for the purpose of protecting a public F interest when that interest is not under threat of direct and proximate harm from the exercise of freedom of expression. The Constitution forbids the imposition of a restriction on the exercise of freedom of expression when it poses no danger of

direct, obvious, serious and proximate harm to a public interest listed in s 20(2)(a) of the Constitution.

In *Rangarajan v Ram* [1990] LRC 412 at p 427 Shetty J said: G

> "There does indeed have to be a compromise between the interest of freedom of expression and social interest. But we cannot simply balance the two interests as if they were of equal weight. Our commitment to freedom of expression demands that it cannot be suppressed unless the situations created by allowing the freedom are pressing and the community interest is endangered. The anticipated danger should not be remote, conjectural or far-fetched. It should have a proximate H

2013 (2) ZLR p517

Malaba DCJ

> A and direct nexus with the expression. The expression of thought should be intrinsically dangerous to the public interests. In other words the expression should be inseparably locked up with the action contemplated like the equivalent of a 'spark in a powder keg'".

Fundamental human rights are personal rights. Freedom of expression belongs to the individual. Any restriction must be based on the concept of B personal responsibility constituted from personal conduct accompanied by a subjective state of mind. Where it has been necessary to restrict the exercise of freedom of expression by means of criminal law the individual must be the unit of analysis in the determination of the question whether the law is constitutionally valid or not.

The principle that criminal liability should be based on personal responsibility C is the justification for the requirement that there ought to have been in existence before the imposition of restrictions on the exercise of freedom of expression a causal link between the prohibited acts, the accompanying state of mind of the speaker, writer or publisher or actor and actual or potential harm to the public interest the protection of which is the object pursued.

D The prohibited acts and their actual or potential harmful effects on the public interest must be traceable to the speaker, writer, publisher or actor as the source. If that is not the case, they cannot be the basis for restricting the exercise of freedom of expression. The rule on the need for a causal link between the prohibited conduct and the injury to be prevented must be shown E to have been satisfied by any permissible legislative limitation to the exercise of freedom of expression. In other words the sole motive of the State should be to ascertain that the protected interests of the community are respected by the individual or that a guarantee exists that they will be respected. The purpose must be to ensure that people are able to make use of their right to freedom of expression to full effect without damaging public interest.

F Not every case of actual or potential harm on the public interests listed in s 20(2)(a) of the Constitution justifies the imposition of restrictions on the exercise of freedom of expression. If that were to be the case the realm of freedom of expression as protected by the Constitution would eventually shrink to zero. The exercise of the right to freedom of expression is not protected because it is harmless. It is protected despite the harm it may cause.

G It also does not mean that every breach of the restrictive provision deserves the exercise of the herculean powers of the sword of prosecution. In fact a restriction is unlikely to be considered proportionate where a less restrictive, but equally effective, alternative exists. At times invoking the adage that the best remedy for a bad speech is another speech may be all that is required to H refute the false allegations and disclose the truth. Government has sufficient

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2013 (2) ZLR p518

Malaba DCJ

resources for doing so. Officials within these institutions who are responsible A for public relations possess the best tools for responding to false statements about performance of their functions. That would relate to their ability to obtain the relevant information concerning their performance and in terms of their ability to draw the attention of the media and thus make their response heard. See *Castell's* case *supra* para. 46. B

As Mr Justice Brandeis of the US Supreme Court said in *Whitney v California* 274 US 357 (1927) at 377:

> "To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is

opportunity for C full discussion. If there be time to expose through discussion the falsehood and fallacies to avert the evil by the process of education, the remedy to be applied is more speech, not enforced silence."

By guaranteeing freedom to impart and receive ideas and information on any subject s 20(1) writes into the constitution as a fundamental principle that competitive persuasion is one of the means by which a public institution can D effectively protect a public interest against the publication or communication of false statements about its activities without having the exercise of the right to freedom of expression curtailed by means of criminal law. The restriction becomes unnecessary.

It must be established as a fact on the examination of the provisions of the E law that the concepts by which the restriction of the exercise of freedom of expression is imposed define the proscribed conduct with adequate precision. The causal connection between the legislative purpose and the means used to achieve it must be clear and convincing. Only acts in the exercise of freedom of expression the prohibition of which is necessary for the achievement of the objective should have been proscribed. The means by which the restriction F to the exercise of freedom of expression is imposed must be narrowly drawn and specifically tailored to achieve the objective pursued by the legislation. The question is not whether the means the Legislature employs to accomplish the end pursued are the wisest or the best.

In *Superintendent Central Prison Fatehgarh v Ram Manohar Lohia* 1960 SCR (2) 821 G the Supreme Court of India held that for a restriction imposed by a law on the exercise of freedom of expression for the purpose of protecting public order to be rationally connected to the objective served there must be a proximate connection between the two. Subba Rao J observed that:

". . . The limitation imposed in the interests of public order to be a reasonable restriction, should be one which has a proximate connection or nexus with public H

2013 (2) ZLR p519

Malaba DCJ

A order, but not one far-fetched, hypothetical or problematical or too remote in the chain of its relation with public order."

In *R v Oakes* (1986) 19 CRR 308 at 337, the Supreme Court of Canada held that the rational connection criterion entailed the establishment of the fact that "measures adopted have been carefully designed by the legislature to B achieve the objective in question. They must not be arbitrary, unfair or based on irrational consideration. In short, they must be rationally connected to the objective". See also *R v Edwards Books & Art Ltd* (1986) 28 CRR 1 at 40-41.

The principle was also stated by the US Supreme Court in *Aptheker v Secretary of State* 378 US 500 (1964) in these words:

"A governmental purpose to control or prevent activities constitutionally subject C to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of constitutionally protected freedoms.

Even though a governmental purpose is legitimate and substantial that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be reviewed in the light of less drastic means for achieving D the same purpose.

The Constitution requires that the powers of government must be so exercised as not, in attaining a permissible end, unduly to infringe a constitutionally protected freedom. . . . Precision must be the touchstone of legislation affecting the liberty guaranteed in the fifth Amendment."

A restriction which is not rationally connected with the objective pursued E is an unreasonable, unnecessary and arbitrary interference with the exercise of freedom of expression.

As a means of protecting the interests of public order and public safety by the State, s 31(a)(iii) of the Criminal Law Code is problematic. It is not narrowly drawn and carefully tailored to achieve the objective pursued. Whilst F placing substantial restriction on the basic right to freedom of expression the effectiveness of the impugned statute in achieving the legislative purpose is in practice very uncertain.

Section 31(a)(iii) of the Criminal Law Code must be construed taking into account the context of the company it keeps. It is indeed a principle of statutory interpretation that the true meaning of the words used and the G intention of the legislature in any statute can be properly understood if the statute is considered as a whole. Every part of a section must be considered as far as it is relevant to do so in order to get the true meaning and intent of any particular portion of the enactment. It is

also important to bear in mind that as the statute purports to implement derogation from the principle of a H guaranteed fundamental right it must be strictly construed.

2013 (2) ZLR p520

Malaba DCJ

It has already been found that s 31(a) prohibits publication or communication A of a false statement when it is accompanied by the subjective state of mind to secure the results specified in subpara(s) (i), (ii) (iii) and (iv). The prohibited consequences show the interest protected. Subparagraph (i) protects public safety or public order. Subparagraph (ii) protects the defence and economic interests of Zimbabwe. It must follow that subpara (iii) protects public B confidence in the security service institutions referred to in the provision. Section 31(a)(iii) of the Criminal Law Code makes no reference to public peace and tranquillity or public safety except by inference drawn from the reference to security service institutions in the provision.

Public order, public safety, defence and economic interests of Zimbabwe are interests specifically listed by s 20(2)(a) of the Constitution for the protection C of which imposition of a restriction on the exercise of freedom of expression may be justified. Public confidence in a security service institution is not one of those interests. A restriction in the interest of public confidence in a security service institution is not one of the restrictions permitted by s 20(2)(a) of the Constitution. As an end in itself protection of public confidence in D a security service institution cannot justify the imposition of a restriction on the exercise of freedom of expression under s 20(2)(a) of the Constitution. Its protection can only be as part of the means of securing the maintenance of public order or preservation of public safety.

If public confidence is viewed in the light of the role it plays in influencing the efficient and effective performance of the functions of maintaining public E order and preserving public safety, the conduct prohibited by s 31(a)(iii) of the Criminal Law Code is covered by s 31(a)(i) or (ii) of the Criminal Law Code. Section 31(a)(iii) of the Criminal Law Code would be an unnecessary enlargement of the provisions of the preceding subparagraphs.

Section 31(a)(iii) of the Criminal Law Code prohibits publication or F communication of a false statement on any subject matter accompanied by the requisite state of mind. It does so without regard to the question whether the fact about which the lie is published or communicated relates to an important aspect of the performance by a security service institution of its functions. For the protection of public confidence in a security service G institution to have any connection with the legitimate aim of protecting the interests of public order and public safety, the false statement the publication or communication which is prohibited must relate to the performance by the security service institution of its functions as defined by law.

The matter to which the false statement relates does not have to be a matter within the jurisdiction of a security service institution referred to in s 31(a) H

2013 (2) ZLR p521

Malaba DCJ

A (iii)of the Criminal Law Code. The prohibition is not even limited to apply only to a publication or communication which reaches a significant number of people. A conversation between two people in a private home would be covered.

A statement the publication or communication of which is suppressed because its content is intended to undermine public confidence in a security service B institution may not also undermine the ability of the security service institution to efficiently and effectively secure the maintenance of public order and preservation of public safety. There are many activities by security service institutions on which false statements may be published or communicated to others to undermine public confidence in them which are unrelated to C their efficient performance of the functions of maintaining public order or preserving public safety. The legislative purpose of protecting public order or public safety from the false statements, the publication or communication of which is prohibited by s 31(a)(iii) of the Criminal Law Code was not necessarily achieved by the method used in the statute. The effectiveness of the prohibition for achieving the proposed legislative objective is open D to serious doubt.

It would be actual or likely harm to the public interest in the ability of the security service institution to efficiently and effectively perform the function of maintaining public order and

preserving public safety which would justify the imposition of the restriction on the exercise of freedom of expression. E Section 31(a)(iii) of the Criminal Law Code makes no reference to the functioning of the security service institution as an interest to be protected.

There is the problem of the use of the words "wholly" or "materially" false. The word "wholly" suggests an intention to exclude a statement which is a "half-truth" because it is always also a "half-lie". The use of words "materially F false" in the alternative undermines that conception. For example a statement that police caused crime suspects to walk for 50km may be a true statement. The half lie would be in not revealing that they did so because of lack of transport but suggesting instead that they were doing so to torture the suspects. The statement is not wholly true because the omission of the information on the non-availability of transport makes it a half-lie. A person may have G published or communicated the statement with the intention of undermining public confidence in the police. To say a statement is "materially false" is to say it is not "wholly false".

False news that is harmless to the effectiveness of a security service institution in maintaining public order or preserving public safety would be covered H by the offence as long as it is accompanied by an intention to undermine

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Malaba DCJ

public confidence in the security service institution. The point is not that A a requirement of actual harm to public confidence in a security service institution is necessary. It is that protecting public confidence in a security service institution in the manner it does s 31(a)(iii) of the Criminal Law Code has the effect of shielding the public interest from every possibility of harm. That includes harm the occurrence of which is a remote possibility. B

A remote possibility of harm to the maintenance of public order or preservation of public safety cannot be a reasonable basis for the legislative imposition of a restriction on the exercise of freedom of expression. When the enforcement of the provisions of a criminal law can lead to conviction and punishment of a person even in situations in which the harm intended to be prevented is a remote possibility the reason for the law is lost. In *Gosh's case* supra at C 814-815 the Supreme Court of India held that:

> ". . . the words 'in the interests of' . . . cannot be interpreted to mean that even if the connection between the restriction and the public order is remote and indirect the restriction can be said to be in the interests of public order. A restriction can be said to be in the interests of public order only if the connection between the restriction and the public order is proximate and direct. Indirect or far-fetched or D unreal connection between the restriction and public order would not fall within the purview of the expression 'in the interests of public order'".

The danger of undermining public confidence in the security service institution by a false statement does not have to be significant. The prohibition applies to cases where the harm caused by a false statement to public confidence E in a security service institution is of a trivial nature. The clear principle is that prohibition of the exercise of freedom of expression is a measure so stringent that it would be inappropriate as a means for averting a relatively trivial harm to society. Where the evil apprehended is not relatively serious the fact that the exercise of freedom of expression is likely to undermine public confidence in a security service institution is not enough to justify its F suppression. See *Whitney supra* at 377 to 378.

The provision permits the State to restrict constitutional rights in circumstances that may not justify the action. As the offence relates to expression, state of mind and effects on attitudes of people it was imperative that it be narrowly drawn and specifically tailored to achieve the objective so as not to inhibit G expression which does not require that the ultimate sanction of the criminal law be brought to bear. Protecting public confidence in a security service institution may give rise to a situation where the law is invoked to prevent the publication or communication of a false statement because it upsets people.

Where public confidence is temporarily lost security service institutions may be able to maintain public order and preserve public safety by use of H

Malaba DCJ

A the coercive force of the State. Without specific reference to maintenance of public order or public safety in the terms of the impugned provision there would be no obvious obligation on the State to prove that the proscribed conduct posed any real danger to the public interest concerned. Nothing in the language of the statute limits its applicability to situations where the prohibited acts directly and proximately cause harm to the maintenance of B public order or preservation of public safety.

The concept of "undermining" requires that there be some sort of actual or likelihood of concrete change of attitude in the audience from reposition of confidence in the security service institution to a withdrawal of such confidence. It is, however, not a requirement of the offence that the false C statement be of the nature from which such consequence would flow. It is what the person thinks the statement will do for him or her when it reaches the audience which matters.

A person who publishes or communicates a false statement without an intention to also undermine public order is not necessarily outside the constitutional D guarantee although he or she may be within the statutory prohibition. Whilst it does not specify any subject matter of a false statement published or communicated with the requisite state of mind s 31(a)(iii) of the Criminal Law Code fails to require that the subject matter then conveyed must be shown to have a direct and proximate deleterious effect on the public interest E the protection of which is the objective pursued.

In *Hector v Attorney-General of Antigua and Barbuda & Others* [1991] LRC 237 the appellant was the editor of a newspaper published in Antigua known as the "Outlet". He was charged in respect of an article published in the "Outlet" in May 1985. The charge alleged that the article complained of F was a false statement which was likely to undermine public confidence in the conduct of public affairs in contravention of s 33B of the Public Order Act 1972 as amended by the Public Order (Amendment) Act 1976.

Section 33B provided:

> "Notwithstanding the provisions of any other law any person who –
>
> (a) in G any public place or at any public meeting makes any false statement; or
>
> (b) prints or distributes any false statement which is likely to cause fear or alarm in or to the public or to disturb the public peace or to undermine public confidence in the conduct of public affairs;
>
> shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding five hundred dollars or to a term of imprisonment not exceeding H six months."

Malaba DCJ

The appellant challenged the validity of the prosecution on the ground that A the specific provisions of s 33B under which the charge was laid on him violated s 12(1) of the Constitution of Antigua and Barbuda. Section 12(1) guarantees to every person the right to freedom of expression in terms and to the scope similar to that guaranteed by s 20(1) of our Constitution. Section 12(4) of the Constitution of Antigua and Barbuda provides that: B

> "Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision –
>
> (a) that is reasonably required –
>
> (i) in the interests of defence, public safety, public order, public morality or public health." C

In considering the question whether s 33B was justified under s 12(4) of the Constitution of Antigua and Barbuda, Lord Bridge of Harwich, writing for the unanimous bench of the Judicial Committee of the Privy Council, addressed the constitutionality of legislation which applied to situations in which harm to public order was a remote possibility. His Lordship said at D p 241f-g:

> "If . . . a particular false statement although likely to undermine public confidence in the conduct of public affairs is not likely to disturb public order, a law which makes it a criminal offence cannot be reasonably required in the interests of public order by reference to the remote and improbable consequence that it may possibly do so." E

Section 20(2)(a) of the Constitution having allowed the imposition of restrictions on the exercise of freedom of expression only in cases where danger to the public interests listed therein is involved, an enactment which is capable of being construed and applied to cases where no such danger could arise cannot be held to be constitutional and valid to any extent. As s F 31(a)(iii) of the Criminal Law Code would apply where the false statement published or communicated to others would cause no harm or be unlikely to cause harm to a public interest listed in s 20(2)(a) of the Constitution it must

be held to be constitutionally invalid. In other words the restriction must be exclusively not just tangentially directed towards the legitimate aim.

In *Ramesh Thapper v State of Madras* (1950) SCR 594 at p 603 (Supreme G Court of India) Patanjali Sastri J (as he then was) stated the legal position thus

> "Where a law purports to authorise the imposition of restrictions on a fundamental right in language wide enough to cover restrictions both within and without the limits of constitutionally permissible legislative action affecting such right, it is not possible to uphold it even so far as it may be applied within the constitutional limits, as it is not severable. So long as the possibility of its being applied for H

> A purposes not sanctioned by the constitution cannot be ruled out it must be held to be wholly unconstitutional and void."

The legislation sweeps under the prohibition a person who at the time he or she publishes or communicates a statement sincerely believes that it is true, although it happens to be false. It does not use such words as "falsely publishes" which would connote a knowledge requirement. It is left to be B assumed in every case that the accused person had reasonable opportunity to investigate the accuracy of the statement communicated or published and knowing that it was false, deliberately chose to publish or communicate it to others.

The assumption required to be made of the fact that the accused person had C knowledge of the falsity of the statement does not take into account the fact that news media in particular often work in situations in which information changes fast denying even the most responsible journalist time to verify the accuracy of the information received. It is one thing to say it is a basic rule of journalism that news media need to verify the accuracy of their stories before publishing them. It is another to enact it as a requirement of a criminal law D in the form of a subtle presumption of knowledge of falsity of a statement the responsibility of disproving of which is on the journalist.

The argument was that a person who does not know that a statement is false at the time he or she publishes or communicates it, would not be convicted because the State would not prove that he or she had the intention to undermine E public confidence in a particular security service institution. The contention is based on the assumption that the intention to undermine public confidence in the institution is a substitute for knowledge of the falsity of the statement. It fails to appreciate the fact that insistence on knowledge as a requirement of a law imposing restrictions to the exercise of freedom of expression is an element of permissible legislative limitation. It also overlooks the fact that F intent and knowledge have different meanings depending on the elements to which they are connected. Knowledge is a different state of mind from intent. It refers to a conscious awareness of the existence of a thing whilst intent refers to the purpose of an act.

An act committed with a specific intent is an act committed in order to G achieve a specific result. The act cannot be separated from the result. The accompanying state of mind directs the act towards the achievement of the desired result. A deed is not done with intent to produce a consequence unless the consequence is the aim of the deed. Knowledge relates to the facts which make the statement false. Knowledge and intent relate to the subjective state of mind of the accused person at the time of publishing or H communicating the statement to others. The latter is, however, concerned

with the purpose of publishing or communicating the statement and events A in future which may happen or not happen after the readers or listeners have received the statement.

Whilst intent is associated only with the relevant consequences there is no knowledge associated solely with the relevant conduct. The knowledge element is important because a false statement may be a result of unscrupulous B fabrication by the publisher or speaker or it may originate from someone-else with the accused person being a facilitator in publishing it or it may be a result of interpretation of facts in a statement made by another person.

The conduct as defined by s 31(a)(iii) of the Criminal Law Code includes the factual circumstance of the false statement. The element of the crime is a statement which is already false. A false statement is a fact which forms an C integral part of the criminal conduct. Once the State proves a

false statement it does not have to prove that the accused person knew that the statement was false at the time of publishing or communicating it.

A person who sincerely believes, at the time of publication or communication of the statement, that it is true would not have the state of mind justifying D the imposition of criminal liability. Liability must be based on the notion of personal responsibility inherent in the concept of the exercise of freedom of expression.

A person may not be in a position to prove at the trial the facts on which his or her belief that the statement is true was based. That failure may lead to the inference that he or she knew or "must have known" that the statement was E false and intended to use it to undermine public confidence in the security service institution concerned. The consequences of failure to prove lack of knowledge of falsity of the statement would be the rigorous sanction of criminal conviction and possible imprisonment for a period up to twenty years. In *Hector's case* supra, the Privy Council noted at p 318 that it would F be "a grave impediment to freedom of the press" if one could publish only after having verified the accuracy of all statements of fact. Fear of erroneous finding of fact by the judicial process in such cases may deter citizens from uttering true statements.

When determining the question whether s 181 of the Canadian Criminal G Code was rationally connected to the objective of fostering social harmony McLachlin J (as she then was) said in *R v Zundel supra* at p 217:

> "What is false may be determined by reference to what is generally accepted as true, with the result that the knowledge of falsity required for guilt may be inferred from the impugned expression's divergence from prevailing or officially accepted beliefs. This makes possible conviction for virtually any statement which does not accord with currently accepted 'truth' and lends force to the argument that H

Malaba DCJ

> A the section could be used (or abused) in a circular fashion essentially to permit the prosecution of unpopular ideas."

Section 181 of the Canadian Criminal Code punished any person who wilfully published a false statement knowing it to be false which caused or was likely to cause injury or mischief to a public interest.

B A person who voices a genuine concern, about selective or discriminatory enforcement of the law by the law enforcement agency may find himself or herself charged and convicted of the offence because of the difficulty of proving the truth of the allegation in a court of law. Genuine criticism of the way law is enforced may be suppressed. The suppression may be justified by labelling the statement a false statement published or communicated C with intent to undermine public confidence in the law enforcement agency.

Information confirmatory of the truth of a statement may in some cases be in the possession of the institution. Withholding such information would inevitably create a situation where the statement is labelled a false statement. As opposed to the usual situation in which one can verify the relevant facts with D relative ease, the possibility of obtaining information concerning improper actions of security service officials is typically quite limited. Such a statement may be regarded as false because a journalist feels compelled to uphold the principle of confidentiality protecting the sources of his information within the institution from disclosure.

It is a fundamental principle of the protection of freedom of expression that E the State should not penalise people who make false statements in good faith about a matter of public concern. That is the case if the statement is published or communicated to another person without knowledge of its falsity or without reckless disregard as to whether the statement is false or not. Reckless disregard in this usage would mean that the person subjectively F believed that what he or she published or communicated was probably false.

The principle that there be an element of knowledge of falsity of the statement published or communicated proved by the prosecution is based on the assumption that journalists, in particular, are responsible professional people. They value freedom of expression and its importance to society such that they would in most cases not deliberately propagate falsehood. G A reporter's reputation depends on the quality of information he or she provides. Journalists would naturally have a strong incentive, only to share news which they are fairly confident is correct.

The lies criminalised by the offence under s 31(a)(iii) of the Criminal Law Code are not necessarily fraudulent because the section does not require a H person to act in reliance on the lie or that the lie should cause individual

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2013 (2) ZLR p528

Malaba DCJ

harm. Courts have nonetheless insisted in such cases that the statement must A be a knowing or reckless falsehood. The rule with its tolerance of honest mistakes of fact limits criminal liability whilst more freedom of expression is protected than less. It prevents the unhindered exercise of freedom of expression from being unacceptably chilled when people choose to make only statements which "steer far wider of the unlawful zone". See *New York* B *Times v Sullivan supra* at 280.

The harm caused by the unacceptable chilling of the exercise of freedom of expression is comparatively greater than the harm resulting from the chilling of other activities. The logical mandate of the chilling effect doctrine is that legal rules should be formulated to allocate the risk of error away from the preferred value thereby minimizing the occurrence of the most harmful C errors. See Antonio J Califa "Rico Threatens Civil Liberties" 43 *Vanderbilt Law Review* 805 (1990) at 833.

The principle is that taking into account the importance of freedom of expression in a democratic society it would be better to let ten irresponsible journalists free than have one responsible one refrain from reporting an D otherwise true story for fear of ending up in jail lest the story is found to have been false. The chilling effect objective is the more obnoxious when regard is had to the fact that it is presented as an unavoidable consequence of the exercise of legislative power. In other words are the people better off for a law which in seeking to protect their confidence in the efficient and effective performance by a security service institution of the functions E of maintaining public order and preserving public safety from deleterious effects of publication or communication of false statements has the indirect and noxious effect on lawful exercise of freedom of expression?

A narrowly drawn offence would criminalise only false factual statements made with knowledge of their falsity and with intent that they be taken as F true. Applying the same principle, the Supreme Court of the United States of America had occasion to state in *Garrison v Louisiana* 379 US 64 (1964) at p 73 that:

> "Even when the utterance is false the great principles of the constitution which secure freedom of expression . . . preclude attaching adverse consequences to any except the knowing or reckless falsehood." G

See also *Gooding v Wilson* 405 US 518 (1972) at 522.

There is an element of affront to a writer's, publisher's or speaker's dignity and autonomy when he or she is punished for writing, publishing or saying what he or she believed to be true. Most people would probably feel that the Government was reaching too far if it punished them for innocent falsehoods. H

2013 (2) ZLR p529

Malaba DCJ

A They would feel a loss of dignity and equal respect owed to them as citizens. See Mark Spottswood "Falsity, Insincerity and the Freedom of Expression" *William & Mary Bill of Rights Journal* Vol 16 Issue 4 Article 10 (2008).

In *Castell's* case *supra* the European Commission of Human Rights states in para 69 that:

> B "It is as a general rule difficult to justify the "penalisation of the expression. . . of erroneous facts in as much as the person relating them has good reasons to believe that they are true."

A provision may not only infringe the requirement of permissible legislative limitation of the exercise of a fundamental right by what it imposes by way of essential elements of an offence. It can breach the requirements of C permissible legislative limitation by omitting from the essential elements of an offence matters which if included as a requirement of the law would make the provision restrict the exercise of the fundamental right as little as possible.

It must follow from the above analysis that a rational connection between the restriction and the objective pursued by the legislation would be one which incorporate the requirement of knowledge

of the falsity of the statement D published or communicated as the element of the offence on the basis of knowledge of its effectiveness as part of measures for the protection of the interests in public order and public safety without the chilling effect on freedom of expression.

The duty of the court is not limited to the elaboration of constitutional E principles. It may examine for itself the statements in issue and the circumstances under which they were made to see whether they are of a character which the principles of freedom of expression protect.

In this case the question arising from the first article is whether the Attorney-General named the law enforcement agents as abductors or witnesses. F The determination of the accuracy of the statement would be based on the interpretation of what the Attorney-General wrote. The cynical may say that the writer of the article was simply saying that from what the Attorney-General recorded as what each person was going to say in the criminal proceedings it was reasonable to infer that the person was involved in the abductions. The cynical may go on to say, after all a witness is a person who gives evidence G of what he or she did or saw being done by another. At law a witness can have been a participant in the commission of an offence.

The accuracy of the statement that the summary of the State case named the law enforcement agents as the abductors would not relate to the question whether the people named were the abductors or not. The fact of their being H the abductors would be irrelevant to the consideration of the question whether

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Malaba DCJ

the statement was false. The determination of the question would not even A prove the offence. It was a matter of public knowledge at the time that the law enforcement agency was involved in the abductions. That fact had been established by the uncontested evidence in *Mukoko v Attorney-General supra*. The statements would have to be looked at in their proper context and in the light of the particular circumstances of the case. B

Section 31(a)(iii) of the Criminal Law Code is particularly invasive because of the level of the maximum penalty by which it has chosen to effect its end. A penalty of imprisonment up to twenty years for publishing or communicating a false statement with the intention or realising that there is a real risk or possibility of undermining public confidence in a security service institution is draconian. In the "Commentary on the Criminal Law (Codification and C Reform) Act 2004" published by the Legal Resources Foundation, Professor G Feltoe at p 28 expresses the view that the penalty "can only be described as savage". It is also disproportionate to the harm against which the public interest in the ability of the institution to efficiently and effectively perform its functions is protected. D

The legislature having constitutional powers to set out punishments and the severity of those punishments when laying down the constitutive elements of a particular criminal offence has a duty to set the maximum limits on the punishments for the particular criminal offence. The constitutional principles of justice and a State governed by the rule of law presuppose that every E penalty imposable in this sphere must be proportionate to the legitimate aim pursued and the seriousness of the offence. The maximum penalty of imprisonment to which a person convicted of the offence is made liable does not meet this test.

The establishment is not permitted of punishments, the severity of which are obviously inappropriate for the criminal offence and the purposes of the F punishment for which maximum penalties are ordinarily fixed. No relevant and sufficient reasons were advanced by the State for the decision to fix the maximum penalty of imprisonment at twenty years. It is very hard to see in the circumstances the justification for the use of such a maximum sentence on the principle of general deterrence of commission of similar offences. G

The only inference that can be drawn from the maximum penalty of imprisonment to which the offender may be subjected is that the punishment is intended to have a chilling effect on the exercise of freedom of expression as opposed to merely deterring the occurrence of the prohibited acts. This is particularly the case when regard is had to the fact that the cases to which s 31(a)(iii) of the Criminal Law Code applies would not involve actual H

Malaba DCJ

A violence or threats of violence. It is an offence which punishes a person for conduct committed with intent to produce a specific result or when realising that there is a real risk or possibility of the result occurring quite often regardless of whether the result materialises or not.

By its nature the offence is committed in a peaceful environment and does B not usually give rise to actual disturbance of public order. In this case the ability of the law enforcement agency to maintain peace and tranquillity in the community remained what it was before the two articles were published in the newspaper. The security service institutions continued with the performance of the functions of maintaining public order and preserving public safety.

The factor of seriousness of the offence could not have caused Parliament to C set the maximum penalty of imprisonment at 20 years. It is equally difficult to imagine the worst offence and worst offender deserving of the imposition of the maximum penalty of imprisonment of 20 years. The proportionality requirement takes into account the fact that a threat of criminal prosecution, conviction and punishment for publishing or communicating falsehood to D undermine public confidence in a security service institution must inevitably have an inhibiting effect on the exercise of freedom of expression. The principle is concerned to prevent inhibition which extends beyond the subject matter of the law.

The pervasive threat inherent in the very existence of a law authorising a criminal prosecution for making a false statement coupled with the E prospects of suffering a sentence of imprisonment up to 20 years has an unconstitutionally inhibiting effect on the exercise of the right to freedom of expression by all citizens.

People may be inhibited from saying what they desire to say or publish for fear that if they are caught, prosecuted and fail to prove that what they F said or wrote is true they may be convicted and sentenced to long terms of imprisonment. This is particularly the case when regard is had to the fact that because of the pervasive nature of false factual statements, Government is provided with a weapon which it may use to prosecute falsehoods against security service institutions without more. Those who are unpopular may fear that the Government will use that weapon selectively against them.

G The chilling effect of the disproportionate threat of the period of the maximum penalty of imprisonment to which a person convicted of the offence is liable harms operations of a free media. By authorising the discretionary imposition of a maximum punishment of 20 years imprisonment for offences amounting to attempts, s 31(a)(iii) of the Criminal Law Code has a serious inhibiting H effect on the exercise of the right to freely criticise public institutions in the

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performance of their functions. A

A strong constitutional protection of freedom of expression cannot tolerate the imposition of self-censorship on free speech and press through fear of lengthy sentences of imprisonment for offences of publishing or communicating false news.

Taking into account the fact that freedom of expression is peculiarly more B vulnerable to the "chilling effects" of criminal sanctions than any other fundamental right it has been stated by the UN Special Rapporteur on freedom of opinion and expression that penal sanctions, particularly imprisonment should never be applied to offences of publishing false news. The higher the level of the maximum penalty of imprisonment the greater the chilling effect on freedom of expression. C

The United Nations Human Rights Commission commented on the effect of the use of sentences of imprisonment for offences of publishing or communicating false news. In 2000 the UN Special Rapporteur made a statement on the unacceptability of imprisonment under false news provisions saying:

> "In the case of offences such as publishing or broadcasting 'false' or 'alarmist' information, prison terms are both reprehensible and out of proportion to the D harm suffered by the victim. In all such cases imprisonment as punishment for the peaceful expression of an opinion constitutes a serious violation of human rights."

Provisions of a law which fixes a maximum level of punishment disproportionate to the objective pursued have the effect of setting a court up as an inadvertent censor of freedom of expression contrary to its constitutional function of safeguarding the enjoyment of fundamental human rights. E

Experience has shown that it is difficult to excise false statements on matters of public concern such as the performance of law enforcement agents without significantly damaging democratic self-governance. The UNHRC has even gone to the extent of recommending the scrapping of false news provisions from statute books because they F "unduly limit the exercise of freedom of opinion and expression". What all this means is that such laws are not deemed necessary in a democratic society. What is clear is that because of the severity of the deleterious effects on the exercise of freedom of expression of the level of the maximum penalty of imprisonment the law is not justified by the objective it is intended to G serve. The requirement that there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised by the measure applied by the State in restricting the exercise of freedom of expression was not met.

It has not been shown that s 31(a)(iii) of the Criminal Law Code was not in contravention of s 20(1) of the former Constitution. Section 24(5) of H

2013 (2) ZLR p533

Malaba DCJ

A the former Constitution applies. The Minister of Justice, Legal Affairs and Parliamentary Affairs is hereby called upon to appear if he so wishes before the Constitutional Court on 20 November 2013 at 9.30am to show cause why s 31(a)(iii) of the Criminal Law Code should not have been declared to be in contravention of s 20(1) of the former Constitution.

B CHIDYAUSIKU CJ, ZIYAMBI JA, GARWE JA and CHEDA AJA concurred.

Atherstone & Cook, applicants' legal practitioners

C *Civil Division, Attorney-General's Office*, respondent's legal practitioners

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Document 56 of 79

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2013/Volume 2/MANGENJE v TBIC INVESTMENTS (PVT) LTD & ORS; MANGENJE v MIN OF LANDS & ORS 2013 (2) ZLR 534 (H)

MANGENJE v TBIC INVESTMENTS (PVT) LTD & ORS; MANGENJE v MIN OF LANDS & ORS 2013 (2) ZLR 534 (H)

2013 (2) ZLR p534

Citation	2013 (2) ZLR 534 (H)
Case No	Judgment No. HH-377-13
Court	High Court, Harare
Judge	Mafusire J
Heard	19 September 2013; *CAV*
Judgment	30 October 2013
Counsel	*D Ochieng,* for the applicants in both cases *R Goba,* for first and second respondents in case 1, and for interested party in case 2 *L Chimuriwo,* for fourth respondent in case 1 No appearance for third & fifth respondents in case 1 No appearance for first & second respondents in case 2
Case Type	Civil application

Annotations Link to case annotations

Flynote

Administrative law – *audi alteram partem rule – application – failure to grant hearing before taking decision – legitimate expectation on part of affected person that hearing would be granted – limited situations* D *where subsequent hearing may constitute compliance with rule*

Headnote

The applicant in these two amalgamated cases had been given an "offer letter" by the Minister (first respondent in the second case) in respect of a farm. The original owner had sub-divided the farm and sold two portions E of it, leaving a little over half of the original farm. The remainder was then sold to the first respondent in the first case (TBIC), who leased it to the second respondent (the tenant) in that case. The following year, 2000, the whole property was identified for compulsory acquisition for resettlement, in spite of part having been sold previously. At that time, the period of validity of a notice of acquisition was one year. The F acquisition of the property was not subsequently confirmed in court in accordance with the provisions of s 8 of the Land Acquisition Act [*Chapter 20:10*]. Another notice of acquisition was published in 2003, again referring to the full original property. This notice was withdrawn after about 10 weeks. A third notice of acquisition was published and G withdrawn. In spite of these withdrawals, and the expiry of the first notice, the property was listed in Schedule 7 of the Constitution of Zimbabwe 1980. This Schedule had 157 preliminary notices that had been published in the *Government Gazette*. They listed the properties that had been "identified" for acquisition. The two notices of 2000 and 2003 were on the list. On 3 November 2005 the original title deed for H

A the whole property was endorsed by the Registrar of Deeds in line with s 16B(4) of the Constitution to the effect that the farm was now State land.

In August 2006 the Minister, in terms of the standard term "offer letter", allocated the remainder of the farm to the applicant. The applicant accepted the offer in February 2007. When he tried to occupy the farm, he found the tenant in occupation. The tenant refused to move. In 2009 B TBIC somehow managed to take transfer of the remainder of the farm, in spite of the endorsement by the Registrar of Deeds. The applicant sought a declaratory order that the compulsory acquisition of the property by government had been valid, as well as several other orders: the nullification of the transfer of the property to TBIC; the nullification of C TBIC's lease of the property to the tenant; and the eviction of the tenant and anyone else claiming occupation through TBIC.

About four months before the date of hearing, the Minister gave the applicant a written notice of the immediate withdrawal of the offer letter. The withdrawal letter was said to be in terms of the conditions of offer D attached to the offer letter. The applicant was required to forthwith cease all operations on the property and to immediately vacate. The withdrawal letter concluded by inviting the applicant to make representations, if he wished to do so, within seven days of the receipt of the letter. The reasons for the withdrawal letter were explained as being that the property was owned by an indigenous entity, that it was not the policy of the ministry E to dispossess indigenous owners of land and that therefore the applicant could not insist on enforcing his rights against TBIC. An alternative piece of land in another district was offered, but the applicant found it unsuitable for his purposes. The Minister's withdrawal letter was not motivated by any breach by the applicant of the conditions contained in F the offer letter. The Minister did not specify any such condition.

The applicant then brought the second case, against the Minister. He sought the setting aside of the withdrawal letter and the reinstatement of the offer letter on the grounds that the withdrawal letter had offended against the rules of natural justice in that he had not been afforded an opportunity to make representation before the Minister had taken G the adverse decision against him. He also argued that by taking that administrative function the Minister had failed to act fairly and had therefore breached the Administrative Justice Act [*Chapter 10:20*]. The Minister

and TBIC argued that it was a mistake that the property was included on Schedule 7 to the Constitution as the listing notices had H either lapsed or been withdrawn.

2013 (2) ZLR p536

Held, that the *audi alteram partem* rule holds that a man shall not be A condemned without being given a chance to be heard in his own defence. The rule is so basic to jurisprudence that it is often termed a rule of natural justice. The legitimate expectation doctrine is an extension of the *audi alteram partem* rule. Fairness is the overriding factor in deciding whether a person may claim a legitimate entitlement to be heard. An B administrative decision made in violation of natural justice can be set aside, especially if it is to be implemented immediately. Once a decision has been reached in violation of natural justice, even if it has not been implemented, a subsequent hearing will be no meaningful substitute. The prejudicial decision taken will be set aside as procedurally invalid. In this way the human inclination to adhere to the decision is avoided. There C are some limited situations where a subsequent hearing will constitute compliance with natural justice, but only if, in all the circumstances, it was sufficiently fair as to have the effect of curing the failure to hold a hearing before. The Minister had not observed the rules of natural justice when he issued the withdrawal letter.

Held, further, that on the issue of the applicant's *locus standi*, the holder of D an offer letter in respect of land acquired for resettlement in terms of the land reform programme is entitled to occupy the land and to use it. He is entitled to sue for the eviction of anyone interfering with that right, unless that person proves a superior right of occupation. In this case, therefore, the applicant had the requisite *locus standi*. E

Held, further, that the Administrative Justice Act requires an administrative authority to observe the rules of natural justice whenever it makes an administrative decision or takes an administrative action adverse to vested rights or legitimate expectations. The Minister was undoubtedly an "administrative authority" within the meaning of s 2 of the Act. His withdrawal letter was an "administrative action." The Minister F breached s 3 of the Act in relation to the manner the withdrawal letter was issued. He failed in his duty to act in a fair manner; he failed to give the applicant any notice of the nature of his action and he gave the applicant no opportunity to make adequate representations before he implemented his decision, let alone before making it. G

Held, further, that the mode of compulsory acquisition of agricultural land that was ushered in by s 16B of the 1980 Constitution was materially different from that under the Land Acquisition Act. Under the Act it was the "acquiring authority" that was tasked with the duty to compulsorily acquire land for agricultural purposes. The "acquiring authority" was the President or any Minister authorised by the President. Section H

2013 (2) ZLR p537

A 16B(2)(a), particularly subparagraphs (i) and (ii) thereof, short circuited the process under the Act. In one fell swoop, Parliament, and not the acquiring authority, cancelled the prior deeds of transfer in the names of the previous owners, and transferred ownership of the acquired lands to the State. In enacting s 16B, the Legislature was alive to the issue of possible mistakes that could have been made by the "acquiring B authority" in the previous dispensation in relation to the identification of agricultural lands targeted for compulsory acquisitions. If the property appeared in the list then that would be the end of the matter. It would be the property being acquired by Parliament; the property the ownership of which was being divested from the previous owner and the property C the ownership of which was being vested in the State. If indeed such a property would have been withdrawn but nonetheless found itself back on the list in terms of s 16B, then the acquisition in terms of the Constitution would prevail. Such an error, if ever it was one, would be "… any error whatsoever contained in such notice…" within the meaning of s 16B(5)(a) and (b).

Cases referred to D

Administrator, Transvaal and Ors v Traub and Ors 1989 (4) SA 731(A)

Affretair (Pvt) Ltd & Anor v MK Airlines (Pvt) Ltd 1996 (2) ZLR 15 (S)

Breen v Amalgamated Engineering Union and Ors [1971] 1 All ER 1148

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

Dube v Chrmn, PSC & Anor 1990 (2) ZLR 181 (H)

Etheridge v Min of State for Lands & Anor 2009 (1) ZLR 82 (H)

Forestry Commission v Moyo 1997 (1) ZLR 254 (S)

Hartland Implemente (Edms) Bpk v Enal Eiendomme Bpk en Andere 2002 (3) SA 653 (NC)

F *Health Professions Council v McGown* 1994 (2) ZLR 329 (S)

Joosub v J I Case SA (Pty) Ltd & Ors 1992 (2) SA 665 (N)

Kanonhuwa v Cotton Co of Zimbabwe 1998 (1) ZLR 68 (H)

Masuka v Chitungwiza Town Council & Anor 1998 (1) ZLR 15 (H)

Masunda v Min of State for Land & Anor 2006 (2) ZLR 72 (H)

G *Matanda (Pvt) Ltd v Min of Lands & Ors* 2009 (2) ZLR 340 (H),

Mike Campbell (Pvt) Ltd & Anor v Minister of National Security Responsible for Land, Land Reform & Resettlement & Anor 2008 (1) ZLR 17 (S)

Mngadi NO v Ntuli and Others 1981 (3) SA 478 (D)

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

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

H *Sachs v Min of Justice; Diamond v Min of Justice* 1934 AD 11

Mafusire J

Schmidt & Anor v Sec of State for Home Affairs [1969] 1 All ER 904 (CA) A

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

Taylor v Min of Higher Education & Anor 1996 (2) ZLR 772 (S)

Vumane & Anor v Mkize 1990 (1) SA 465 (W).

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

Zindoga & Ors v Min of Public Service & Anor 2006 (2) ZLR 10 (H) B

Legislation considered

Administrative Justice Act [*Chapter 10:28*], ss 2 & 3(1), (2), & (3)

Agricultural Land Settlement Act [*Chapter 20:01*]

Constitution of Zimbabwe 1980, ss 16B(2)(a)(i), (ii) & (iii), 16B(4) & 16B(5)(a) & (b) C

Deeds Registries Regulations 1977 (RGN 249 of 1977), s 20

Land Acquisition Act [*Chapter 20:10*]. s 5(7)

Case information

D Ochieng, for the applicants in both cases

R Goba, for first and second respondents in case 1, and for interested party in case 2 D

L Chimuriwo, for fourth respondent in case 1

No appearance for third & fifth respondents in case 1

No appearance for first & second respondents in case 2

Judgment

Mafusire J: I have decided in the two cases above that it would make E justice "turn on its head" [1] if I did not grant relief to the applicant. These cases were heard together. The parties had agreed to such a course of action.

Introduction

The applicant has undoubtedly "been more sinned against than sinning." [2] The facts read like a comedy of errors. The dispute centres on a piece of land F in Goromonzi district. There have been errors in describing that property. There have been errors in stating its exact name. There have been errors in describing its exact extent. There have been errors in just about everything surrounding it, including even in the spelling of the name of the original owner in some official documents; errors on whether or not it was in fact the property that had been acquired for resettlement purposes and allocated G to the applicant; errors in deciding whether or not some crime or crimes had been committed in relation to the property; errors in respect of certain H

Mafusire J

A legal advices proffered by certain government functionaries, including the Attorney-General, and so on.

The original title deed to the property and a replacement copy had disappeared from the deeds office. The registrar of deeds, the fourth respondent in Case 1, was still investigating at the time of the hearing. When the applicant had B decided to sue, there had been errors in his original application. He had had to withdraw it. When he had started afresh still there were errors in the founding papers. He had had to correct them through some supplementary affidavit and heads of argument. The litany of errors is not exhaustive.

The Attorney-General had been the legal advisor and counsel for the Registrar of Deeds and the Minister of Lands and Rural Resettlement, (hereafter referred C to as "the Minister"). The Minister was the third respondent in Case 1 and the first respondent in Case 2. The Attorney-General himself was a substantive party in Case 2, having been cited as the second respondent. Owing to certain legal advice which he had proffered on the matter and which was now incongruous to the official position taken by him, the Minister and the D Registrar of Deeds in the pleadings filed of record, the Attorney-General's representative found herself in an invidious position. On the day of the hearing she renounced agency. The matter had to be postponed to another week to enable the Minister to secure alternative legal representation. When the matter resumed the Minister had still not found an alternative lawyer. However, the in-house counsel in the Ministry was present in court. She asked E for the matter to proceed to avoid any further delay. It was advised that the Minister had decided to remain neutral in the whole matter and to abide by the court's decision. The in-house counsel would maintain a watching brief.

What the applicant seeks in the main, in a nutshell, and in my own words, is the setting aside of the current deed of transfer in respect of the property F which is held by one of the litigants called TBIC Investments (Pvt) Ltd. TBIC Investments (Pvt) Ltd is the party cited as the first respondent in Case No 1 above. In Case No 2 it is cited under the strange title "Interested Party". I shall from now on refer to it simply as "TBIC".

The applicant also wants the re-instatement to him of the so-called "offer G letter" in respect of the property. He seeks other ancillary relief that includes the eviction from the property of TBIC and all those claiming through it. As I determine these issues I have to deal with the technical objections raised by, or on behalf of, the Minister, the Attorney-General and TBIC, such as whether or not the applicant has *locus standi*; whether or not Case 2 was filed timeously or properly and what the correct identity or description of H the property in question is.

Mafusire J

But before I get into the technicalities of the nature of the relief sought and A the nature of the defences proffered, and before I set out the crisp issues for determination, it is necessary to explain the background of the dispute in some detail. One has to rewind back to 1997 and begin the story from there.

Background

As at 18 June 1997 the property existed as a certain piece of land situate B in the district of Goromonzi called Remaining Extent of Stuhm, measuring 1074.7410 hectares. The owner was one Cecil Michael Reimer (hereafter referred to as "Reimer"). The title deed no was 3032/87. From now

on I shall refer to this property as the "property" or, depending on the context, "the original property" or "the Goromonzi property". C

It appears that at some stage Reimer had obtained a sub-division permit to subdivide the original property. He was carving out portions of land and selling them off to third parties. One such portion, measuring 412.1091 hectares, was sold off to an entity called Darnall Investments (Pvt) Ltd. It was transferred as Lot 2 of Stuhm on 19 June 1997 under deed of transfer no 4975/97. D

In 1988 Reimer sold and transferred another portion, called Lot 3 of Stuhm to another entity called Douglasdale (Pvt) Ltd, under deed of transfer no 9247/98. That portion measured 79.4959 hectares.

TBIC enters the picture in 1999. Its case, and that of the Minister, was that in that year TBIC had bought from Reimer what had remained of E the original property. In correspondence and affidavits deposed to on his behalf, the Minister avers that TBIC had made considerable investment on the portion of the original property sold to it. However, TBIC itself does not say anything in this regard. Be that as it may, it appears that once it had bought the remaining extent of the original property, TBIC subsequently leased it to one Paul Esau Hupenyu Chidawanyika (hereafter referred to as F "Chidawanyika"). That was in 2003. Chidawanyika is cited as the second respondent in Case 1. He is not a party in Case 2.

Before going to the events of 2003 in any greater detail, I note that on 25 August 2000 the original property was identified for compulsory acquisition by Government in accordance with its programme of land reform. It was G listed in the Government *Gazette* under General Notice No 405A/2000 as the Remaining Extent of Stuhm. But there were errors. The notice referred to the owner as one Cecil Michael Rei*n*er (*sic*). The extent of the property was given as 1074.7410 hectares. Thus, the owner's surname was misspelt. He was Rei*m*er, not Rei*n*er. Further, as a matter of fact, by that time 412.1091 hectares and 79.4959 hectares had already been hived off the original property when H

Mafusire J

A Lots 2 and 3 had been sold and transferred in 1997 and 1998 respectively. Thus the arithmetic was also wrong, because if 412.1092 hectares and 79.4959 hectares had been deducted from the original 1074.7410 hectares then 583.1359 hectareswould have remained. But it seems the notice had simply referred to the original area, namely 1074.741 hectares. It was partly for this reason that TBIC argued that the property that had been listed for B acquisition was not the same property that had been sold to it. I shall come back to this particular argument later on.

In May 1992 Parliament had enacted the Land Acquisition Act [*Chapter 20:10*]. Part III of that Act provided the procedure for compulsory acquisition of land. Among other things, a notice of acquisition had to be published in C the Government *Gazette*. Such notices would remain valid for one year, after which they would automatically lapse, unless an application for the confirmation of the acquisition was pending in the Administrative Court, in which case the period during which such application was pending would not be counted as part of the one year period.

I mention in passing that the Land Acquisition Act was amended in 2001 D and 2004 to increase the period of validity for the preliminary notices of acquisition to two years and ten years respectively. However, at the time that GN 405A/2002 was published the period of validity was one year. One of TBIC's strong arguments was that GN 405A/2002 had automatically lapsed after the period of validity had expired and that therefore the property E could not have been up for acquisition and re-allocation by the time that the Constitutional Amendment (No. 17) Act was promulgated. It was that Constitutional amendment that ushered in s 16B in the then Constitution of Zimbabwe. It was common cause that GN 405A/2000 had never been expressly withdrawn by the time of the promulgation of s 16B of the F Constitution. Furthermore, the acquisition of the property had never been subsequently confirmed in court in accordance with the provisions of s 8 of the Land Acquisition Act. I shall revert to this point later on.

The next significant events were in 2003. On 13 May 2003 GN 228/2003 was published. It listed the original property for acquisition. Whilst this time the owner's surname was spelt correctly, the area was still referred to, G incorrectly, as 1074.7410 hectares. However, GN 228/2003 was on 1 August 3003 withdrawn by GN 298A/2003.

The property was again listed for compulsory acquisition for the third time. This was under GN 323A/2003. But again GN 323A/2003 was later on withdrawn by GN 438/2003. Both the Minister and TBIC averred that it H was TBIC that had been behind these withdrawals, allegedly owing to its

Mafusire J

vested interest in the property. TBIC argued that the withdrawals of those A notices, coupled with the fact that the first one under 405A/2000 had lapsed automatically, meant that the property was no longer available for acquisition when the aforesaid s 16B to the Constitution was promulgated in 2005. Again I shall revert to these points later on.

By 2003 the applicant had not yet entered the picture. It appears that B in that year he had bought himself a farm elsewhere. That was in the district of Salisbury. The farm was called Remainder of Guernsey. It measured 743.8355 hectares. Hereafter I shall refer to that property as "applicant's Guernsey farm" or, plainly "Guernsey farm". The applicant had taken transfer of Guernsey farm on 29 May 2003. However, he was subsequently to lose this farm in 2005. It was to be compulsorily acquired by Government for resettlement. C

The new s16B evidently had far-reaching provisions with far-reaching consequences as far as rights to land ownership were concerned. Prior to the amendment, the right to protection from compulsory deprivation of property was justiciable. Under that new Constitutional provision the jurisdiction of the courts to adjudicate on any aspect of land acquisition other than the D amount of compensation payable was expressly ousted: see *Mike Campbell (Pvt) Ltd & Anor v Minister of National Security Responsible for Land, Land Reform & Resettlement & Anor* 2008 (1) ZLR 17 (S) and *CFU & Ors v Minister of Lands & Ors* 2010 (2) ZLR 576 (S).

The relevant provisions of 16B of the then Constitution read as follows:

> **"16B Agricultural land acquired for resettlement and other purposes** E
>
> (1) …
>
> (2) Notwithstanding anything contained in this Chapter –
>
> (a) all agricultural land –
>
> (i) that was identified on or before the 8th July 2005, in the *Gazette* or *Gazette Extraordinary* under section 5(1) of the Land Acquisition Act [*Chapter 20:10*], and which is itemised in Schedule 7, being F agricultural land required for resettlement purposes; or
>
> (ii) that is identified after the 8th July 2005, but before the appointed day, in the *Gazette* or *Gazette Extraordinary* under section 5(1) of the Land Acquisition Act … being agricultural land required for resettlement purposes: or
>
> (iii) that is identified in terms of this section by the acquiring authority G after the appointed day in the *Gazette* or *Gazette Extraordinary* for whatever purpose, including but not limited to –
>
> A. settlement for agricultural or other purpose; or
>
> B. the purposes of land reorganisation, forestry, environmental conservation or the utilisation of wild life or other natural resources; or H

Mafusire J

> C. the A relocation of persons dispossessed in consequence of the utilisation of the land referred to in subparagraph A or B;
>
> is acquired by and vested in the State with full title therein with effect from the appointed day or, in the case of land referred to in subparagraph (iii), with effect from the date it is identified in the manner specified in that paragraph; and
>
> (b) no B compensation shall be payable for land referred to in paragraph (a) except for any improvements effected on such land before it was acquired.
>
> (3) …
>
> (4) As soon as practicable after the appointed day, or after the date when the land is identified in the manner specified in subsection (2)(a)(iii), as the case may be, the person responsible under any law providing for the registration of B title over land shall, without further notice, effect the necessary endorsements upon any title deed and entries in any register kept in terms of that law for the purpose of formally cancelling the title deed and registering in the State title over the land.
>
> (5) Any inconsistency between anything contained in –
>
> (a) a notice itemised in Schedule 7;
>
> (b) a D notice relating to land referred to in subsections (2)(a)(ii) or (iii);
>
> and the title deed to which it refers or is intended to refer, and any error whatsoever contained in such notice, shall not affect the operation of subsection (2)(a) or invalidate the vesting of title in the State in

terms of that provision …"

The Schedule 7 referred to in subs (2)(a)(i) of s 16B had 157 preliminary E notices that had been published in the *Government Gazette*. They listed the properties that had been "*identified*" for acquisition. The two notices under GN 405A/2000 and GN 228/2003 relating to the property were on the list. On 3 November 2005 the original title deed no 3032/87 aforesaid was endorsed by the Registrar of Deeds. This was in line with s 16B(4) of the Constitution. That subsection required that as soon as the new Constitutional provision F had come into force the Registrar of Deeds would be required to make the necessary endorsements on the properties as "identified" for compulsory acquisition as provided. The purpose and effect of the endorsements were to cancel the existing deeds and registering such properties in the name of the State.

G The endorsement over the original property read as follows:

> "The within mentioned land now vests in the President of Zimbabwe in terms of section 16B(4) of the Constitution of Zimbabwe as amended"

Although it was not clear as to when applicant's Guernsey farm had been listed in the Government *Gazette*, it was also acquired in 2005 on the coming into being of the new Constitutional Amendment (No 17) Act. An identical H endorsement was noted on its title deed on 10 October 2005.

2013 (2) ZLR p544

Mafusire J

On 7 August 2006 the Minister, in terms of the standard term "offer letter" A allocated the remainder of Stuhm to the applicant. The actual description of the offered land was "Subdivision 1 of R/E of Stuhm in Goromonzi District of Mashonaland East Province … The farm is approximately 534.00 hectares in extent." The applicant accepted the offer on 2 February 2007. He said before accepting he had checked the status of the land at the deeds B office and had been satisfied that it had become State land by virtue of the endorsement aforesaid. On request he had been given a copy of the endorsed deed of transfer.

However, when the applicant had tried to take occupation of the offered land in terms of the offer letter, he had found Chidawanyika already in occupation in terms of the lease agreement aforesaid. Chidawanyika refused to move. C Problems then started. The dispute that has raged incessantly began at this time. The applicant wanted to take up occupation. He wanted Chidawanyika evicted. Chidawanyika claimed rights of occupation through TBIC which in turn claimed prior rights of ownership.

When Chidawanyika would not vacate, the applicant enlisted the help of the D Minister. The applicant also approached the Attorney-General. He agitated for Chidawanyika's prosecution for his refusal to vacate what he considered to be State land. There were intense and protracted agitations. TBIC maintained that the inclusion of the property on Schedule 7 had been a mistake. It argued that the property was no longer available for acquisition because the notices E for acquisition had either lapsed or been withdrawn.

On the other hand, the applicant maintained that GN 405A/2000 had never been withdrawn and that in any event the property had been listed on Schedule 7 through both the original notice and the subsequent ones. The title deed had been endorsed. The property had become State land. It was still therefore capable of being offered for re-settlement. F

At first the Minister, through the in-house counsel, had seemed to support the applicant's position. Part of her letter on 2 September 2009 to the Attorney-General read as follows:

> "Chidawanyika contends that after Remaining Extent of Stuhm was gazetted on 8 September 2003 the preliminary notice was subsequently withdrawn G and thereafter the land was never gazetted again. He is wrong. The land was identified in that *Gazette* of 08 August 2003 and it is itemized in schedule 7 of the Constitutional Amendment (No 17) Act. That constitutes acquisition. In fact, the acquisition is confirmed twice in that the *Gazette* of 2000 in which the Remaining Extent of Stuhm is identified is also itemized in schedule 7 of the Constitutional amendment (No 17) Act of 2005. The intention to acquire Remaining Extent of Stuhm cannot be clearer." H

2013 (2) ZLR p545

Mafusire J

A As the applicant piled up pressure for Chidawanyika's prosecution, and as the Attorney-General apparently pondered on what action to take, he had suggested that the property be re-gazetted for

compulsory acquisition. However, in the letter aforesaid, the Minister's in-house counsel had strongly argued against such a move. She had concluded her letter by saying it was totally unnecessary and an extra expense to re-gazette the land because it B had already been gazetted. There was a stalemate.

Litigation

As efforts to prosecute Chidawanyika fizzled out, the applicant switched his attention to civil redress. He says when he went to the deeds office to check on the title deed he had been surprised to learn that the original one with the C endorsement aforesaid had been removed and had been replaced with one without the endorsement. Since he still had that copy that the deeds office had given him before, the registry staff had made an extra copy for their file.

Under HC 7301/10 the applicant filed an application for the eviction of TBIC and Chidawanyika. It was this application that he subsequently withdrew D and tendered wasted costs. He felt that the application had incurable errors. According to him, not all interested parties had been joined.

In March 2009 TBIC had somehow managed to take transfer of the remainder of the property under deed of transfer no. 1724/2009. The transfer had apparently been the consummation of the alleged 1999 agreement of purchase with Reimer. The description of the property as transferred to TBIC was E "Remaining Extent of Stuhm, measuring 583.1360 hectares".

The applicant complained that the transfer was fraudulent. He said that the property having become State land in 2005, there was no way TBIC could lawfully have taken transfer. He fingered TBIC in the disappearance from the deeds office of the original deed of transfer and the copy that he had F supplied and both of which had the endorsement.

Reimer, the original owner and transferor of the property, explained in an affidavit dated 10 March 2009 that in April 1999 he had sold it to Time Bank Investments Company (Pvt) Ltd which allegedly had become the "real owner" and that the certificate of "no present interest" which he held at that G time in respect of the property had eventually expired before the property had been transferred. He further explained that in May 2005 he had offered the property to the Minister but had got no response within the stipulated 90 days. He had then gone on to inform the Minister in September 2008 of his intention to sell and transfer to Time Bank Investment Company (Private) Limited which had now become TBIC. The transfer attorney or H conveyancer, one Christopher Chigwanda, deposed to an affidavit, also on

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Mafusire J

10 March 2010. The substance of that affidavit was that after he had been A instructed to transfer the property he had been advised by the deeds office that their office copy of the title deed had gone missing, but that there were no encumbrances registered against the property. He had then requested the registrar of deeds to transfer the property using the client's copy of the deed.

The Registrar of Deeds filed identical affidavits in the two cases above. The B summary of those affidavits was that the Remaining Extent of Stuhm had at all times been registered in the name of Reimer; that an XN Caveat had been noted against the title deed in 2000 following the listing of the property in the Government *Gazette*; that on 3 November 2005 the property had been transferred to the President of Zimbabwe in terms of s 16B of the Constitution Amendment (No 17) Act, an endorsement to that effect having been noted C on the title deed; that both the original title deed and a copy which had been requested by one of the deeds registry staff had been removed deliberately and had gone missing; that the transfer of the property from Reimer to TBIC had been irregular and that an investigation was under way but was being hampered by the fact that even the new title deed in favour of TBIC had D also been removed and could not be located.

The applicant filed Case 1 in January 2011. He sought a declaratory order that the compulsory acquisition of the property by government had been valid. He sought several other orders, namely the nullification of the transfer of the property to TBIC; the nullification of TBIC's lease of the property to Chidawanyika and the eviction of Chidawanyika and anyone else claiming E occupation through TBIC.

TBIC, the Minister and Chidawanyika all filed opposing papers in Case 1. The registrar of deeds simply filed the aforesaid affidavit. The Commissioner-General of Police who had been cited

evidently as a nominal party did not file any papers. F

The one ground of opposition by both TBIC and the Minister was that the applicant lacked *locus standi* allegedly because his claim was in reality based on the *rei vindicatio* remedy; that this remedy was available only to owners of property; and that since he was not the owner his claim was ill-conceived. The Minister weighed in with the argument that it was only the State that G could take civil or criminal proceedings in relation to the land.

The next ground of opposition was taken by the Minister alone. This was in the heads of argument. It was that in Case 2 the applicant was out of time. It was argued that whatever name the applicant had chosen to call the nature of his proceedings, in reality the application was one for review which had to be filed within eight weeks of the decision sought to be impeached in H

A accordance with r 259 of the rules of this court. In Case 2 the applicant was some five weeks out of time. No application for condonation had been made.

The next ground of opposition was by TBIC. It was that the property that the applicant had been offered was different from the property owned by TBIC which it held under deed of transfer no 1724/2009. Much was made of the discrepancy between the description and the extent of the property in the B offer letter and the description and the extent the property in the title deed. In the offer letter the property had been described as "*Subdivision 1 of R/E of Stuhm in Goromonzi District of Mashonaland East Province* measuring *approximately 534 hectares in extent*". In the title deed held by TBIC the property was registered as "*Remaining Extent of Stuhm situate in the District* C *of Goromonzi measuring 583.1360 hectares*".

On the merits TBIC argued that the offer letter given to the applicant had been invalid because it had referred to a non-existent property, since not only was the description of the property incorrect, as already stated, but also that by the time the offer letter had been issued the property was no longer D available for compulsory acquisition by reason of the fact that the notices of acquisition had either lapsed automatically or had expressly been withdrawn.

On the merits, the Minister argued that by the time the property had been acquired by the Government the original property had been subdivided and a portion thereof had been sold to TBIC and that therefore the property was no longer available for acquisition; that on buying the property TBIC had E gone on to lease and invest heavily on it; that it was not Government policy to dispossess indigenous persons of their land in favour of other indigenous persons. and that efforts were under way to offer the applicant alternative land.

The applicant had prosecuted Case 1 up to the hearing stage. About four months before the date of hearing, the Minister gave the applicant a written F notice of the immediate withdrawal of the offer letter (hereafter referred to as "the withdrawal letter"). The withdrawal letter was said to be in terms of the conditions of offer attached to the offer letter. The applicant was required to forthwith cease all operations on the property and to immediately vacate. The withdrawal letter concluded by inviting the applicant to make representations, if he wished to do so, within seven days of the receipt of the letter.

G The reasons for the withdrawal letter were explained in two other letters written to the applicant and his legal practitioners by the Minister's in-house counsel three days later. The reasons were, basically, that the property was owned by an indigenous entity, that it was not the policy of the Ministry to dispossess indigenous owners of land and that therefore the applicant could H not insist on enforcing his rights against TBIC.

Mafusire J

The applicant reacted to this development by making strong representations A against the withdrawal of the offer letter. He wrote to the Minister some three days after the letter from the Minister's in-house counsel. In the letter he basically laid out the history of the matter from the time that the property had been listed for acquisition, the actual acquisition, his offer letter, the transfer to TBIC, the abortive prosecution and the loss of his Guernsey farm. B He complained of the Minister's manifest double standards on the policy regarding dispossession of land owned by indigenous persons, since he, also an indigenous person, had lost his farm to Government.

The applicant had been offered an alternative piece of land in the Beatrice area. However, after inspecting it he had turned the offer down as he had considered the land to be unsuitable for the type of farming that he had been C carrying out in Goromonzi and which he intended to continue with. The applicant touched on this in his written representations. He concluded by imploring the Minister to support his efforts to get occupation of the property since, as he said, no plausible reason had been given for why he could not.

The applicant further reacted to the withdrawal letter by instituting Case 2 D above. He argued that the withdrawal letter had offended against the rules of natural justice in that he had not been afforded an opportunity to make representation before the Minister had taken the adverse decision against him. He also argued that by taking that administrative function the Minister had failed to act fairly and had therefore breached the Administrative Justice Act [*Chapter 10:20*]. After setting out the history of the dispute all over again, the E applicant sought the setting aside of the withdrawal letter and the reinstatement of the offer letter. He explained that his Case 1 had been predicated on the offer letter. Since it had now been withdrawn it was pointless to proceed with it without first sorting out the issue of the withdrawal letter. In Case 2 the applicant cited the Minister as the first respondent, the Attorney-General F as the second respondent and TBIC as the "Interested Party".

Only the Minister and TBIC opposed Case 2. The Attorney-General prepared all the pleadings on behalf of the Minister but filed no papers for himself.

The Minister's one ground of opposition in Case 2 was that he and his officials had actively engaged the applicant and his legal practitioners to explain why G he could not occupy the property and that therefore he could not be said to have violated the rules of natural justice.

The Minister also argued that where the acquiring authority did not support the holder of an offer letter it was incumbent upon it to withdraw the letter. He then repeated the argument that TBIC had bought the property and had been recognised as the owner; that it had been TBIC that had been behind H

Mafusire J

A the delisting of the property; that TBIC had invested heavily on it and that owing to applicant's adamant stance despite previous correspondence to him it became necessary "*to speak legally with a withdrawal letter*".

TBIC opposed Case 2 on the preliminary basis that the applicant had not exhausted his domestic remedies. It was argued that applicant had made representations in respect of the withdrawal letter as the Minister had invited B him to do; that he ought to have waited for the Minster's response before he approached this court and that applicant "cannot challenge unconsummated administrative proceedings" in a court of law. It was argued that until the Minister had responded applicant's cause of action was incomplete.

I note for the record that the withdrawal letter was on 24 June 2011. The C applicant's representations were on 30 June 2011. Case 2 was filed on 28 September 2011.

TBIC's opposing affidavit is largely argumentative on mere technical points, such as the claim that the Administrative Justice Act did not authorise a court to intervene in a matter that was still under consideration by an administrative D authority; that the Constitutional amendment that introduced s 16B had actually supported the Minister's policy that indigenous owners of land would not be dispossessed of their land; that the applicant had not accepted the offer of land timeously and that it was unlawful for the applicant to have "ordered" the Registrar of Deeds to insert in the official records of the deeds registry a foreign document that he himself had brought. The argument that the E property was no longer available for compulsory acquisition by the time of the Constitutional amendment was repeated. TBIC criticised the applicant's rejection of the offer of an alternative land and claimed that the applicant believed that no other land in Zimbabwe was suitable for him and that, at any rate, the Minister had no obligation to offer him an alternative piece of land.

F **The issues**

Despite the volumes of papers filed of record, in my view there was one major issue that was decisive. What was the status of the original property by the time of the Constitutional Amendment

(No 17) Act in September 2005 when it was included on Schedule 7 to s 16B via the preliminary notices that had previously been published in the Government *Gazette*?

G However, before dealing with that main issue, there are some other preliminary points arising in Case 2 that I have to dispose of. Only if the applicant succeeds in Case 2 can I go on to decide Case 1.

The one issue in Case 2 was whether or not the applicant had approached the court prematurely without first having exhausted his domestic remedies. The H next was whether the *audi alteram partem* rule of natural justice had been

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violated. The third was whether there had been a breach of the provisions of A the Administrative Justice Act. The last was whether applicant lacked *locus standi*. I will now deal with these issues in turn.

(i) Failure to exhaust domestic remedies

Initially TBIC's point was that in the withdrawal letter the Minister had invited applicant to make representations, albeit after the decision to withdraw the B offer letter had been made. After he had obliged applicant had however, gone on to file Case 2 before waiting for the Minister's response. Therefore, the argument proceeded, the process had not been completed.

For the record, on 20 December 2011 the Minister had finally responded to the applicant's representations. But he said nothing new. He maintained his C position that the land in question had been bought by an indigenous entity which had enjoyed the right of use prior to getting transfer and that it was the entity that had been behind the de-listing of the property. The Minister also said that if TBIC had procured the title deed fraudulently then that was a criminal issue that had to be investigated.

However, even if the Minister had not written the letter of 24 December D 2011, I would still not have been prepared to hold that in Case 2 the applicant was non-suited. I am satisfied that he had been treated unfairly. In my view, the Minister did not seem to have been sufficiently sensitive to his plight. Here was someone who had been an indigenous land owner. Despite the Minister's avowed policy of sparing indigenous land owners from compulsory E acquisitions, the applicant had nonetheless lost his Guernsey farm. Of course, the Minister had tried to do something about it. He had offered him the Goromonzi property. But whatever the Minister's good intentions, the fact remains that since 2009 the applicant had not been able to occupy that land. The Beatrice farm that he had been offered as an alternative had demonstrably turned out to be unsuitable for reasons that he had clearly and satisfactorily F articulated to the Minister. It had never been in doubt that the applicant had been entitled to a second farm. TBIC's argument that the Minister had no obligation to offer the applicant alternative land was self-serving and contrary to the Minister's own position. The Minister's own position was that he would continue to look for an alternative piece of land for the applicant. G

Thus given that applicant had lost his own farm in 2005 despite that he was an indigenous person; given that the land he had been offered in 2009 had turned out to be unavailable because TBIC and Chidawanyika claimed it; and given that when he had taken action in Case 1 to assert his rights the process had been thwarted by the Minister when he had revoked the offer letter just before the hearing, I would not be prepared to hold that in Case H

A 2 the applicant had approached the court prematurely. That case had been instituted some four months after the Minister's withdrawal letter.

I am satisfied that by the withdrawal letter the Minister had made a substantive decision. By that decision all the rights of the applicant to the property had terminated. The applicant had been ordered to cease all operations forthwith B and to vacate the property. It was a complete decision. It was justiciable. That the possibility existed that the Minister could well make another decision in

response to the applicant's representations would not detract from that fact that the first decision had been complete by itself.

(ii) Whether the *audi alteram partem* rule had been violated

C The *audi alteram partem* rule holds that a man shall not be condemned without being given a chance to be heard in his own defence. The rule is so basic to jurisprudence that, as Ebrahim J said in *Dube v Chairman, Public Service Commission & Anor* 1990 (2) ZLR 181 (H), it is often termed a rule of natural justice.

D The rule implores public officials, judicial and quasi-judicial officers, and really anyone entrusted with the power to make decisions or the power to take action affecting others adversely, to exercise such powers fairly. Fairness is the overriding consideration.

The legitimate expectation doctrine is an extension of the *audi alteram partem* E rule. In England, in *Schmidt and Anor v Secretary of State for Home Affairs* [1969] 1 All ER 904 (CA), Lord Denning MR said at p 909:

> ". . . an administrative body may, in a proper case, be bound to give a person who is affected by their decision an opportunity of making representations. It all depends on whether he has some right or interest, *or, I would add, some legitimate expectation, of which it would not be fair to deprive him without* F *hearing what he has to say*" (emphasis added).

Later on, in 1971, Lord Denning had this to say in *Breen v Amalgamated Engineering Union and Ors* [1971] 1 All ER 1148 at 1153:

> "It is now well settled that a statutory body, which is entrusted by a statute with a discretion, must act fairly. It does not matter whether its functions are described as judicial or quasi-judicial on the one hand, or as administrative on the other G hand, or what you will. *Still it must act fairly. It must, in a proper case, give a party a chance to be heard*. . ." (emphasis added).

The doctrine is also part of the South African law. See *Administrator, Transvaal and Ors v Traub and Ors* 1989 (4) SA 731 (A). In Zimbabwe it is firmly entrenched in our law: *Health Professions Council v McGown* 1994 (2) ZLR 329 (S); H *Taylor v Minister of Higher Education & Anor* 1996 (2) ZLR 772 (S)

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and *Kanonhuwa v Cotton Co of Zimbabwe* 1998 (1) ZLR 68 (H) A among others. In *McGown's* case Gubbay CJ stated as follows at p 334:

> "In short, the legitimate expectation doctrine, as enunciated in *Traub*, simply extended the principle of natural justice beyond the established concept that a person was not entitled to a hearing unless he could show that some existing right of his had been infringed by the quasi-judicial body… *Fairness is the overriding factor in deciding whether a person may claim a legitimate entitlement to be* B *heard*. . ."(emphasis added).

See also *Affretair (Pvt) Ltd & Anor v MK Airlines (Pvt) Ltd* 1996 (2) ZLR 15 (S), *per* McNally JA at 21C-D.

Thus, administrative decisions such as the one made by the Minister in the present case when he issued the withdrawal letter are reviewable by this C court. An administrative decision made in violation of natural justice can be set aside, especially if it is to be implemented immediately. In *McGown's* case the learned Chief Justice said at 337C-D:

> "The general rule is that once a decision has been reached in violation of natural justice, even if it has not been implemented, *a subsequent hearing will be no meaningful substitute*. The prejudicial decision taken will be set aside as D procedurally invalid. In this way *the human inclination to adhere to the decision is avoided*" (emphasis added).

In the present case, not only was the Minister's decision reached in violation of natural justice but also it was to be implemented immediately. I accept that when the applicant instituted Case 2 the Minister was still to respond E to his representation. However, as stated in *McGown* above, a subsequent hearing would be no meaningful substitute.

There may be situations where the court might accept an administrative decision taken in violation of natural justice where for, instance, a statute authorises an *ex parte* action by the administrative authority in an emergency or where there is a sufficient interval between the decision and its implementation F during which there is a fair hearing. In *Sachs v Minister of Justice; Diamond v*

Minister of Justice 1934 AD 11 at 38, whilst dealing with the statutory exclusion of the *audi alteram partem* rule in certain situations, Stratford ACJ said:

> "Sacred though the maxim is held to be, Parliament is free to violate it. In all cases G where by judicial interpretation it has to be invoked, this has been justified on the ground that the enactment impliedly incorporated it. When on the interpretation of the Act, the implication is excluded, there is the end of the matter."

In *McGown supra* the learned Chief Justice stated at 337E-H:

> "The exceptions to the rule are set out by Professor Baxter in his work on *Administrative Law* at pp 587-588, as follows: H

Mafusire J

> '(i) Where A a statute authorises emergency, *ex parte* action, it might be implicit in the statute that, unless natural justice is excluded altogether, a hearing need only be given after the decision is taken. *If there is no urgency, however, the court will require natural justice to be observed beforehand.*
>
> (ii) A court may accept as sufficient compliance with natural justice a B hearing held after the decision has been taken where:
>
> – there is a sufficient interval between the taking of the decision and its implementation to allow a fair hearing;
>
> – the decision maker retains a sufficient open mind to allow himself to be persuaded that he should change his decision;
>
> – the affected individual has not thereby suffered prejudice
>
> *These* C *are concessions to the demands of administrative efficiency, but they are limited*. A hearing held after the decision can only be acceptable if, in all the circumstances, it was sufficiently fair as to have the effect of 'curing' the failure to hold one before'" (my emphasis).

The "human inclination to adhere to [one's] decision", referred to by the D learned Chief Justice in *McGown* above, was probably aptly demonstrated in this case. In his letter of 24 December 2011 aforesaid, the Minister simply stuck to his earlier decision and his earlier position that the applicant could not have the property because it was owned by an indigenous entity.

In the withdrawal letter, the Minister alleged that the withdrawal was in terms of the conditions of offer attached to the offer letter. The offer letter E itself reserved to the Minister the right to withdraw or change the offer if he deemed it necessary or if the applicant was in breach of any of the *set* conditions. The set conditions must have been those at the back of the letter. They were these:

(1) The applicant was to take up personal and permanent residence on the F property or, within three months of the acceptance of the offer letter, appoint a manager to personally and permanently stay there.

(2) The acceptance of the offer had to be communicated to the Minister within 30 days of the receipt of the offer letter.

(3) Developments on the property had to be initiated in accordance with G the five year development plan submitted with the application.

(4) The applicant could not in any way part with possession of the property, for example, by way of cession, lease or assignment of rights, or subletting, without the Minister's prior written consent.

(5) The applicant had to comply with all the provisions of the Agricultural H Land Settlement Act [*Chapter 20:01*] pertaining to the leasing of State

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Mafusire J

land, and, in addition any special conditions which the Minister might A impose.

(6) The applicant had to comply with any laws requiring the grant of any servitude over the property.

(7) The onus to notify the Minister of any change of address lay with the applicant, whose failure to do so would absolve the Minister of B responsibility over any misdirected mail.

(8) On it being established that the applicant had taken occupation of the property, a 99 year lease would be prepared for the applicant's signature.

It was common cause that the Minister's withdrawal letter was not motivated by any breach of the conditions of offer by the applicant. At any rate, in his C withdrawal letter the Minister did not specify any such condition as may have been breached by the applicant. That can only mean that the Minister withdrew the offer letter on the basis that the letter itself had reserved to him the right to do so if he deemed it necessary. His in-house counsel confirmed as much. In the one explanatory letter of 27 June 2011 to the applicant she wrote:

> "It is the acquiring authority's prerogative to issue offer letters and withdraw D them where it deems necessary" (*sic*).

But, as I have already mentioned, in doing so the Minister had to observe the rules of natural justice. Furthermore, and at any rate, in *Masunda v Minister of State for Land & Anor* 2006 (2) ZLR 72 (H), this court (*per* Bere J) held that the Agricultural Land Settlement Act, which regulates the allocation of E land, does not give the Minister unilateral powers to withdraw offer letters to beneficiaries of the land reform programme. The learned judge went on to state that it is a very basic tenet of administrative law that before a decision is taken that adversely affects another person, the affected individual has to be given an opportunity to be heard.

In the premises I find that the Minister violated the *audi alteram partem* rule F when he withdrew the offer letter.

(iii) *Locus standi*

In support of its argument that the applicant did not have the requisite *locus standi* to seek its eviction from the property because such an action could G only be based on the *reivindicatio* remedy, TBIC referred to the South African cases of *Hartland Implemente (Edms) Bpk v EnalEiendomme Bpk en Andere* 2002 (3) SA 653 (NC); *Joosab v J I Case SA (Pty) Ltd & Ors* 1992 (2) SA 665 (N); *Mngadi NO v Ntuli& Ors* 1981 (3) SA 478 (D) and *Vumane & Anor v Mkize* 1990 (1) SA 465 (W). The common thread running through those cases was that, in order for an applicant to vindicate a property, he H

Mafusire J

A was required to prove his ownership of the property and the respondent's possession of same.

Vumane's case dealt with a statute, the Black Communities Development Act, which conferred on applicants *inter alia* the right to occupy buildings on certain premises. The court held that the applicants could not in law be B regarded as owners of the premises and consequently that they could not vindicate.

In Zimbabwe, the issue of offer letters and *inter alia* the right of beneficiaries over agricultural lands offered for resettlement is governed by the Constitution. In *Commercial Farmers' Union & Ors v Minister of Lands & Ors* 2010 (2) ZLR 576 (H) and *Commercial Farmers' Union & Ors v Minister of Lands &* C *Ors, supra*, the Supreme Court, sitting as a Constitutional Court, held that an "offer letter" conferred on the holder or beneficiary the right to occupy and use the land so offered. Thus the South African authorities cited by TBIC are irrelevant. In Zimbabwe the holder of an offer letter in respect of land acquired for resettlement in terms of the land reform programme is entitled D to occupy the land and to use it. He or she is entitled to sue for the eviction of anyone interfering with that right, unless that person proves a superior right of occupation. In this case the applicant had the requisite *locus standi*.

(iv) Whether there was a breach of the administrative justice act

In my view, the Administrative Justice Act [*Chapter 10:28*] is an elaborate E restatement of the rules of natural justice. In *Zindoga & Ors v Minister of Public Service & Anor* 2006 (2) ZLR 10 (H), Patel J (as he then was) said at 13D-E:

> "It is axiomatic that any party who has a right or interest that is likely to be affected by an administrative decision or which is susceptible to being prejudiced thereby must be heard before that decision is taken. This is dictated by the time honoured F precept of the common law embodied in the *audi alteram partem* rule *and now codified in the Administrative Justice Act* [Chapter 10: 28]" (emphasis added).

In substance, the Act behoves an administrative authority to observe the rules of natural justice whenever it makes an administrative decision or takes an administrative action adverse to vested rights or legitimate expectations.

G One of the arguments put forward for and on behalf of the Minister, particularly in the heads of argument, was that, despite the reference to the Administrative Justice Act, the applicant's Case 2 was simply one for review, that in terms of r 259 of the rules of this court an application for review has to be filed within eight weeks of the decision to be reviewed and that the applicant's application was out of time, allegedly it having been filed some five weeks H out of time. Relying on *Masuka v Chitungwiza Town Council & Anor* 1998

2013 (2) ZLR p556

Mafusire J

(1) ZLR 15 (H) and *Forestry Commission v Moyo* 1997 (1) ZLR 254 (S), it A was argued that if the applicant instituted Case 2 in terms of s 26 of the High Court Act, then the proceedings were common law proceedings for review.

In *Masuka supra*, Devittie J rejected the position taken in *Musara v Zinatha* 1992 (1) ZLR 9 (H) that in the field of administrative law there is a distinction between, on the one hand, void acts which can be brought on B review within the prescribed time limits but which also can be brought as ordinary applications even outside those time limits, and, on the other hand, voidable acts which can only be brought by way of review within the eight week period prescribed by r 259.

In his heads of argument on this point the applicant seemed confused. In paras C 34 and 35 of those heads, the applicant argues that proceedings brought in terms of s 4 of the Administrative Justice Act "… are not review proceedings simpliciter in the sense that they do not supplant the procedure of common law review". He argued that proceedings under that Act amount to a form of statutory review but that circumstances might exist when they might not constitute a review at all. D

The applicant's Case 2 was predicated on the withdrawal letter and on his argument that in terms of that letter his cause of action had matured and that he did not have to wait for the Minister's response to his representations. On the other hand, the Minister and TBIC insisted he ought to have waited for that response. E

In his heads of argument, the applicant states unequivocally that in terms of s 26 of the High Court Act [*Chapter 7:06*] this court has power to review all decisions of, *inter alia*, administrative authorities; that the grounds of review as specified in the High Court Act are common law review procedures; that r 259 of the rules of this court is peremptory in providing that review proceedings "shall" be instituted within eight weeks of the "termination of F the suit, action or proceedings in which the irregularity complained of is alleged to have occurred"; and that if he failed to bring the review proceedings timeously then he would be non-suited.

What then confuses issues is that the applicant goes on to argue that it could not be said that there had been "*termination*" within the meaning of G r 259 when the Minister issued the withdrawal letter, because, the argument persisted, such "termination" would only have occurred after the Minister had either made a decision on the applicant's representations (as he had been invited to do so in the withdrawal letter), or if he had failed to respond to those representations within a reasonable time. The applicant stressed that the Minister had not yet become *functus officio* at the time of the withdrawal letter. H

2013 (2) ZLR p557

Mafusire J

A Such confusion by the applicant prompted the Minister to retort in his heads of argument as follows:

> "8.0 At paras 39 and 42 of his heads of argument, the applicant says he was not out of time when he instituted these proceedings because the decision to withdraw the offer letter 'was not final' at the time it was made and it was therefore 'not reviewable' at that time. But he has now instituted these proceedings because B of that same decision and the question is: When did the decision become final and reviewable?"

Since, as noted before, the Minister eventually decided not to contest the matter and chose to abide by the decision of this court and since none of the remaining parties took up the point at the hearing I have refrained from C deciding whether or not the applicant's Case 2 was a review application

which had to be presented within a specific time frame, or whether it was some other application that could be brought within a reasonable time.

My view is that the Minister is undoubtedly an "administrative authority" within the meaning of that expression as defined in terms of s 2 of the Administrative Justice Act. His withdrawal letter was an "administration D action." Section 2 of the Act defines these terms as follows:

> **"2 Interpretation and application**
>
> (1) In this Act –
>
> "administration action" means any action taken or decision made by an administrative authority …"
>
> "administrative authority" E means any person who is –
>
> (a) an officer, employee, member, committee, council, or board of the State or a local authority or parastatal; or
>
> (b) …
>
> (c) any other person or body authorised by any enactment to exercise or perform F any administrative action concerned;"

Section 3 of the Act reads:

> **"3 Duty of administrative authority**
>
> (1) An administrative authority which has the responsibility or power to take any administrative action which may affect the rights, interests or legitimate G expectations of any person shall –
>
> (a) act lawfully, reasonably and in a fair manner; and
>
> (b) act within the relevant period specified by law or, if there is no such specified period, within a reasonable period after being requested to take the action by the person concerned; and
>
> (c) where it has taken the action, supply written reasons therefor within the H relevant period specified by law or, if there is no such specified period,

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Mafusire J

> within a reasonable period after being requested to supply reasons by the A person concerned.
>
> (2) In order for an administrative action to be taken in a fair manner as required by paragraph (a) of subsection (1), an administrative authority shall give a person referred to in subsection (1) –
>
> (a) adequate notice of the nature and purpose of the proposed action; and B
>
> (b) a reasonable opportunity to make adequate representation; and
>
> (c) adequate notice of any right of review or appeal where applicable.
>
> (3) An administrative authority may depart from any of the requirements referred to in subsection (1) or (2) if –
>
> (a) the enactment under which the decision is made expressly provides for any of the matters referred to in those subsections so as to vary or exclude any C of their requirements; or
>
> (b) the departure is, under the circumstances, reasonable and justifiable, in which case the administrative authority shall take into account all relevant matters, including –
>
> (i) the objects of the applicable enactment or rule of common law; D
>
> (ii) the likely effect of its action;
>
> (iii) the urgency of the matter or the urgency of acting thereon;
>
> (iv) the need to promote efficient administration and good governance;
>
> (v) the need to promote the public interest."

In my view, the Minister breached s 3 of the Administrative Justice Act in E relation to the manner the withdrawal letter was issued. In particular, he failed to comply with para (a) of subs (1) and with subs (2).He failed in his duty to act in a fair manner; he failed to give applicant any notice of the nature of his action and he gave the applicant no opportunity to make adequate representations before he implemented his decision, let alone before making it.

As I have observed, the Act is a codification of the rules of natural justice E as they relate to the area of administrative law. Therefore the factors that are relevant to the considerations of the common law rules of natural justice would all, or largely apply to considerations of the duties of public bodies under the Act. In this case, I find that there were no factors that would exempt the Minister from compliance in terms of subsection (3) of s 3 of the Act. G

(v) Status of property as at 4 September 2005

The Registrar of Deeds states categorically that the transfer of the property from Reimer to TBIC under deed of transfer no 1724/2009 dated 18 March was done *irregularly* because the rightful owner of the property was the President of Zimbabwe at the time of the that transfer. I agree. H

Mafusire J

A In their opposing papers both the Minister and TIBC gloss over certain facts. TIBC may have bought the remaining extent of Stuhm from Reimer in 1999. However, at that time it had only acquired personal rights. Real rights in a property are transferred by the registration of transfer in the deeds office. In terms of the Deeds Registries Act [*Chapter 20:05*], the owner of an immovable property is the person *registered* as the owner thereof. Registration B of real rights in the deeds office is not a mere matter of form. In *Takafuma v Takafuma* 1994 (2) ZLR 103 (S)at 105-106 McNally JA stated as follows:

> "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 C of 'real right' in s2 of the Act."

TBIC obtained transfer of the remaining extent of Stuhm only in 2009. Until it did so, it had no real rights over it. But, most importantly, Reimer, who purported to transfer the property to it, had lost all rights over the property save, perhaps, the right to a fair compensation. By 3 November 2005 the D property had become State land by virtue of s16B of the then Constitution of Zimbabwe, as amended by Constitutional Amendment (No 17) Act.

The circumstances surrounding TIBC getting transfer of the property in 2009 have already been canvassed. The deliberate and unlawful removal form the deeds registry of the original title deed which bore the endorsement in favour of the President of Zimbabwe undoubtedly facilitated the transfer. E Admittedly, there was no evidence placed before me that TBIC or anyone else associated with it was behind that illegal move. Therefore, I have drawn no inferences. Nonetheless, that does not detract from the fact that the act was illegal and that it was only because of it that the transfer could have been registered in the face of the endorsement on the title deed. Whether or F not TBIC was innocent of the act does not transform a patently and blatantly illegal act into a legitimate one which this court could ignore.

There was, in my view one other irregularity in the transfer of the property to TBIC. Apparently it was transferred on the strength of, among other things, the affidavit by the transfer attorney. He had become aware that the deeds office copy of the holding deed had been removed. Part III of the Deeds G Registries Regulations 1977 (RGN 249 of 1977) provides for the replacement of documents that are filed in the deeds registry. An elaborate procedure is prescribed. It involves an application to the registrar. It entails, among other things, notifying the public through publication of the application in the manner prescribed in the Government *Gazette* and the print media, and allowing for H a period of objections. Section 20 of those Regulations provides as follows:

Mafusire J

> **"20.Application for copy or replacement of document** A
>
> (1) Any person who requires –
>
> (a) a copy of any document filed in the deeds registry;
>
> (b) the replacement of any document filed in the deeds registry because his copy of the document has been lost, destroyed, defaced or damaged;
>
> shall apply to the registrar in writing." B

In my view, it was not enough for the transfer attorney, on behalf of Reimer, to simply submit his affidavit and request the registrar to use Reimer's copy of the deed for the purposes of transfer. When s16B of the Constitution and Schedule 7 thereto had been published listing the 157 properties, including Reimer's property, for immediate transfer to the State, the whole world, C including Reimer and his attorney, had become aware that the property had automatically transferred to the State. They had become aware, or ought to have become aware, that the deeds registry copy of the title deed had been endorsed in accordance with s 16B(4). How then could Reimer and his attorney

simply request the registrar to transfer on the basis of Reimer's copy deed which they knew bore no endorsement? In my view, Reimer would D have required a replacement deed for the deeds office in accordance with s 20(1)(a) of the Regulations before he and his lawyer could legitimately have moved for the transfer.

If TBIC had invested heavily on the property, as the Minister claimed, then it would have done so on the basis of mere personal rights. Obviously it would E have taken a huge risk. That should not affect the status of the transaction and therefore the status of the property. Title deed no 1724/2009 was registered irregularly and must be set aside.

The argument on behalf of the Minister and TBIC that it was a mistake that the property was included on Schedule 7 to s 16B of the amended Constitution as the listing notices had either lapsed or been withdrawn was predicated F on *Matanda (Pvt) Ltd v Minister of Lands & Ors* 2009 (2) ZLR 340 (H), a decision of this court by Makoni J. In that case offer letters had been issued in respect of a property in respect of which the preliminary notices of acquisition had been issued but subsequently withdrawn. The fifth to ninth respondents, the beneficiaries of the offer letters, supported by the first respondent, the G Minister or the acquiring authority, had argued that despite the "de-listing", the property had subsequently been acquired by operation of s 16B of the Constitution as it had been listed in the Schedule. The applicant, the previous owner of the property, had argued that the inclusion of the property on the Schedule had been a mistake and he sought a declaratory order that he was still the owner. H

2013 (2) ZLR p561

Mafusire J

A Section 5(7) of the Land Acquisition Act [*Chapter 20:10*] provides that an acquiring authority may at any time "withdraw" a preliminary notice (of compulsory acquisition) by publishing the notice of such "withdrawal" in the Government *Gazette*.

Makoni J interpreted the word "withdraw", in the context of the Land Acquisition Act, to mean to "discontinue, cancel, retract." The learned judge B held that the Government had cancelled or retracted the preliminary notice in respect of the farm in question and that it no longer had an interest in it. If the Government were to develop another interest in the farm it would have had to start the whole process of acquisition afresh. At 344C–E the learned judge stated as follows:

> C "It is not in issue that the land in question was not issued with a fresh notice of acquisition. *It is clear that it was a mistake or an oversight on the part of the acquiring authority to include the property in Schedule 7 of s 16B, since the initial identification of the land had been withdrawn*. It is therefore my finding that the land was not acquired by the operation of the provisions of s 16B of the Act as advanced by the respondents … The land in question is owned by the applicant. The fifth to ninth respondents are claiming occupation on the basis D of offer letters. The first respondent is not the owner of the property and cannot, therefore, issue offer letters in respect of that land" (my emphasis).

With due respect to the learned judge I find myself unable to agree with her approach. Whilst in the case before me the status of the property as at the time of the Constitutional amendment aforesaid was substantially the same E as that of the property my sister Makoni was dealing with in the *Matanda* case, it is my view that no mistake is apparent or manifest on Schedule 7 to s 16B of the then Constitution as amended. Firstly, it must be noted that the Constitution, as set out in s 3, was the supreme law of the country. Any other law inconsistent with it would be void to the extent of the inconsistency.

Secondly, I find that the mode of compulsory acquisition of agricultural land F that was ushered in by s 16 B of the then Constitution was materially different from that under the Land Acquisition Act. Under the Land Acquisition Act it was the "acquiring authority" that was tasked with the duty to compulsorily acquire land for agricultural purposes. The "acquiring authority" was the President or any Minister as authorised by the President. Under that Act the G process was tedious and long winded. Among other things, it entailed the issuing of preliminary notices for publication. These notices would expire if further processes were not undertaken on time. The acquisition had to be confirmed through the Administrative Court. If the preliminary notices lapsed or if the acquisition was not confirmed, the process would have to start afresh if the acquiring authority intended to persist. Above all, the whole concept H of compulsory deprivation of rights to property was justiciable.

2013 (2) ZLR p562

Mafusire J

On the other hand the acquisition process under s 16B(2)(a), particularly A subparagraphs (i) and (ii) thereof, short circuited the cumbersome process under the Act. By the stroke of a pen, and in one fell swoop, Parliament, and not the acquiring authority, cancelled the prior deeds of transfer in the names of the previous owners, and transferred ownership of the acquired lands to the State. As noted by Malaba JA in the *Mike Campbell* case on p 31: B

> "Section 16B of the Constitution *is a complete and self-contained code* on the acquisition of privately owned agricultural land by the State for public purposes. …. By the use of the *non obstante* clause, 'notwithstanding anything contained in this Chapter' at the beginning of subs (2), *the Legislature gave the provisions of s 16B overriding effect in respect of the regulation of matters relating to the acquisition of all agricultural land identified by the acquiring authority in terms of s 16B(2)(a)*" (emphasis added). C

In my view, the significance of the difference in the two modes of acquisition aforesaid was that under the Act the acquiring authority was the President or a Minister but under s 16B(2)(a)(i) and (ii) it was the Legislature. Only under s 16B(2)(a)(iii) did the Minister, as the acquiring authority, retain his previous role. But this was in respect of land to be identified *after* the D effective date of the Constitutional amendment. This is not the type of land with which we are concerned.

By virtue of the supremacy of the Constitution, the mode of acquisition under s 16B(2)(a)(i) and (ii) would override or supersede the mode of acquisition under the Act. E

Under the Act land acquisitions were being stalled by endless litigation which challenged all sorts of perceived infractions. These could include challenges on the validity of the preliminary notices themselves; challenges on errors of description of the properties, or challenges even on the right of Government to acquire any particular land. As was noted in the *Mike Campbell* case at p 29 of the judgment: F

> "To stop what was considered obstructive litigation and secure finality in cases of compulsory acquisition of agricultural land for public purposes, the Legislature enacted the Constitution of Zimbabwe Amendment (No. 17) Act, 2005 on 14 September 2005."

In enacting s 16Bof the Constitution and arrogating to itself the power to G divest ownership of targeted lands and vesting such ownership with the State the Legislature was alive to the issue of possible mistakes that could have been made by the "acquiring authority" in the previous dispensation in relation to the identification of agricultural lands targeted for compulsory acquisitions. Subsection (5) of s 16B of the Constitution put it as follows:

> "(5) Any inconsistency between anything contained in – H

Mafusire J

> (a) a A notice itemised in Schedule 7;
>
> (b) a notice relating to land referred to in subsections(2)(a)(ii) or (iii);
>
> and the title deed to which it refers or is intended to refer, *and any error whatsoever contained in such notice*, shall not affect the operation of subsection (2)(a) or invalidate the vesting of title in the State in terms of that provision."

B Thus while under the Land Acquisition Act the process of "identifying" agricultural land for compulsory acquisition entailed the publication in the Government *Gazette* and in a newspaper, for a period as specified, of a preliminary notice describing the nature and extent of the land, and setting out the purpose of the acquisition, in terms of the new mode of acquisition under s 16B of the Constitution the process of identification simply took the C form of a reference to the preliminary notices themselves.

So in terms of the acquisition under s 16B of the Constitution, particularly subs (2)(a)(1),one simply looked at those preliminary notices and the properties listed by them in Schedule 7 to see if a particular property was the one targeted. If the property appeared in the list then that, in my view, D would be the end of the matter. It would be the property being acquired by Parliament; the property the ownership of which was being divested from the previous owner and the property the ownership of which was being vested in the State. In my view it would matter not that in a subsequent notice in the Government *Gazette* such a property might have been withdrawn in E accordance with s 5(7) of the Land Acquisition Act.

If indeed such a property would have been withdrawn but nonetheless found itself back on the list in terms of s 16B of the Constitution then the acquisition in terms of the Constitution would prevail.

Such an error, if ever it was, would be "any error whatsoever contained in such notice" within the meaning of s 16B(5)(a) and (b) of the Constitution. The Supreme Court, in the *Mike Campbell* case above, stated that the pieces of agricultural land listed in the 157 preliminary notices as itemised on Schedule 7 had indeed been acquired by and vested in the State with full title therein with effect from the appointed day, namely 14 September 2005.

Gowora J, as she then was, in *Etheridge v Minister of State for Lands & Anor* 2009 (1) ZLR 82 (H), also noted, at 87A–B of the judgment, that the force and effect of s16B of the then Constitution was to immediately vest ownership in the State of rural land as would have been gazetted in terms of the Land Acquisition Act, either prior to 8 July 2005, or after that date, but before 14 September 2005, the appointed date for the Constitutional amendment.

2013 (2) ZLR p564

Mafusire J

Furthermore, and at any rate, *Matanda's* case would, in my view, be distinguishable in that in the present case the very first preliminary notice in 2000, namely GN 405 of 2000, was never withdrawn. It had merely lapsed by operation of the law. But it was still included on Schedule 7, suggesting that the Legislature did intend to acquire the land that had previously been identified by that notice together with the rest of the other 156 properties listed.

The Remaining Extent of Stuhm had therefore been acquired by operation of the law.

Disposition

On 12 February 2009, which was about a month before the transfer of the property to TBIC, the registrar of deeds had issued an open letter addressed to "whom it may concern". In substance the letter stated as follows:

(i) that Reimer had been the owner of the original property called the remaining extent of Stuhm measuring 1047.7410 hectares and held under deed of transfer 3032/87;

(ii) that two subdivisions therefrom called Lot 2 of Stuhm measuring 412.1091 hectares held under deed of transfer 4975/97 and Lot 3 of Stuhm measuring 79.4959 hectares held under deed of transfer 9247/98 had been sold and transferred to Darnall Investments (Pvt) Ltd in 1997 and Douglasdale (Pvt) Ltd in 1998 respectively; and

(iii) that as at that date the remainder of that property was being held by Reimer under deed of transfer 3032/87 and that the extent thereof was 583.1360 hectares and that it had been acquired by the State on 3 November 2005.

As it was the property described in 3 above that was transferred irregularly to TBIC as already noted, that transfer is hereby declared null and void *ab initio.* Deed of transfer no 1724/2009 is hereby set aside. Flowing from that ruling I order as follows:

1. The decision by the first respondent in HC 9527/2001 who is also the third respondent in HC 601/2011, and his letter to the applicant dated 24 June 2011 purporting to withdraw the offer letter dated 7 August 2006 to the applicant in respect of the property situate in Goromonzi District, Province of Mashonaland East, called Subdivision 1 of the Remaining Extent of Stuhm, measuring approximately 534 hectares are hereby set aside.
2. The aforesaid offer letter to the applicant dated 7 August 2011 in respect of the aforesaid property shall be regarded as valid and effectual for all intents and purposes.

2013 (2) ZLR p565

Mafusire J

3. It is declared that the piece of agricultural land situate in the district of Goromonzi called the Remaining Extent of Stuhm measuring 583.1360 hectares and previously held by Cecil Michael Reimer under Deed of Transfer No 3032/1987 dated 12 May 9187 had been validly acquired by the State in terms of s 16B of the then Constitution of Zimbabwe.
4. Deed of Transfer no 1724/2009 dated 18 March 2009 in favour of TBIC Investments (Pvt) Ltd over the piece of land situate in the district of Goromonzi called Remaining Extent of Stuhm, measuring 583.1360 hectares is hereby cancelled.
5. The fourth respondent in HC 601/2011is hereby directed to restore the original endorsement in terms of s 16B (4) of the then Constitution of Zimbabwe on Deed of Transfer No 3032/1987

aforesaid on the property as more fully described in para 3 above.

6. The Interested Party in HC 9527/2011, being the first respondent in HC 601/2011 and the second respondent in HC 601/2011, together with all those claiming rights of occupation through them, shall vacate the property more fully described in paragraph 3 above within 60 days of D the date of service of this order. failing which the Sheriff for Zimbabwe, or his deputy, or assistant deputy, and if need be, with the assistance of the Zimbabwe Republic Police, shall be authorised, empowered and directed to evict them.
7. The applicant's costs of suit in HC 601/2011 shall be borne by the first E respondent, the second respondent and the third respondent jointly and severally, the one paying the others to be absolved.
8. The applicant's costs of suit in HC 9527/2011 shall be borne by the first respondent and the Interested Party jointly and severally, the one paying the other to be absolved.

F *Robinson & Makonyere,* legal practitioners for applicant in both cases,

Madzivanzira, Gama & Associates, legal practitioners for first and second respondents in Case 1, and for Interested Party in Case 2,

Civil Division of the Attorney-General's Office, legal practitioners for third respondent in Case 1 and for first and second respondents in Case 2

G *L Chimuriwo,* legal practitionersfor fourth respondent in Case 1

1 See *ZESA v Maposa* 1999 (2) ZLR 452 (S) at 466 and *Pamire & Ors v Dumbutshena NO & Anor* 2001 (1) ZLR 123 (H) at 127
2 William Shakespeare in *King Lear*

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Document 57 of 79

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S v TAFIRENYIKA 2013 (2) ZLR 566 (H)

Citation	2013 (2) ZLR 566 (H)
Case No	Judgment No. HH- 441-13
Court	High Court, Harare
Judge	Hungwe J & Mavangira JJ
Heard	25 September 2013; CAV
Judgment	30 October 2013
Counsel	Ms *M Mushaka,* for the appellant *J Uladi,* for the respondent
Case Type	Criminal appeal
Annotations	No case annotations to date

Flynote

Evidence – *credibility – sexual case – child witness – when court may accept such evidence as reliable*

Headnote

It is a well-established rule of our law that judicial officers are required to warn themselves of the danger of convicting on the uncorroborated D evidence of certain categories of witnesses who are potentially suspect. Complainants in sexual offences is one such category. Single witness cases is another. The fact that the witness is a child would add to the caution required in assessing the credibility of such a witness. This however does not detract from the ability of the court to satisfy itself E on the issues of competency when confronted by a child witness. It is not suggested that a court will, in all cases, require a child interviewer to be a specialist in order to adduce evidence from a child. There is no principle of law that says that it is inconceivable that a child of tender age will not be able to recapitulate the facts in his or her memory. A child is always receptive to abnormal events which take place in his life F 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 future.

As a general rule, it can be said that in a case where a child explains relevant events at the crime scene without improvement or embellishment, and at G the same inspires the confidence of the court, his or her deposition does not require any corroboration whatsoever. A child of tender age, it is now accepted, is incapable of having any malice or ill-will against any person. The competency of a child to give evidence is determined by the common law. It relates to whether the child has sufficient intelligence, sense and reason in order to understand the difference between truth H

A and falsehood and recognise that it is wrong to lie. This is determined by the presiding judicial officer after the judicial officer, as well as the prosecution and the defence, have had an opportunity to question the child.

This approach accords with article 12(1) of the UN Convention on the Rights of the Child, 1989, which requires signatories to the convention to accord to "the child who is capable of forming his or her own views the right to B express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child." These rights are only extended to children who are capable of forming their own views and those views are only given due weight according to the age and maturity of the child in question. The courts C can rely on evidence tendered by a child if it inspires its confidence and there was no embellishment or improvement in it.

Cases cited

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

S v Chuma 1994 (2) ZLR 284 (S)

D *S v Moyo* 1992 (1) ZLR 158 (H)

Legislation considered

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

UN Convention on the Rights of the Child 1989, art 12

Case information

E Ms *M Mushaka,* for the appellant

J Uladi, for the respondent

Judgment

Hungwe J. The appellant, a seventy-year old man, was convicted of rape F as defined in s 65(1) of the Criminal Law (Codification and Reform) Act, [*Chapter 9:23*] after a trial. He was sentenced to 15 years' imprisonment of which seven years were suspended on conditions of good behaviour. The appellant was convicted on the following facts found to have been proved by the court *a quo*. The complainant was aged 11 years at the time of the alleged offence. She was staying with the appellant, who is married to her G aunt. On an unknown date in December 1998 her aunt left her together with the appellant. She instructed that complainant sleeps in the same bedroom with her husband that night. She would sleep on the floor and he would be on their bed. The appellant, on that night, took off his clothes and forced himself on the complainant. The following day he instructed her to bring H him bath water to a structure used as a bath room. When the complainant

did so, he again ravished her. He threatened her against telling anyone lest A he would throw her into a crocodile infested pool.

The appellant noted his appeal to this court on the following grounds:

"1.1 The learned regional magistrate did not accord due credence to the fact that the complainant was a 6 year old minor from which a highly creative imagination could be reasonably expected at the time of the alleged offence B although she testified as a major at 19 years.

1.2 The court *a quo* also omitted to take into cognisance the fact that the complainant's report was formally made four years after the alleged offence and that the said report was not made freely and voluntarily.

1.3 Given the time lapse between the commission of the alleged offence and its consequent report, the learned regional magistrate did not accord due weight C to the fact that in the absence of concrete circumstantial evidence, proof of penetration *per se* does not necessarily imply that the appellant was the penetrator (sic).

1.4 The court *a quo* also adopted an over-cautionary approach against the appellant's sole witness, whose evidence it deemed to be total lies, aside from holding her to be a highly probable accomplice given her understandable contention (given the complainant's infancy) that she never left the complainant D in the custody of the appellant (*sic*).

1.5 In believing the complainant's testimony it would seem that the regional magistrate overlooked to note the inconsistencies by the complainant as regards her age at the time of the alleged offence which would in turn throw grains of dust on her overall recollection of events (*sic*).

1.6 The court *a quo* also handled the trial on the conviction that the complainant E was eleven years old at the time of the alleged offence when she was in fact six years old. It is contended that the trial court is likely to have handled facts, circumstances, evidence and/or the complainant's testimony with a higher degree of caution had it taken into account the complainant's real age at the material time.

1.7 The trial court also omitted to enquire into the fate of the alleged blood F stained skirt, if at all it ever existed. This is more particularly so if regard is had to the fact that the appellant was a self-actor and the dress is on record for alleged giving rise to criminal proceedings against the appellant (*sic*).

1.8 The learned regional magistrate therefore overlooked the fact that the appellant's conviction and consequent sentence is extremely unsafe at law on the least (*sic*)." G

Background

It is necessary, before dealing with the specific grounds of appeal advanced on the appellant's behalf, to correct the appellant's apparent mis-reading of the evidence on record. This can be achieved by going over the facts proved at the trial. It may well have arisen from the fact that the appellant's counsel H

A was not part of the trial proceedings, being briefed only after the appellant's conviction and sentence. That, however, on its own, cannot excuse the distortion of the record of proceedings.

The record reflects that the complainant was born on 19 June 1987. The official report to police was recorded sometime in January 2002. The crime, B according to the complainant, was committed during December 1998. She then left the village in Goromonzi, where the offence was committed,

sometime in 1998 during the school holidays. She had, soon after the offence, been threatened by the appellant. Later, the appellant brought her clothes from his residence in Goromonzi to Chiswiti, Mt Darwin, Mashonaland Central. The complainant's aunt took the clothes from where the appellant had left C them at a shop. She noticed on the complainant's skirt a washed blood-stain and alerted the complainant's mother. Upon being quizzed, the complainant revealed how she was raped by the appellant on two occasions. A report was made to a local police base in Mt Darwin. Police at Juru, in Mashonaland East, only recorded the official report in about January 2001. It is clear that the complainant was 11 years old when she was raped, not six years as D suggested by the appellant in his heads of argument. She was actually 24 years old when she testified at the trial, not 19 years as she states in her evidence in court. The trial court found these facts proved. It is therefore erroneous to suggest that she was only six years old when she was raped. The report was made around the time she came to her parents' village in 1998, which E would make it contemporaneous with the events regarding the discovery of the blood stain. The police report was made around January 2002, going by the CR reference for Juru Police. The report to Juru came well after the report to the police base at Chiswiti in Mt Darwin, which report was made immediately after the discovery of the offence. The report to police was, at the very latest, made some two years after the offence was discovered but F after an earlier report had been filed with a local police base in Chiswiti.

The finding in favour of the complainant's credibility was challenged on the basis of the report she made to her aunt and, subsequently, to her mother. This followed the discovery of blood-stained clothing which the appellant had brought. She was 11 years old then. That report included details as to how G the crime was committed on the two occasions she said she was ravished. Corroboration of the report was found in what the second State witness, who is the complainant's aunt, told the court about the complainant's description of the circumstances in which the crime was committed. The fact that she gave a consistent account of how she was ravished indicates the degree of probative value to be attached to her report. The formal report to police H was recorded in 2001, some two years later, not four years as suggested in

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the appellant's second ground of appeal. The complainant was not asked to A explain why the police report took so long to make. Her aunt, the second State witness, was asked. Her explanation was that the complainant's mother went to report to a nearby police base. By inference this would be soon after the complainant revealed her ordeal in Chiswiti. She testified that this led to acrimony between the complainant's parents. The wife blamed the B husband for the complainant's plight as he had sent the complainant to stay with the appellant. The husband has since died. All this may have, in my view, contributed to the delay in lodging the report at Juru in Mashonaland East, which is the police station administering the village where the crime occurred. There is no suggestion that the report to her mother and to her aunt was not made freely and voluntarily, as suggested in the second ground of C appeal. This ground was not persisted with in the heads of argument.

Issues of evidence

In convicting the appellant, the court stated in its reasons for judgement;

> "When the alleged offence occurred complainant was aged 11 years old and she D testified when she was 19 years old. According to her testimony she told the court that she was raped in the absence of her aunt who had left instructions that she would sleep in the bedroom, and she slept on the floor. Accused then sexually abused her and the following day abused her in the garden while giving him water to bath.
>
> She was threatened to be thrown in a pool full of crocodiles if she discloses E hence she kept quite. The matter came to light after a blood-stained skirt was discovered among her clothes and when confronted she disclosed."

The thrust of the appellant's dissatisfaction with the conviction appears to be grounded on the acceptance of the evidence given by a child, whether six or eleven years old. It was argued by Ms *Mushaka* that the complainant's evidence could not be relied upon because of her age at the time of the F commission of the offence. On the other hand, Mr *Uladi* urged the court to reject the appellant's contention since the complainant's evidence met the criteria set out in *S v Banana* 2000 (1) ZLR 607 (S) where, at p 616, the Supreme Court stated as follows:

> "(c) Complaints made in sexual cases G

Evidence that a complainant in an alleged sexual offence made a complaint soon after its occurrence, and the terms of that complaint, are admissible to show the consistency of the complainant's evidence and the absence of consent. The complaint serves to rebut any suspicion that the complainant has fabricated the allegation.

The requirements for admissibility of a complaint are: H

2013 (2) ZLR p571

Hungwe J

(1) It A must have been made voluntarily and not as a result of questions of a leading and inducing or intimidating nature. See *R v Petros* 1967 RLR 35 (G) at 39G-H.

(2) It must have been made without undue delay and at the earliest opportunity, in all the circumstances, to the first person to whom the complainant could reasonably be expected to make it. See *R v C* 1955 (4) SA 40 (N) at 40G-H; *S v Makanyanga (supra* at 242G-243C).″

B Flowing from this and other cases cited in this case, the general principles which can be gleaned from the court's approach may be stated in the following terms. It is a well-established rule of our law that judicial officers are required to warn themselves of the danger of convicting on the uncorroborated evidence of certain categories of witnesses who are potentially suspect. C Complainants in sexual offences are one such category. Single witness cases are another. The fact that the witness is a child would add to the caution required in assessing the credibility of such a witness. This however does not detract from the ability of the court to satisfy itself on the issues of competency when confronted by a child witness. It is not suggested that a court will, in all cases, require a child interviewer to be a specialist in order D to adduce evidence from a child. There is no principle of law that says it is inconceivable that a child of tender age will not be able to recapitulate the facts in his or her 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 or her life. The child may be able to recapitulate carefully and exactly E when asked about the same in future.

As a general rule, it can be said that, in a case where a child explains relevant events at the crime scene without improvement or embellishment, and at the same inspires the confidence of the court, his or her deposition does not require corroboration whatsoever. The child of tender age, it is now accepted, is incapable of having any malice or ill-will against any person. F The competency of a child to give evidence is determined by the common law. It relates to whether the child has sufficient intelligence, sense and reason in order to understand the difference between truth and falsehood and to recognise that it is wrong to lie. This is determined by the presiding judicial officer after the judicial officer, as well as the prosecution and the G defence, have had an opportunity to question the child.

In my respectful view, this position is in accordance with art 12(1) of the UN Convention on the Rights of the Child 1989, which states:

12.1 States' Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the H age and maturity of the child.

2013 (2) ZLR p572

Hungwe J

There are, however, two restrictions to the rights in art12(1), namely that the A rights are only extended to children who are capable of forming their own views and those views are only given due weight according to the age and maturity of the child in question. The court can rely on evidence tendered by a child if it inspires its confidence and there was no embellishment or improvement in it. B

The complainant was questioned by her mother as to how she had lost her virginity. At first she maintained her silence. She expressed the fear induced in her by the appellant that she would be thrown into a crocodile infested river should she tell anyone what he had done to her. After being assured that she was not returning to stay with the appellant, the complainant then divulged, in detail, how the appellant had raped her. In my view, there is nothing to C suggest that the requirements set out in *Banana's* case *supra* were not met. The fact that thereafter the complainant told her story tends to confirm her naivety, which in turn lends transparency to the truthfulness of her evidence.

The first ground of appeal is that the magistrate failed to observe the "cautionary rule", especially in regard to the evidence of children. I have D expressed my view as to the admissibility of evidence by children in general and the particular evidence tendered by the complainant in the present matter. I dismiss this ground out of hand. The competency to give evidence displayed by the witness, in my view, removed any fear that may have been entertained when the matter was not reported at the earliest possible opportunity. She had been threatened by her assailant. She was 11 years then. It is quite clear E that the magistrate had considered the issues of capacity and suggestibility at the time the complainant made her initial report. He carefully analysed the evidence placed before him and treated it with caution, seeking corroboration of the evidence of the complainant, both on the ground of her youth and on the ground that she was the victim in a sexual offence. He accepted that E evidence. I find no misdirection in his doing so.

Ms *Mushaka* maintained that the magistrate failed to observe this evidential requirement and thus did not exclude the possibility of false incrimination. I will consider this contention in detail presently. There is no basis for the argument regarding the age of the complainant being six years. She was 11 years old. As pointed out above, there is no rule excluding young children G from testifying in sexual offences; or adults, from relating in court what happened to them when they were children of a given age. The capacity of a child to form his or her views does not mean that the child must be fully developed to do so, since it is up to the court only to give weight to the views expressed by a child in accordance with his or her age and her maturity. The question to ask is whether the child is in a position to form a view on an issue H

Hungwe J

A in question and not on a whole range of possible issues in a particular case. This is the basis upon which, over the years, the evidence of children has been relied upon, with necessary assistance in appropriate cases, to determine the question of sufficiency of evidence in such cases as rape where the child was the victim. In any event, the complainant in the present case was 24 years old when she gave her evidence. She was testifying as to her experience B several years ago. Her evidence was sufficiently corroborated by her aunt. I find no misdirection in the acceptance of her evidence by the court *a quo*.

The rest of the grounds of appeal attack the findings of fact made by the trial magistrate. The appellant is not on firm ground. I say so because it is a well established rule of procedure that on appeal an appellate tribunal will disturb C the findings of fact only when they are demonstrably wrong. Criticism was levelled at the trial magistrate's findings rejecting the evidence of both the appellant and his wife. Upon a perusal of the evidence on record, I am not prepared to hold that the learned magistrate was wrong in disregarding it.

The appellant seemed to suggest that the court was not entitled to rely on the testimony tendered by the complainant on the basis that she was of D tender age. Clearly she was not when she gave that testimony. She was 24 years old when she testified, as confirmed by her birth certificate that was produced in court. In any event, no authority for this submission was cited. Even if the suggestion was that her initial report to her aunt was given when she was a child, the court can rely on the evidence tendered by a child if it E inspires confidence and there was no embellishment or improvement in it. The law on the issue can be summarised as being that the testimony of a child witness may require corroboration, but where his or her deposition inspires the confidence of the court and there is no embellishment or improvement therein, the court may rely on his or her evidence. The evidence of a child must be evaluated more carefully and with greater circumspection because F he or she is susceptible to suggestions and other influences more easily than an adult. Only in the case where there is evidence on record to show that a child has been so influenced, will the court be justified in rejecting his or her testimony partly or fully. However, the inference as to whether a child has been coached or not can be drawn from the content of his or her evidence. There was no evidence that the complainant had been coached or influenced G in her testimony. She gave her evidence when she was an adult. The criticism levelled against her, therefore, is unjustified. Even if it did, for the reasons I have given I find no fault in her evidence, both at law and in fact. The trial court, correctly in my view, and for the reasons it gave, accepted her testimony and rejected that of the appellant. Only in the case where there is evidence H on record that the child has been tutored or coached can the court reject his

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Hungwe J

or her evidence, partly or fully. However, the inference as to whether or not A a child has been tutored or coached can be drawn from the content of his or her testimony. In the present case there is no suggestion that the record in some way reflects such an irregularity.

Since the complainant was testifying to events which occurred over a decade before, her evidence required to be treated with caution. The trial court, in my B view, was alive to the danger which passage of time wreaked on memory. The trial magistrate sought corroboration of her evidence regarding the event in issue. It found sufficient corroboration in the reference to the blood-stained dress which aroused the suspicion of the complainant's aunt, the subsequent account given by the complainant in explaining the stain and the medical C examination report which confirmed penetration of her vagina.

The significant facts that were revealed by the examination were:

(1) it was confirmed that the complainant had lost her virginity; and

(2) she was not currently sexually active (the examination was painful).

Her explanation fits in with her version of events. The fact that she was not D sexually active suggests that penetration occurred in the distant past rather than the recent past. The question as to who penetrated her is answered in the consistent explanation which she gave from the moment the blood-stained skirt was discovered. When asked to explain the blood stain, her first reaction was to express her fear of being dumped into a crocodile infested river by her uncle. It is only after she was assured that she was not returning to stay E with him that she narrated her ordeal. In my view, the absence of the blood-stained clothing did not detract from the sufficiency of the evidence placed before the court *a quo.* The conviction was not based on the blood-stained clothing, but it was a piece of evidence that triggered the suspicion leading to the discovery of the crime. How the production of this piece of evidence could, in some way, be exculpatory of the appellant is not clear. I am unable F to find that the failure to produce the piece of cloth in evidence during trial in any way affected the propriety of the conviction. Had it been produced, then it would have corroborated the evidence tendered in support of the conviction rather than exculpate the appellant.

Some oblique reference was made to the failure to bring the appellant to G trial within a reasonable time as required by s 18(9) of the old Constitution of Zimbabwe. First, this ground was raised for the first time in the heads of argument when addressing sentence only. Second, no notice of the intention to raise a constitutional point was given to the respondent. As such it was not persisted with at the hearing of the appeal and therefore did not fall for consideration **– s**ee *S v Nkomo & Anor* S-52-06. H

2013 (2) ZLR p575

Hungwe J

A As for sentence, the ground of appeal advanced was that the trial court failed to give due weight to the age of the appellant and the period which he spent awaiting trial, when assessing an appropriate sentence. I am unable to find merit in this ground. The trial court specifically mentioned those factors it considered mitigatory when assessing sentence. Age was identified as one such factor. The court also correctly gave due weight to the fact that it would B treat both counts as one for sentencing purposes. Generally, sentences of 10 years imprisonment per count are a regular feature in cases of this nature. See *S v Moyo* 1992 (1) ZLR 158 (H); *S v Chuma* 1994 (2) ZLR 284 (S).

The Criminal Law (Codification and Reform) Act [*Chapter 9:23*] provides for up to life imprisonment for this type of offence. Where, therefore, a C shorter sentence is imposed which is an indication that the sentencing court exercised its sentencing discretion properly, an appellant would have to show more than just that another court would have imposed a different sentence in the circumstances. An appellant would have to demonstrate clearly that the sentence impugned was, in one way or the other, out of line with the usual sentences imposed in similar cases. Without that an appeal court would not D interfere with a sentence simply because it felt that it would have imposed a different sentence.

In light of the above, I dismiss the appeal in its entirety.

E MAVANGIRA J concurred.

Masawi & Partners, appellant's legal practitioner

Attorney-General's Office, respondent's legal practitioner

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Document 58 of 79

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2013/Volume 2/WONG & ORS v LIU & ANOR 2013 (2) ZLR 576 (H)

WONG & ORS v LIU & ANOR 2013 (2) ZLR 576 (H)

Citation	2013 (2) ZLR 576 (H)
Case No	Judgment No. HH-380-13
Court	High Court, Harare
Judge	Mathonsi J
Heard	23 October 2013; *CAV*
Judgment	30 October 2013
Counsel	*Z Makori*, with him *T Chiurayi* and *W Magaya*, for the applicants *E T Samkange*, within him *T Hungwe*, for the first respondent No appearance for the second respondent
Case Type	Chamber application
Annotations	Link to case annotations

Flynote

Costs – *security for – application – who may request security for costs – defendant not an incola – not entitled to request security for costs*

Practice and procedure – *parties – peregrinus – action against peregrini – attachment order – need to obtain order of attachment even if peregrinus* D *is within Zimbabwe or has property therein – jurisdiction – right of court to raise the matter mero motu*

Words and phrases – *"incola" – meaning thereof in the context of security for costs*

Headnote

In the jurisdiction of Zimbabwe there are no rules providing for E an order for security for costs. It arises out of judicial practice. The court, however, retains the exclusive discretion to make such an order or not to. A party seeking the remedy of a security for costs must satisfy the court that it is an *incola* before the protection can flow to it. *"Incola"* connotes the element of residence: not merely temporary residence but domicile in F a country. The remedy exists to make sure that an *incola* will not suffer any loss if he is awarded the costs of court proceedings when he is sued by a *peregrinus.*

In terms of r 9 of the High Court Rules 1971 (RGN 1047 of 1971), a summons is a process commencing an action and ordinarily has to be served upon G the defendant or his authorized agent. Where a *peregrinus* is being sued, even if he is within Zimbabwe or has property located

in Zimbabwe, the plaintiff must seek and obtain an attachment order in order to find or confirm jurisdiction and, this being a question of jurisdiction, the court is entitled to raise it *mero motu.* H

Cases referred to A

Bowes & Ors v Manolakakis 2011 (2) ZLR 59 (H)

Chirongoma v TDG Logistics & Anor 2011 (1) ZLR 98 (H)

O'Gormain v Forestry Comission & Ors HH-107-06

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

Legislation considered B

High Court Rules 1971 (RGN 1047 of 1971), rr 9 and 44

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

Case information

Z Makori, with him *T Chiurayi* and *W Magaya*, for the applicants

E T Samkange, within him *T Hungwe*, for the first respondent

C No appearance for the second respondent

Judgment

Mathonsi J: The applicants are Chinese nationals resident in Hong Kong who are seeking an order for stay of execution of a judgment obtained against them in default by the first respondent, another Chinese national, D on 23 September 2013 in terms of which they were ordered, jointly and severally, the one paying the others to be absolved, to pay the first respondent the sum of US$12 million together with interest at the prescribed rate and costs of suit, being damages for malicious prosecution. They have since filed an application for the rescission of that judgement in HC8709/13 which application is yet to be determined and, as such, they would want execution E to be stayed pending the hearing of the rescission of judgement application.

In historical perspective, the first respondent sued the 3 applicants in HC434/13 by summons issued on 21 January 2013 seeking damages totalling a sum of US$60 900 000 which, he claimed, arose out of his arrest and detention at the instance of the applicants in October 2012. He was detained for two days F before being released on bail and, in due course, the criminal case came to naught after the court refused his further remand on 7 January 2013.

At the hearing of this application Mr *Samukange* took a preliminary point that the applicants should not be heard because they being *peregrini*, they have not given security for costs to protect the first respondent. While conceding that the applicant himself is a Chinese national and an international businessman, G he was of the view that the first respondent is a resident of Zimbabwe running about 7 companies in this country. He submitted that the $20 000 security offered by the applicants is inadequate.

Mr *Samukange* relied on the authority of *O'Gormain v Forestry Commission & Ors* HH-107-06 in which Gowora J (as she then was) stated at p 2 of H that judgment that:

Mathonsi J

> "It is trite that under our law any person who is a foreigner or who is not ordinarily A resident within this jurisdiction may, as plaintiff, be called upon to provide security for costs unless he can prove that he has immovable property sufficient to pay the costs which may arise. In *casu* the applicant has not denied that he has an obligation to provide the security for the costs. He has not indicated what amount would constitute a reasonable sum. The court has a discretion to dispense with the provision by a *peregrinus* to provide security for costs but B only in exceptional cases."

In my view, that decision does not even support Mr *Samukange*'s submission that the applicants should not be heard to the extent that it is distinguishable by the fact that in the present case the

applicants have offered $20 000 as security. Gowora J (as she then was) also recognised the discretion of the C court to dispense with security in exceptional circumstances.

In this jurisdiction, there are no rules providing for an order for security for costs. The issue of security for costs arises out of judicial practice. The court however retains the exclusive discretion to make such order or not to: see *Bowes & Ors v Manolakakis* 2011 (2) ZLR 59 (H) at 63. A party seeking the remedy of security for costs must satisfy the court that it is an *incola* before D the protection can flow to it. "*Incola"* connotes the element of residence, not temporary residents but it constitutes domicile in a country.

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

> "The issue relating to the furnishing of security for costs by a plaintiff who is *peregrinus* is discussed by the learned authors of *The Civil Practice of the Superior Courts of South Africa* 3 ed at p 25. There the learned authors have this to say:
>
> > 'A *peregrinus* who initiates proceedings in our costs must as a general rule give security to the defendant for his costs, unless he has within the area of jurisdiction of the court immovable property with a sufficient margin unburdened to satisfy any costs which may arise. F
>
> The presence of immovable property is a defence to a claim for security but the doctrine has not been extended to include movable property. The court has, however, a discretion to dispense with security in exceptional cases but should exercise its discretion sparingly'
>
> The rule requiring a *peregrinus* to give security for the defendant's costs was laid down as far back as 1828 in *Witham v Venables* (1828) 1 Menz 291 and G subsequently explained in *Lumsden v The Kaffraian Bank* (1884-51) 3 SC 366.
>
> *The object of the rule is to make sure that an* incola *will not suffer any loss if he is awarded the costs of the proceedings. The rule exists primarily to protect the interests of an* incola *who is sued by a* peregrinus*."* (Emphasis added.)

In *Bowes & Ors v Manolakakis supra* I quoted with approval the following passage in *Herbstein and van Winsen supra* at p251 in drawing the conclusion H

2013 (2) ZLR p579

Mathonsi J

A that the protection of provision of security for costs is only available to an *incola* in this country:

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

The first respondent is a Chinese national cherishing his domicile in that part of the world although with business interests within the territorial jurisdiction of Zimbabwe. He is insisting on the applicants providing security for costs before their application can be heard. The authorities I have cited above state that the protection for security for costs is only available to an *incola* of this D jurisdiction. The respondent enjoys no automatic right to security for costs he also being a *peregrinus* who has brought a suit against the applicants in this country. I would therefore not countenance granting such an order in this matter even in there was an application for it before me. There is not.

Even if I am wrong in that conclusion, I would still not grant an order for E security as l have a discretion to dispense with security in exceptional cases. In my view, this case is such exception, given the fact that it is an urgent application for a stay of execution of an order for payment of a huge sum of $12 million as damages for malicious prosecution which, on the face of it, appears to have been granted in error. To that extent, the parties still have an F opportunity in the main action to deal with the issue of security for costs. In any event the applicants have made an offer for costs. It is for the foregoing reasons that I dispensed with the provision of security for costs in this matter.

I proceed, to deal with the merits of the application which is opposed by the first respondent. In the summons and declaration the applicants' address was given as "c/o Manase and Manase Legal Practitioners, 9th Floor Megawatt G House, 44 Samora Machel Avenue, Harare". The Deputy Sheriff for Harare, purported to serve the summons upon that firm of legal practitioners on 22 January 2012 and in his return of service, he remarked:

> "Served on Thelma receptionist for Messrs Manase and Manase Legal Practitioners, first, second, and third defendants' legal practitioners of record, who accepted H service on behalf of the defendants".

2013 (2) ZLR p580

Mathonsi J

The Deputy Sheriff does not say in that return that he was shown any A authority on the part of that firm to receive summons, given that a summons is a process commencing action in terms of r 9 of the High Court Rules and ordinarily has to be served upon the defendant or his authorised agent. He could not properly claim that Manase and Manase were the "first, second and third defendants' legal practitioners of record", when he had not had B sight of either a power of attorney given to them to receive summons or a notice of assumption of agency filed by that firm.

Indeed, Manase and Manase were quick to point out in letters written to the first respondent's legal practitioners, Venturas & Samukange, the Deputy Sheriff and the Registrar of this court, that they did not have authority to receive summons on behalf of the three applicants. In fact those protestations C regarding lack of authority and the residence of the applicants were made by the erstwhile legal practitioners days before the purported service of summons upon them, and even after the service. Let it suffice to quote just one such letter dated 15 January 2013 addressed to Venturas & Samukange:

> "RE: HUNG YUEN WONG v HSAIO CHENG LIU & THREE OTHERS – D CASE NO HC 135/13
>
> We refer to the above matter instant and your attempted service of summons at our law firm and the subsequent meeting our Mr W T Pasipanodya had with the Deputy Sheriff and the ensuing tele-conference with your Mr J Samukange.
>
> We write to reiterate that we do not have instructions to represent the defendants. They reside in Hong Kong China and you should serve them there personally. E
>
> We shall consequently advise the Registrar of this position. Kindly be advised accordingly.
>
> In the mean time we shall remain.
>
> Yours faithfully
>
> MANASE & MANASE" .

A similar letter was written on the same date to the Registrar. Therefore, F when the Deputy Sheriff returned to that firm on 22 January 2012 purporting to serve the summons on the instructions of Venturas & Samukange, that was an exercise in mischief. Not only was it known that Manase & Manase did not have authority to receive summons, as they did not even represent the applicants, it was also within the knowledge of the first respondent's G legal practitioners that the applicants were *peregrini* cherishing residence in Hong Kong.

Indeed, in his opposing affidavit the first respondent makes it clear that he was aware that the applicants are based in Hong Kong and that they possess no property whatsoever in this jurisdiction. He however makes the shocking point that because Manase & Manase represented them in the criminal H

2013 (2) ZLR p581

Mathonsi J

A prosecution against him and even visited them in Hong Kong, they were obliged to enter appearance to defend and thereafter transfer the summons to the applicants' current legal practitioners. No attempt is made to lay a legal foundation for this strange assertion.

The knowledge of the applicant's residence in Hong Kong should have B triggered in the mind of the first respondent's legal practitioner the question of jurisdiction of this court, assuming that issue had escaped his gaze before that. To the extent that the defendants in that action are known to reside in Hong Kong, the plaintiff in that matter should have sought leave of the court in terms of r 44 to serve the process in Hong Kong not to force service upon Manase & Manase. He did not do that.

C As if that was not enough, the mere fact that the first respondent cited the address of Manase & Manase as the address for service of the applicants and admits that they are residents of Hong Kong means that he knew very well that they did not have an address in this jurisdiction as they are *peregrini*. The first respondent was therefore proceeding rough shod against all procedures D set out in the rules, disregarding the rules and the law in cavalier fashion.

I say so because our civil practice and procedure is clear that a person domiciled and resident in a foreign country cannot be sued in this court as it does not have jurisdiction over that person. For that reason, there is need for an attachment *ad fundandam jurisdictionem* of that person or his property E in order to make him amenable to the jurisdiction of the court. Such person or his property can only be attached while he or it is within the jurisdiction of the court and only after an attachment order has been issued by the court.

It is important to point out that the attachment order should be issued by the court before the summons is issued against that person. In *Chirongoma* v F *TDG Logistics & Anor* 2011 (1) ZLR 98 (H) at 101H-102B I had occasion to quote with approval Herbstein and van Winsen *The Civil Practice of the Superior Courts of South Africa* 3 ed (1979) at pp 788 and 789 where the learned authors state:

> "Where an *incola* wishes to sue a *peregrinus* and none of the usual grounds upon which the court might have jurisdiction is present, attachment is a condition G precedent to the action, for it is upon the attachment that the court's jurisdiction is founded …
>
> In addition to he grounds mentioned by De Villiers CJ, quoted above, a court will have jurisdiction to try a suit arising out of a delict committed within the area of its jurisdiction, whether the suit be between an *incola* and a *peregrinus* or between two *peregrini*. But in an action *ex delicto* a *peregrinus* cannot obtain H an attachment where none of the ordinary grounds of jurisdiction exist".

2013 (2) ZLR p582

Mathonsi J

Clearly, therefore, where a *peregrinus* is being sued, even if he is within A Zimbabwe or has property located in Zimbabwe, the plaintiff must seek and obtain an attachment order in order to found or confirm jurisdiction. Even where the court acts in terms of s 15 of the High Court Act [*Chapter 7:06*] to direct service of process without an attachment order, it can only do so if satisfied that the person or his property concerned is within Zimbabwe and B is capable of attachment or arrest.

The question of jurisdiction is one which the court is entitled to raise *meromotu* even where the parties have not done so. In my view, had the attention of Bere J who granted the default judgment in favour of the first respondent been drawn to the letters written by Manase & Manase protesting the absence of authority to receive summons on their part and the lack of jurisdiction, he C would not have granted default judgment. It is unfortunate that the letters were not included in the bound record placed before the learned judge. Clearly there was no proper service and there is still a need to inquire into whether this court has jurisdiction, especially as the summons was issued without an order of attachment to found or confirm jurisdiction. Without declaring the summons to be invalid, it being unnecessary to do so at this stage, it is D an issue that has to be investigated.

For the present matter, it is enough to state that the applicants have made a solid case for a stay of execution of the default judgment as it is susceptible to rescission on the grounds that it was granted in error. In addition, the first respondent was awarded damages of $12 million without a thorough E inquiry as to the propriety of that award given that the court did not have the benefit of opposition to the claim. This is a factor I cannot ignore in the interest of justice.

Accordingly I grant the provisional order as amended, the interim relief of which reads: F

> "INTERIM RELIEF GRANTED
>
> Pending determination of this matter, the applicants are granted the following relief –
>
> 1. The execution of the default judgment of this court handed down on 23 September 2013 is hereby stayed.
> 2. In the event that any of the applicants' property has been attached G and removed in pursuance of a writ of execution issued out of this court, such property should forthwith be released."

Coghlan, Welsh & Guest, applicants' legal practitioners

Venturas & Samkange, first respondent's legal practitioners H

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Document 59 of 79

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2013/Volume 2/NHARI v ZIMBABWE ALLIED BANKING GROUP 2013 (2) ZLR 583 (S)

NHARI v ZIMBABWE ALLIED BANKING GROUP 2013 (2) ZLR 583 (S)

Citation	2013 (2) ZLR 583 (S)
Case No	Judgment No. S-51-13
Court	Supreme Court, Harare
Judge	Chidyausiku CJ, Garwe JA & Omerjee AJA
Heard	4 September 2012; *CAV*
Judgment	31 October 2013
Counsel	*T Mpofu*, for the appellant *D Mehta*, for the respondent
Case Type	Details not supplied
Annotations	No case annotations to date

Flynote

Employment – *suspension pending disciplinary proceedings – suspension* C *set aside and reinstatement ordered by Labour Court – disciplinary proceedings and penalty resulting therefrom falling away*

Headnote

The appellant was a senior employee with the respondent bank. She reported directly to the CEO. The bank introduced a new management structure, under which the appellant was to report to a divisional head. The new D structure did not affect her grade, salary or benefits. She was not happy about the change and made complaints directly to the Board, despite being told not to. She was suspended from work without salary or benefits in terms of the Labour (National Employment Code of Conduct) Regulations 2006 (SI 15 of 2006) and charged with two offences, namely, any act, E conduct or omission inconsistent with the fulfilment of the express or implied conditions of a contract and wilful disobedience to a lawful order given by the employer. A disciplinary hearing was conducted two weeks after her suspension. The matter was postponed so that the disciplinary committee could consider the verdict. The appellant did not attend further hearings of the committee.

F The appellant filed an urgent application in the Labour Court in which she sought an order setting aside her suspension and reinstating her to her former position without loss of salary and benefits. The basis of the application was that since the respondent had failed to conclude the matter within the period of 14 days prescribed in the Regulations, the proceedings had become a nullity. Additionally she averred G that the suspension was unlawful as no act of misconduct had been committed and the circumstances merely indicated the existence of a misunderstanding. Notwithstanding the filing of the application, the disciplinary committee determined a few weeks

later that the appellant be dismissed. Subsequently, the Labour Court granted a default judgment H in favour of the appellant in terms of which the suspension was set aside

and re-instatement was ordered. She then filed an application for the A review of the decision to dismiss her. The application was dismissed by the Labour Court.

Held, that where action is taken by an employer in terms of s 6 of the Regulations, the employer must have good cause to believe that an employee has committed a misconduct as defined in s 4 of the Regulations. B If he does have good cause, the employer *may* (but does not have to) suspend the employee with or without pay and benefits. A copy of the letter of suspension with reasons and grounds of suspension must forthwith be served on the employee. Within 14 days of serving the employee with the letter of suspension, the employer must investigate the matter and conduct a hearing into the alleged conduct. After reaching a verdict, C the employer must serve a notice on the employee either terminating the employment if the misconduct has been proved or removing the suspension where the grounds of suspension are not proved.

Where the suspension is set aside and re-instatement ordered, any verdict or penalty imposed pursuant to any allegation made as part of the reason for the suspension must fall away. The suspension and the misconduct D alleged against an employee are intertwined. There can be no suspension where there is no misconduct alleged against an employee. Since the suspension in this case was set aside by an order of court, which order remained extant, the findings of the disciplinary committee and the penalty of dismissal that was imposed could not stand. E

Cases referred to

Nyoni v Secretary for Public Service & Anor 1997 (2) ZLR 516 (H)

PTC v Chizema S-108-04

Legislation considered F

Labour (National Employment Code of Conduct) Regulations (SI 15 of 2006), s 6(1) & (2)(a)

Case information

T Mpofu, for the appellant

D Mehta, for the respondent G

Judgment

Garwe JA: This is an appeal against a judgment of the Labour Court dismissing with costs an application for the review of the decision of the respondent to dismiss the appellant from employment.

The facts of this case are as follows. The appellant was employed by the Zimbabwe Allied Banking Group ("the respondent bank") as Head of the H

Garwe JA

A Compliance Section. In this capacity she reported directly to the Chief Executive Officer. In November 2007, the Chief Executive Officer of the respondent bank advised senior management of the bank of the introduction of a new reporting structure. In terms of the new structure the appellant's position was renamed General Manager, Compliance and she was to report to the Head of the Corporate and Legal Services Division. The memorandum B made it clear that the new structure would not affect the grade, salary or benefits of any incumbent.

The appellant was unhappy that she now had to report through another Head of Department and took the view that her conditions had been unilaterally changed by the respondent bank. She sought clarification from the Chief C Executive Officer of the respondent bank who responded clarifying the position. She was still not satisfied with the explanation given and insisted on using the old reporting structure. She made representations to the Board of Directors of the respondent bank. The Chief Executive Officer again wrote to her directing her to follow the new structure pending any decision to be taken by the Board. The appellant continued to question the new structure D and made further

representations to the Board of Directors of the respondent bank. On 6 June 2008, the appellant was suspended from work without salary or benefits in terms of the Labour (National Employment Code of Conduct) Regulations (SI 15 of 2006) and charged with two offences, namely, any act, conduct or omission inconsistent with the fulfilment of the express or E implied conditions of a contract and wilful disobedience to a lawful order given by the employer. A disciplinary hearing was thereafter conducted on 20 June 2008. The matter was postponed so that the disciplinary committee could consider the verdict. The appellant did not attend further hearings of the committee.

On or about 30 June 2008, the appellant filed an urgent application in which F she sought an order setting aside her suspension and reinstating her to her former position without loss of salary and benefits. The basis of the application was that since the respondent had failed to conclude the matter within the period of 14 days prescribed in the Regulations, the proceedings had become a nullity. Additionally, the appellant averred that the suspension was unlawful as no act of misconduct had been committed and the circumstances merely G indicated the existence of a misunderstanding. Notwithstanding the filing of the application, the disciplinary committee determined on 18 July 2008 that the appellant be dismissed. On 14 August 2008 the Labour Court granted a default judgment in favour of the appellant in terms of which the suspension was set aside and re-instatement was ordered. In October 2008 the appellant H then filed an application for the review of the decision to dismiss her. The

application did not find favour with the Labour Court which proceeded to A dismiss the application with costs. It is that decision which is the subject of the present appeal.

In her notice of appeal, the appellant has attacked the decision of the Labour Court on several grounds. Counsel on both sides are however agreed that there are three main issues that fall for determination before this court. The B first is whether the court *a quo* misdirected itself in failing to find that the chairman of the disciplinary committee was biased. The second is whether the court *a quo* was correct in finding that the first charge in respect of which the appellant was convicted had been proved. The third is what effect, if any, the order of the Labour Court setting aside the suspension of the appellant and ordering her reinstatement had on the disciplinary proceedings which C resulted in the dismissal of the appellant from employment. I consider it prudent to deal with the last issue first.

In his submissions before this court, Mr *Mpofu* urged us to find that the continuation of the disciplinary proceedings was invalid in light of the application which had been filed with the Labour Court and pursuant to which D an order was made setting aside the suspension and ordering re-instatement of the appellant. He further submitted that since the judgment of the Labour Court setting aside the suspension and ordering re-instatement has not been appealed against or otherwise set aside, the decision of the respondent to dismiss the appellant, predicated as it was on a suspension that has been set E aside, cannot stand.

Mr *Mehta*, for the respondent, was asked to address the court on the implications of the order of the Labour Court setting aside the suspension and ordering re-instatement. Mr *Mehta* had no useful submissions to make in this regard. He advised the court that he had made attempts to get details on the order granted by the Labour Court but had failed to get any. He accepted F that the Labour Court had indeed set aside the suspension of the appellant and ordered her re-instatement and that the order remains extant.

Section 6 of the Labour (National Employment Code of Conduct) Regulations (SI 15 of 2006) provides in relevant part:-

> "(1) Where an employer has good cause to believe that an employee has committed G a misconduct mentioned in section 4, the employer may suspend such employee with or without pay and benefits and shall forthwith serve the employee with a letter of suspension with reasons and grounds of suspension.
>
> (2) Upon serving the employee with the suspension letter in terms of subsection (1), the employer shall, within 14 working days investigate the matter and conduct a hearing into the alleged misconduct of the employee and, may, according to H the circumstances of the case –

(a) serve A a notice, in writing, on the employee concerned terminating his or her contract or employment, if the grounds for his or her suspension are proved to his or her satisfaction; or

(b) …"

On a proper reading of the above section, the following emerge:

(a) An B employer must have good cause to believe that an employee has committed a misconduct as defined in s 4 of the Regulations.

(b) If this is the case, the employer may suspend the employee with or without pay and benefits.

(c) A copy of the letter of suspension with reasons and grounds of suspension shall forthwith be served on the employee.

(d) Within C 14 days of serving the employee with the letter of suspension, the employer shall investigate the matter and conduct a hearing into the alleged conduct.

(e) After reaching a verdict, the employer shall serve a notice on the employee either terminating the employment if the misconduct has been proved D or removing the suspension where the grounds of suspension are not proved.

It is clear that a suspension must be based on a belief that a misconduct as defined has been committed. An employer must have good cause for such belief. Only then may the employer consider suspending the employee. The E procedure outlined in s 6 of the Regulations has to be followed where the employee is suspected on reasonable grounds of having committed an act of misconduct. Whilst it is clear from the language of that section that an employer need not suspend an employee in all cases, where he decides to suspend he must comply within the requirements outlined in that section.

F It follows from what I have stated above that where the suspension is set aside and re-instatement ordered, any verdict or penalty imposed pursuant to any allegation made as part of the reason for the suspension must fall away. The suspension and the misconduct alleged against an employee are intertwined. There can be no suspension where there is no misconduct alleged against an employee. Since the suspension was set aside by an order G of court, which order remains extant, the proceedings that followed such suspension cannot therefore stand on their own. The law is settled that one cannot put something on nothing as it will collapse.

In the circumstances, I am satisfied that the findings of the disciplinary committee and the penalty of dismissal that was imposed cannot stand. It is H perhaps pertinent to note at this stage that the basis for the setting aside of

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Garwe JA

the suspension appears to have been the failure on the part of the respondent A bank to comply with the 14 day requirement provided for in s 6(2) of the Regulations. Whether the Labour Court was correct in making that order is not an issue before me. Attention should however be drawn to the decisions in *Nyoni v Secretary for Public Service Labour and Social Welfare & Anor* 1997 (2) ZLR 516 (H) at 522G-523B and *PTC v Chizema* S-108-04 which B suggest that delay alone cannot justify reinstatement and that delay merely gives the aggrieved party the right to the remedy of a *mandamus* to enforce due compliance with any time limits. Whether the 14 day requirement applies to the entire proceedings or only to the investigations is not a matter which is before me and need not therefore detain me.

In the light of the finding that I have made above, namely, that the verdict C and penalty cannot stand, it becomes unnecessary to decide the other issues raised during this appeal.

Before concluding, it appears to me desirable that I comment on the order of 14 August 2008 granted by the Labour Court setting aside the suspension and ordering reinstatement. That order, it is common cause, was granted in D default. In terms of s 92(c)(i) of the Labour Act, a default judgment can, on application, be rescinded. No consideration appears to have been given to the filing of such an application. Both the respondent and the court *a quo* appear to have been oblivious to the existence of such an order and proceeded as if none existed.

The appeal must therefore succeed. It is accordingly ordered as follows: E

(1) The appeal is allowed with costs.

(2) The judgment of the court *a quo* is set aside and the following substituted:

"(1) The application is allowed with costs.

(2) The decision of the disciplinary committee of the respondent of 18 July 2008 terminating the employment of the applicant is set aside." F

CHIDYAUSIKU CJ and OMERJEE AJA concurred

Gill, Godlonton & Gerrans, appellant's legal practitioners

Chihambakwe, *Mutizwa & Partners,* respondent's legal practitioners G

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Document 60 of 79

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2013/Volume 2/INTERFIN BANKING CORPORATION LTD v VEANARCY (PVT) LTD 2013 (2) ZLR 589 (H)

INTERFIN BANKING CORPORATION LTD v VEANARCY (PVT) LTD 2013 (2) ZLR 589 (H)
2013 (2) ZLR p589

Citation	2013 (2) ZLR 589 (H)
Case No	Judgment No. HH-388-13
Court	High Court, Harare
Judge	Mafusire J
Heard	24 July 2013; *CAV*
Judgment	1 November 2013
Counsel	*L Uriri*, for the plaintiff *H Mutasa*, for the defendant
Case Type	Application for provisional sentence
Annotations	No case annotations to date

Flynote

Practice and procedure – *provisional sentence – distinction between provisional sentence and summary judgment procedure – what plaintiff must show – defendant's right to defend action*

Headnote

D In terms of r 20 of the High Court Rules 1971, the holder of a valid acknowledgement in writing of a debt, commonly called a liquid document, may cause a summons to be issued claiming provisional sentence on the document. A "liquid" document is one which evidences by E its own terms, without the need for extrinsic evidence, an unconditional acknowledgement of indebtedness in an ascertained sum of money the payment of which is due. In order to escape provisional sentence on a liquid document, the defendant must satisfy the court on a balance of probabilities that it is unlikely that the plaintiff will succeed in the principal case. Under r 21, a summons for provisional sentence shall F *inter alia* call upon the defendant to satisfy the plaintiff's claim, or, in default, to appear before the court to show cause why he has not done so,

and to acknowledge or deny the signature to the said liquid documents or the validity of the claim.

The provisional sentence procedure is designed to afford summary relief to G a plaintiff whose claim is clear and based on a liquid document. The procedure provides a process whereby a creditor who has sufficient documentary proof with a speedy remedy for the recovery of money due without having to go through the expensive, cumbersome and often dilatory process of an illiquid action. A creditor who has a liquid document is able to obtain an enforceable provisional judgment speedily without H having to wait for the final determination of the dispute between the

parties. A judgment granted in terms of this procedure is founded upon A the presumption of indebtedness evidenced by the document which is truly liquid without requiring assistance of extrinsic evidence.

Unlike the summary judgment procedure, also an extraordinary remedy the judgment of which is final unless appealed against, a provisional sentence, even though executable before trial, remains provisional. The defendant B against whom a provisional sentence is granted can still have his day in court, if he so wishes. He may cause an appearance to be entered with the registrar to defend the action, and must notify the plaintiff of such entry. If he fails to do so within the stipulated time (one month), the provisional sentence immediately thereafter becomes a final judgment (r 28). The provisional sentence may also become a final judgment in C terms of r 29 where the defendant appears in court and acknowledges the claim, or files with the registrar in advance an acknowledgement of the claim over his signature which is witnessed by his attorney or verified by affidavit. Where the defendant enters appearance to defend the action, the summons stands as the plaintiff's declaration, and the defendant must file his plea within ten days after the entry of appearance. D Thereafter the matter proceeds as an ordinary action.

The efficacy of the procedure would be compromised if the summary nature of the proceedings were to be transformed into a fully-fledged opposed motion matter by canvassing in much detail the merits of the claim and the merits of the defence. This does not mean that in every situation where E a plaintiff produces a liquid document and claims provisional sentence on it, the court cannot go behind that document. In appropriate situations it can. And the onus remains on the plaintiff. In discharging the *onus* the plaintiff might derive assistance from various factors. Thus, if the defendant does not deny his signature or the cause of action alleged in the F summons, that *prima facie* entitles the plaintiff to provisional sentence.

Cases referred to

Allied Hldgs Ltd v Myerson 1948 (2) SA 961 (W)

Caltex (Africa) Ltd v Trade Fair Motors (Pvt) Ltd & Anor 1963 (1) SA 36 (SR) G

da Costa de Atouguia v Braz 1989 (2) SA 807 (A)

First National Bank v Avtjoglou 2000 (1) SA 989 (C)

Momentum Group Ltd v le Grange [2012] ZANCHC 52

Sibanda v Mushapaidze 2010 (1) ZLR 216 (H)

Union Share Agency & Investment Ltd v Spain 1928 AD 74 H

Legislation considered A

High Court Rules 1971 (RGN 1047 of 1971), rr 20, 21, 28, 31 & 33

Case information

L Uriri, for the plaintiff

H Mutasa, for the defendant

Judgment

Mafusire J: The plaintiff claimed provisional sentence in terms of r 20 of the Rules of this court, which reads as follows:

> **"20. Summons claiming provisional sentence**
>
> Where the plaintiff is the holder of a valid acknowledgement in writing of a debt, commonly called a liquid document, the plaintiff may cause a summons to be issued claiming provisional sentence on the said document."

A liquid document is one which evidences by its own terms, without the need for extrinsic evidence, an unconditional acknowledgement of indebtedness in an ascertained sum of money the payment of which is due: see *First National Bank Ltd v Avtjoglou* 2000 (1) SA 989 (C) at p 994F-H. See also the yet to be reported judgment of Tlaletsi J in the two cases of *Momentum Group Ltd v Le Grange* and *Momentum Group Ltd v Saunderson* [2012] ZANCHC 52.

In the present case the plaintiff's claim was for US$142 672.01 arising out of monies loaned and advanced to the first defendant in terms of a loan or facility agreement. The initial upper limit of the facility was US$50 000. It was subsequently increased to US$143 900. As security for the loan the first defendant had passed a mortgage bond in favour of the plaintiff for US$65 000, and two deeds of hypothecation for US$55 000 and US$95 850. Thus the total owing on those bonds was US$215 850. The bonds were over a property owned by the first defendant. The second and third defendants, being directors of the first defendant, had bound themselves in writing as sureties and co-principal debtors with the first defendant over its liabilities to the plaintiff.

In order to escape provisional sentence on a liquid document the defendant must satisfy the court on a balance of probabilities that it is unlikely that the plaintiff will succeed in the principal case: *Allied Holdings Ltd v Myerson* 1948 (2) SA 961 (W) at p 968. See also *Da Costa de Atouguia v Braz* 1989 (2) SA 807 (A).

In this matter the defendants opposed the claim on two grounds. The first was that they were being sued for the same debt on the basis of the same documents but by another entity, Al Shams Global BVI Ltd, to which the plaintiff had ceded its claim. It was said that this other action was pending.

Mafusire J

The second ground of opposition was that the first defendant had filed a claim of its own against the plaintiff for damages for breach of a lease agreement in an amount far in excess of the plaintiff's claim such that after netting off the plaintiff would remain indebted to the first defendant. The defendants averred that the first defendant's claim for damages had stalled because the plaintiff had been placed under curatorship with the effect that proceedings against it had been suspended.

The loan agreement or facility letter set out in some detail the terms of the loan. Among other things, it set out the amount available under the agreement, the draw down procedure, the repayment time table and some default penalties, to mention just but a few. There was an acceptance of the terms of the facility which was signed for by the two authorised signatories for the first defendant. Furthermore, attached to that facility agreement was an extract of the minutes of the board of directors for the first defendant in which the terms and conditions of the credit facility had been accepted. The second and third defendants had been given the authority to sign all such documents and to do all such things necessary to give effect to the resolution.

The defendants acknowledged all the plaintiff's documents. Rule 21 states that a summons for provisional sentence shall *inter alia* call upon the defendant to satisfy the plaintiff's claim, or in default:

> "… to appear before the court … to show cause why he has not done so, and to acknowledge or deny the signature to the said liquid documents or the validity of the claim."

When plaintiff's claim for provisional sentence came up on the unopposed roll in motion court I granted it despite the defendants' opposition. However, I directed that the plaintiff would have to pay security in accordance with the provisions of Order 4. The defendants have since asked for the reasons for my decision.

Since the defendants admitted the plaintiff's documents upon which its claim for provisional sentence was based, their opposition and appearance in court was undoubtedly to show cause why they had not paid and/or to deny the validity of the claim.

In an answering affidavit the plaintiff had averred that the claim against the G defendants by Al Shams Global BVI Ltd, the entity to which the plaintiff had ceded its claim, had been withdrawn. This appeared to be common cause. Therefore this ground of opposition had fallen away.

As for the second ground, I was not persuaded that the defendants had shown any plausible cause such as to deny the plaintiff the relief which it sought. H

2013 (2) ZLR p593

Mafusire J

A I was also not satisfied that their resistance to paying the amount claimed had any merit.

The first defendant's claim for arrear rentals against the plaintiff was based on the fact that the plaintiff had taken up tenancy at the first defendant's premises. In its summons the claim for arrear rentals was $4 000. The plaintiff had B subsequently reduced its claim for provisional sentence by $20 000 which it tendered for the rentals. It then proceeded to claim provisional sentence on the balance of $122 672.01. Thus, that part of the defendants' second ground of opposition had also fallen away.

The second part of the first defendant's claim against the plaintiff was for holding over damages at the rate of $2 000 per month from November 2011 C to the alleged duration of the lease period, allegedly 31 December 2030 – a period of 19 years. The plaintiff was contesting the claim. I questioned the soundness and legal validity of the first defendant's claim. It was common cause that the plaintiff had been placed under curatorship. Thus the legal relationship between the parties had altered materially. At any rate, it could D not be the position that the first defendant would simply sit back, bid its time and 19 years later present the plaintiff with a bill for arrear rent calculated at $2 000 per month. A party that claims damages for future or anticipated loss is required to mitigate its loss. I was not prepared to let an uncertain and illiquid claim stand in the way of what was classically a liquid claim E which was supported by what were classically liquid documents and which the defendants had expressly admitted.

The provisional sentence procedure is designed to afford summary relief to a plaintiff whose claim is clear and based on a written acknowledgement of debt called a liquid document. Makarau JP, as she then was, said in *Sibanda* F *v Mushapaidze* 2010 (1) ZLR 216 (H) at 220F-G:

> "Provisional sentence procedure is a summary procedure that allows the holder of a liquid document to obtain judgment and execute upon that judgment before the trial of the matter. In that regard, it may be termed an extraordinary remedy procedure, although it has been part of our civil process for decades."

Tlaletsi J in the two *Momentum Group Ltd* cases above, in paras 12 and G 13 of the judgment, put it as follows:

> "[12] It is trite that provisional sentence procedure provides a process whereby a creditor who has sufficient documentary proof with a speedy remedy for the recovery of money due *without having to go through an expensive, cumbersome and often dilatory machinery of an illiquid action. A creditor who has a liquid document is able to obtain an enforceable provisional judgment speedily without* H *having to wait for the final determination of the dispute between the parties.*

2013 (2) ZLR p594

Mafusire J

> [13] A judgment granted in terms of this procedure is founded upon the A presumption of indebtedness evidenced by the document which is truly liquid without requiring assistance of extrinsic evidence" (my emphasis).

Unlike the summary judgment procedure, also an extraordinary remedy the judgment of which is final unless appealed against, a provisional sentence, even though executable before trial, remains provisional. The defendant B against whom a provisional sentence is granted can still have his day in court, if he so wishes. The rules are quite elaborate on that. Rule 28 reads:

> **"28. Rights of defendant when provisional sentence granted**
>
> A defendant against whom provisional sentence has been granted may –
>
> (a) within one month after the attachment made under a writ of execution issued by virtue of such sentence; or C
>
> (b) if he has satisfied the judgment without an attachment, then within one month after having done so;

> cause an appearance to be entered with the registrar to defend the action, and shall notify the plaintiff of such entry. If he fails to do so within the stipulated time, the provisional sentence shall immediately thereafter become a final judgment of the court and the security given by the plaintiff shall *ipso facto* D become null and void."

The provisional sentence may also become a final judgment in terms of r 29 where the defendant appears in court and acknowledges the claim, or files with the registrar in advance an acknowledgement of the claim over his signature which is witnessed by his attorney or verified by affidavit. E

Rule 33 concludes the matter of the defendant's right to go to trial despite the granting of the provisional sentence as follows:

> **"33. Where provisional sentence granted and defendant enters appearance to defend action**
>
> Where a defendant against whom a provisional sentence has been granted enters appearance to defend the action, the summons shall stand as the plaintiff's F declaration, and the defendant shall file his plea within ten days after the entry of appearance, and thereafter the matter shall proceed as an ordinary action."

In my view, the efficacy of the provisional sentence procedure would be compromised if the summary nature of the proceedings were to be transformed into a fully-fledged opposed motion matter by canvassing in much detail G the merits of the claim and the merits of the defence. It is not suggested that in every situation that a plaintiff produces a liquid document and claims provisional sentence on it the court cannot go behind that document. In appropriate situations it can. And the *onus* remains on the plaintiff. The law in this regard has been set out in a number of authorities. In *Caltex (Africa) Ltd v Trade Fair Motors (Pvt) Ltd and Another* 1963 (1) SA 36 (SR) at 40, H

2013 (2) ZLR p595

Mafusire J

A Young J recited a passage from the judgment of Solomon J in *Union Share Agency & Investment Ltd v Spain* 1928 AD 74 as follows:

> "I think we may extract the principle that where an acknowledgement of indebtedness is sufficiently clear and certain and payment depends on some simple condition or event, it is sufficient for the plaintiff to allege that the condition has been complied with or that the event has happened, *and that then* B *the onus lies on the defendant to show what was intended by the document to be a condition precedent to entitle the plaintiff to succeed has not been complied with*" (my emphasis).

Young J, on the same page, went on to elaborate as follows:

> "The question then is whether a sufficiently clear case has been made out by the plaintiff to justify provisional sentence. In deciding this issue 'piecemeal C processes of reasoning' (see *Arthur v Bezuidenhout & Mieny* 1962 (2) SA 566 (A) at 574) would, I surmise, be out of place. The question in the end is whether on the whole of the evidence the case is sufficiently clear. But, of course, in the task of discharging the *onus* the plaintiff might derive assistance from various factors. *Thus, if the defendant does not deny his signature or the cause of action alleged in the summons that prima facie entitles the plaintiff to provisional sentence*" (emphasis added).

D In the present case the defendants acknowledged both the plaintiff's liquid documents and the plaintiff's cause of action. What was in issue really was the quantum because the defendants felt that a netting off of what they owed the plaintiff against what they alleged the plaintiff owed them would result in the plaintiff being indebted to them. But as I have observed already, defendants' E claim was tenuous. It was based on nebulous grounds. I was not satisfied that on a balance of probabilities they would succeed. I did not even have to go behind the liquid documents because that was not their case. Their case was completely divorced from that of the plaintiff and its liquid documents. It was for that reason that I granted provisional sentence as prayed for, albeit F on condition that the plaintiff paid security in accordance with r 31.

Dube, Manikai & Hwacha, plaintiff's legal practitioners

G *Gill, Godlonton & Gerrans,* defendants' legal practitioners

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Document 61 of 79

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2013/Volume 2/KATSANDE v WELTHUNGER HILFE & ANOR 2013 (2) ZLR 596 (H)

KATSANDE v WELTHUNGER HILFE & ANOR 2013 (2) ZLR 596 (H)

Citation	2013 (2) ZLR 596 (H)
Case No	Judgment No. HH- 396-13
Court	High Court, Harare
Judge	Mathonsi J
Heard	30 October 2013; CAV
Judgment	6 November 2013
Counsel	*M E Motsi,* for the applicant *J Samukange,* for the first defendant
Case Type	Civil trial
Annotations	No case annotations to date

Flynote

Contract – *formation – implied – vicarious liability – not a basis for creation of contract – no privity of contract*

Costs – *legal practitioner and client scale – senior lawyer pursuing claim based on no recognizable principle of law – costs on higher scale warranted*

Legal practitioner – *fees – claim for – fees not agreed in advance – client* D *entitled to challenge fee – impropriety of suing for fees when bill has not been taxed and where fee not agreed in advance*

Headnote

The plaintiff, the senior partner in a law firm, sued the defendants for legal fees arising from his representing the second defendant at a criminal E trial. The second defendant was an employee of the first defendant and had been charged with culpable homicide, following a traffic accident. When the second defendant briefed the plaintiff, he assured the plaintiff that his employer would pay the legal fees. However, the plaintiff was never so advised by any official of the first defendant. In evidence, he F said that the basis for his claim against the first defendant was the first defendant's vicarious liability for the work that he performed for the second defendant, and that his was a delictual claim because the fees that he charged were reasonably foreseeable, the nexus being the contract of employment between the first and second defendants. He also said that the fee demanded had not been agreed on beforehand nor had it been taxed. G

Held, the plaintiff's reliance on vicarious liability in seeking payment of his legal fees from the first defendant was extremely strange indeed and constituted a claim as outlandish as it was unheard of in our legal system. Vicarious liability is a concept of our law of delict and not contract. It is a doctrine as alien to contract law as water is to oil. No delict was shown in this matter. A person who is not a party to a contract cannot be held H

A liable or claim on it because, as it is usually expressed, he is not privy to the contract. There was no question of agency or *stipulatio alteri* here.

Held, that it is inappropriate for a legal practitioner to sue out a summons for legal fees, a bill of which has not been taxed. Legal practitioners charge fees in accordance with the tariff of fees set by the Law Society B of Zimbabwe, which tariff has regard to, *inter alia*, the nature of the service to be rendered and the seniority of the legal practitioner involved. Therefore a client is entitled to challenge the fee charged following the dictates of the Law Society tariff. In order to defeat such a challenge, the legal practitioner is generally required to tax his bill through the taxing officer. Where the bill has not been taxed, it remains open to challenge C and the client is not obliged to pay merely because of the self-serving say-so of the legal practitioner. If the fee has been agreed in advance, the lawyer may sue for his fee without taxation, but in other cases taxation is necessary to prove the reasonableness of the amount charged, if this is disputed by the client.

Held, further, that the level of lack of understanding exhibited by the plaintiff, D a senior lawyer running his own legal practice, was lamentable indeed. His persistence with a claim not based on any recognisable principle of law, through pre-trial conference to a full trial and right up to the wire, was deplorable. In the process he succeeded in wasting the court's time and in putting the first defendant unnecessarily out of pocket. There E could be no better way of registering the court's displeasure at such abuse than an order for costs on a punitive scale, for that was the only soothing balm which was at the court's disposal.

Cases cited

Bailey NO v Trinity Engineering (Pvt) Ltd & Ors 2002 (2) ZLR 484 (H)

F *Feldman (Pty) Ltd v Mall* 1945 AD 733

First Class Enterprises (Pvt) Ltd v Muchingami & Ors HH-49-13

Gascoyne v Paul & Hunter 1917 TPD 170

Gwande v Matonhodze & Anor HH-123-12

Mheresi v McNaught Wickwar 1997 (2) ZLR 386 (S)

Mkhize v Martens 1914 AD 382

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

Standard Chartered Finance Zim Ltd v Georgias & Anor 1998 (2) ZLR 547 (H)

Supreme Service Station (1969 (Pvt) Ltd v Fox & Goodridge (Pvt) Ltd 1971 RLR 1 (A); 1971 (4) SA 90 (RA) H

United Air Charters (Pvt) Ltd v Jarman 1994 (2) ZLR 341 (S) A

Case information

M E Motsi, for the applicant

J Samukange, for the first defendant

Judgment

Mathonsi J: The plaintiff is a legal practitioner and senior partner at the B law firm of F M Katsande & Partners who has sued the first defendant, a non-governmental organisation, and its employee, the second defendant, for payment of the sum of $32 286 in respect of legal fees levied against the defendants by the plaintiff for legal services rendered. In his declaration, the plaintiff averred that following a road traffic accident which occurred on 16 July 2011, at the 104 km peg along the Gokwe-Kwekwe road, involving C the second defendant. who was driving a Toyota Cruiser motor vehicle registration no. ABK 2116 belonging to the first defendant during the course and scope of his employment by the first defendant, one Wilton Ncube lost his life. The second defendant was arraigned before a magistrate at Gokwe magistrates court on a charge of culpable homicide.

The plaintiff averred in paras 7 to 10 of his declaration that: D

> "7. Between November 2011 and March 2012, plaintiff rendered professional legal representation, defending the second defendant and *vicariously the first defendant, in particular articulating submissions which protected both defendants' civil rights and liberties* in that the verdict

demonstrated that the degree of fault attributable to the second defendant was of a smaller proportion to that of the other motorist involved. E

8. The court's verdict will substantially reduce any financial liability which may arise from the events surrounding the collision involving the first defendant's motor vehicle.
9. The fair and reasonable charges for the legal services rendered by the plaintiff were calculated and fixed at US$32 286 which amount despite demand defendants refuse or neglect to pay" F

The plaintiff then prays for judgment against both defendants jointly and severally, the one paying the other to be absolved, in the sum of US$32 286, together with prescribed interest and costs of suit. It is significant to note that nowhere in that pleading did the plaintiff allege the existence of a contract for legal services between himself and the first defendant and that the plaintiff's claim is premised upon the doctrine of vicarious liability. G

I must point out that the second defendant has since filed a consent to judgment in the amount claimed and, for that reason, judgment will be entered against him by consent. The first defendant has opposed the claim and in its plea averred that the plaintiff was not instructed by itself to act on behalf of the second defendant. At no time did it enlist the services of the plaintiff as it H

Mathonsi J

A was not facing criminal prosecution and did not require the services of the plaintiff at all.

In his replication, the plaintiff stated that he provided professional services "at the instance and request of the first defendant" and that the "first defendant's liability to plaintiff is vicarious". At the pre-trial conference the parties B identified the issues for trial as:

1. Whether the first defendant instructed the plaintiff to represent Taurai Manyanga, the second defendant, in his criminal prosecution on a charge of culpable homicide at Gokwe magistrates court.
2. Whether the first defendant is vicariously liable to the plaintiff for the legal services rendered to the second defendant.
3. If C so, the quantum of that liability.

The plaintiff gave evidence to the effect that sometime in September 2011 the second defendant, a person he had not met prior to that, fixed an appointment to see him at his offices and instructed him to represent him at his criminal trial at Gokwe magistrates court on a charge of culpable homicide. The second D defendant told the plaintiff that he was an employee of the first defendant and that the latter would pay his fees. They did not agree on a fee in advance, neither did he request a deposit, but he agreed to take up the case because he trusted the second defendant's word. The plaintiff went on to say that at no time did he speak to Vimbai Dhliwayo, whom he understood to be the first defendant's executive who had been tasked with handling the case. Indeed, E he stated that he never spoke to any official of the first defendant regarding his engagement as counsel for the second defendant, but assumed that the first defendant would simply settle whatever bill he sent out at the conclusion of the criminal trial. He was badly disappointed when, upon rendering his bill to the first defendant, the first defendant refused to pay.

F Under cross-examination the plaintiff testified that, when he first interviewed the second defendant, he was anxious to know how he would settle his account but was told by the second defendant that he had been given an assurance that the first defendant would settle the account on presentation and that it was not necessary for him to demand a deposit. This was all subject to the rider G that the fees would have to be reasonable. Asked as to how he had come to issue summons for payment of a bill which had not been taxed, the plaintiff stated that the bill will be taxed in due course. He could not explain how this would be possible when he was already seeking an order for payment before taxation had taken place. When asked at what stage the contract for legal services was concluded with the first defendant, the plaintiff made the H startling remark that the first defendant's liability is vicarious for work that

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Mathonsi J

he performed for the second defendant, and that his was a delictual claim A because "the fees that he charged were reasonably foreseeable, the nexus being the contract of employment" between the first and second defendants.

The plaintiff called the second defendant as his witness. This witness could not add any value to the plaintiff's case, only succeeding to say that when the legal practitioner who had been secured for him by the first defendant in B Gokwe had failed to take up the case, the first defendant's project manager, Dr Thomas Heyland, had given him the blank cheque to secure a lawyer of his choice and that the employer was going to pay that lawyer.

At the close of the plaintiff's case *Mr Samukange,* for the first defendant, made an application for absolution from the instance, arguing that the plaintiff had not made out a *prima facie* case for which the first defendant could be C called upon to answer.

What the court must have regard to where an application for absolution is made at the close of the plaintiff's case has been stated in a line of cases: *Gascoyne v Paul & Hunter* 1917 TPD 170; *Bailey NO v Trinity Engineering (Pvt) Ltd & Ors* 2002 (2) ZLR 484 (H); D *Quintessence Co-ordinators (Pty) Ltd v Government of the Republic of Transkei* 1993 (3) SA 184 (Tk) at 185B–D; *Standard Chartered Finance Zimbabwe Ltd v Georgias & Anor* 1998 (2) ZLR 547 (H) at 552G–H; 553A. In *Supreme Service Station (1969) (Pvt) Ltd v Fox & Goodridge (Pvt) Ltd* 1971 RLR 1 (A) at 5D Beadle CJ said;

> "The test, therefore, boils down to this: Is there sufficient evidence on which a E court, might make a reasonable mistake and give judgment for the plaintiff? What is a reasonable mistake in any case must always be a question of fact, and cannot be defined with any greater exactitude than by saying that it is the sort of mistake a reasonable court might make – a definition which helps not at all."

Gubbay CJ stated it conversely in *United Air Charters (Pvt) Ltd v Jarman* 1994 (2) ZLR 341 (S) at 343B-C where he said: F

> "The test in deciding an application for absolution from the instance is well settled in this jurisdiction. A plaintiff will successfully withstand such an application if, at the close of his case, there is evidence upon which a court, directing its mind reasonably to such evidence, could or might (not should or ought to) find for him. See *Supreme Service Station (1969)(Pty) Ltd v Fox & Goodridge (Pvt) Ltd* 1971 RLR 1 (A) at 5D-E, *Lourenco v Raja Laundry (Pvt) Ltd* 1984 (2) ZLR 151 (S) at 158B-E". G

In the present case the plaintiff relies on vicarious liability in seeking a payment of his legal fees from the first defendant. This is extremely strange indeed and constitutes a claim as outlandish as it is unheard of in our legal system. Vicarious liability is a concept of our law of delict and not contract. In our law of delict, an employer is liable for delicts of its employee committed in H

A the course of his or her duty or service unless if, in committing the delict, the employee was pursuing his own interests, what is roundly referred to as being on a frolic of his own: *Gwande v Matonhodze & Anor* HH-123-12.

In *Mkhize v Martens* 1914 AD 382 at 390, the principle of vicarious liability was stated very succinctly as:

> B "We may, for practical purposes, adopt the principle that a master is answerable for the torts of his servant committed in the course of his employment, bearing in mind that an act done by a servant solely for his own interests and purposes, and outside his authority, is not done in the course of employment, even though it may have been done during his employment"

See also *Feldman (Pty) Ltd v Mall* 1945 AD 733 at 736; *First Class* C *Enterprises (Pvt) Ltd v Muchingami & Ors* HH-49-13; P Q R Boberg The Law of Delict vol 1 p 327.

I have stated that vicarious liability is not a concept of contract law which the plaintiff has deployed in seeking to hold the first defendant liable for his legal fees for services rendered to the first defendant's employee. I say this because the plaintiff does not even begin to prove a delict. It is therefore D amazing that the plaintiff, a senior lawyer seeking to be paid for legal services, would allege vicarious liability in a contractual relationship. The touchstone for any legal practitioner is that he must be capable of being trusted to the ends of the earth. As stated by Sir Thomas Bingham;

> "That is the beginning and the end of professionalism. It is as correct a statement E now as it was in the past."

Even if the plaintiff's claim was based on contract, his opprobrious litigation against the first defendant would still take that deep shade from the fact that privity of contract is the cornerstone of our law of contract. That concept was stated by R H Christie in *Business Law in Zimbabwe* 2 ed at p 75 as follows:

> "A person who is not a party to a contract cannot be held liable or claim on it F because, as it is usually expressed, he is not privy to the contract: *PTC Pension Fund v Standard Charted Merchant Bank Zimbabwe Ltd* 1993 (1) ZLR 55. The doctrine of privity of contract is, however, sufficiently elastic to encompass the rules of agency, under which a principal becomes a party to a contract made on his behalf by his agent. But the appointment by the agent of a sub-agent does not, in the absence of agreement to the contrary, create privity of contract between the G sub-agent and the principal: *Karoolias v Sulam* 1975 (1) RLR 320, 1975 SA 873.
>
> Roman-Dutch law, unlike English law and the old Roman law, recognises a further extension of the doctrine of privity of contract, by accepting the validity of what is variously known as a contract for the benefit of a third party, a *stipulatio alteri* or *ius quaesitum tertio*."

The plaintiff does not suggest that there was a contract for legal services H between himself and the first defendant, basing his claim as he does on

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Mathonsi J

vicarious liability, a doctrine as alien to contract law as water is to oil. In A addition, the plaintiff has not even suggested that the second defendant acted as an agent of the first defendant. Therefore I make a finding that the first defendant did not instruct the plaintiff to represent the second defendant in his criminal trial and, as such, there was no contract between the plaintiff and the first defendant. I also make a finding that the first defendant is not B vicariously liable to the plaintiff for the legal services rendered to the second defendant. It cannot possibly be.

Having come to that conclusion, the question of the quantum of damages (I note that the plaintiff has amended his claim upwards to $32 286) resolves itself in favour of the first defendant. I must state, however, that it is inappropriate C for a legal practitioner to sue out a summons for legal fees, a bill of which has not been taxed.

It is a fact that legal practitioners charge fees in accordance with a tariff of fees set by their regulating authority, the Law Society of Zimbabwe, which tariff has regard to, *inter alia*, the nature of the service to be rendered and the seniority of the legal practitioner involved. Therefore a client is entitled D to challenge the fee charged following the dictates of the Law Society of Zimbabwe tariff. In order to defeat such a challenge, the legal practitioner is generally required to tax his bill through the taxing officer. Where the bill has not been taxed, it remains open to challenge and the client is not obliged to pay merely because of the self-serving "say-so" of the legal practitioner. E

In *Mheresi v McNaught Wickwar* 1997 (2) ZLR 386 (S) at 387H, 388A–E McNally JA made the following important pronouncement , which although made in the context of a summary judgment application, is applicable to this case;

> "It is true that the client paid some of the bills, which set out the charges in such F a way that he could have calculated that he was being charge at a rate of $420 per hour. But it does not seem to me that that alone, in the circumstances, is enough to establish a tacit agreement.
>
> And, as I say, if it is to be held that he must be deemed to have agreed to a reasonable fee, was $420 per hour a reasonable fee? That is at least debatable; It may be a matter of evidence. Not, I would think, a matter to be disposed of G by summary judgment. There is, moreover, a more fundamental problem. The public should be aware, or should be made aware, that any client dissatisfied with his lawyer's charges may insist that the lawyer tax his bill. Of course, if the fee has been agreed in advance, the lawyer may sue for his fee without taxation. But in other cases taxation is necessary to prove the reasonableness of the amount charged, if this is disputed by the client … The Registrar of the High Court is a taxing officer and the matter is dealt with in the Rules of the High Court, Order H

Mathonsi J

> A 38, specifically r 308(1). The law on the subject has been dealt with in this court in *Mxumalo & Ors v Guni* 1987 (2) ZLR 1 (S).
>
> Lay clients are usually unaware of this right, and it is the duty of a legal practitioner, if a dispute over fees arises, to advise the client of his right to take up the dispute with the taxing master. It will of course cost the client something to have the bill taxed. Nonetheless, it is a useful right. It is generally undesirable that the court B should usurp the functions of the taxing master by making decisions as to the reasonableness of fees, except of course when the matter comes from the taxing master by way of review. See Cilliers *Law of Costs* 2 ed para 13.11. This case therefore should have been referred to the taxing master before

summons was issued. I conclude therefore, both on the merits and on the general principle, that summary judgment should not have been granted in this case."

Nothing more needs to be said in this case, because it is common cause C that the parties did not agree in advance on the fee, the applicant does not even begin to allege that the fee is reasonable, and the bill was not taxed by the taxing master before summons was issued. It is regrettable that the second defendant consented to judgment, for he could have also contested the untaxed bill.

D It remains for me to deal with the issue of costs. In my view, the level of lack of understanding exhibited by the plaintiff, who is a senior lawyer running his own legal practice in Harare, is lamentable indeed. His persistence with a claim not based on any recognisable principle of law, through pre-trial conference to a full trial and right up to the wire, is legendary. In the process he has succeeded in wasting the court's time when he should have known E better and in putting the first defendant unnecessarily out-of-pocket. There can be no better way of registering the court's displeasure at such abuse than an order for costs on a punitive scale, for it is the only soothing balm which is at the court's disposal.

In the result, I make the following order, that;

1. By F consent, judgment with costs be and is hereby entered against the second defendant in the sum of US$32 286 together with interest at the rate of per cent per annum from the date of summons to date of payment.
2. In respect of the plaintiff's claim against the first defendant, absolution from the instance is hereby granted.
3. The G plaintiff shall bear the first defendant's costs on the scale of legal practitioner and client.

F M Katsande & Partners, plaintiff's legal practitioners

H *Venturas & Samkange*, first defendant's legal practitioners

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Document 62 of 79

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2013/Volume 2/MUZANENHAMO v OFFICER IN CHARGE, CID, LAW & ORDER & ORS 2013 (2) ZLR 604 (S)

MUZANENHAMO v OFFICER IN CHARGE, CID, LAW & ORDER & ORS 2013 (2) ZLR 604 (S)

Citation	2013 (2) ZLR 604 (S)
Case No	Judgment No. CC-3-13
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	14 November 2013
Counsel	*Z T Chadambuka*, *D Chimbwe* and *M T Zhuwarara*, for the applicant *T Dodo* and *C Chimombe*, for the 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 under – purpose – to provide speedy relief – affected person no longer being subject to treatment complained of – no* D *requirement for matter to be treated as urgent*

Practice and procedure – *motion proceedings – disputes of fact – when dispute may be said to exist – bare denial not enough to create dispute of fact*

Headnote

The applicant brought an application under s 24(1) of the 1980 Constitution E for declaratory and consequential relief pursuant to the Declaration of Rights enshrined in that Constitution. He was HIV positive and had been for several years, though he was receiving treatment. He was arrested at a meeting to commemorate an AIDS activist and detained in police cells, then in remand prison. He complained that his rights under ss 15(1) and F 20(1) of the Constitution relative to the protection against inhuman or degrading treatment and his freedom of expression had been violated because of his treatment in custody. He itemised the ways in which he said his rights had been violated. In their reply, the respondents denied most of the allegations, claiming that the laid down procedures meant that he could not have been treated as claimed. They did concede that G the conditions in the police cells were not entirely acceptable. Counsel for the applicant argued that the respondents' assertions and denials were based on what should be in place, but that the respondents had failed to ascertain and rebut what actually happened to the applicant. These bare denials, he said, did not raise any material disputes of fact that were not resolvable on the papers. The court should therefore take a robust view H

A of the facts in order to do justice as between the parties. The respondents argued that there were disputes of fact that were foreseeable before the application was instituted. Consequently, the matter should be dismissed or struck off, to be instituted afresh.

Held, that a material dispute of facts arises when material facts alleged by the applicant are disputed and traversed by the respondent in such a B manner as to leave the court with no ready answer to the dispute between the parties in the absence of further evidence. The mere allegation of a possible dispute of fact is not conclusive of its existence. The respondent's defence must be set out in clear and cogent detail. A bare denial of the applicant's material averments does not suffice. The opposing papers C must show a *bona fide* dispute of fact incapable of resolution without *viva voce* evidence having been heard. Here, despite the laconic nature of the denials and the failure to elaborate on them, they were quite categorical in contradicting the applicant's averments. Taken in the overall context, they could not be rejected or disregarded as mere fabrication. The conflicting positions of the parties *in casu* were irreconcilable on D the papers in several critical respects. The affidavit evidence did not clearly establish the veracity of all of the applicant's complaints to the extent that it could be said that there was a "ready answer to the dispute between the parties in the absence of further evidence". All of the relief sought involved having to make findings of fact, and only a few of the E relevant facts were resolvable on the papers. There were material and significant disputes of fact that could only be resolved by the calling of oral evidence in trial proceedings.

Held, further, that the purpose of s 24 is to provide, in a proper case, speedy access to the final court in the land. Here, the facts did not evince any need for a speedy resolution. The applicant was no longer in custody F and did not stand in jeopardy of any immediate harm or privation being inflicted upon him. The redress he sought arose from events and practices that had already occurred, but related to the prevention of their recurrence in the future. In either case, there was no urgency warranting a rough and robust approach to the facts under consideration. The court's discretion should be exercised in favour of retaining this matter on the G roll until the constitutional issues raised were properly resolved. The application should be referred to the High Court for it to proceed as an action for trial and for that court to determine the matter in its entirety.

Cases referred to

H *Boka Enterprises (Pvt) Ltd v Joowalay & Anor* 1988 (1) ZLR 107 (S)

Checkers Motors (Pvt) Ltd v Karoi Farmtech (Pvt) Ltd S-146-86 A

Ex-Combatants Security Co v Midlands State University 2006 (1) ZLR 531 (H)

Kingstons Ltd v L D Ineson (Pvt) Ltd 2006 (1) ZLR 451 (S)

Mandirwhe v Minister of State 1986 (1) ZLR 1 (S)

Masukusa v National Foods Ltd & Another 1983 (1) ZLR 232 (S)

Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949 (3) SA 1155 (T) B

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

Van Niekerk v Van Niekerk & Ors 1999 (1) ZLR 421 (S)

Villa Real Flats (Pvt) Ltd v Undenge & Ors 2005 (2) ZLR 176 (H)

Zimbabwe Bonded Fibreglass (Pvt) Ltd v Peech 1987 (2) ZLR 338 (S) C

Legislation considered

Constitution of Zimbabwe 1980, s 24

Case information

Z T Chadambuka, D Chimbwe and *M T Zhuwarara*, for the applicant

T Dodo and C Chimombe, for the respondents D

Judgment

Patel JA: This is an application under s 24(1) of the former Constitution for declaratory and consequential relief pursuant to the Declaration of Rights enshrined in that Constitution. The applicant in this matter is HIV positive. He started his anti-retroviral treatment in 2003. On 19 February 2011, he E was arrested at a meeting held to commemorate an AIDS activist. On the day of his arrest he was detained at Harare Central Police Station and then taken to Harare Remand Prison on 23 February 2011.

The applicant avers that he was subjected to various forms of ill-treatment during his detention at both prisons and that his fundamental rights were consequently violated by the respondents. In particular, he complains that at F Harare Central Police Station he was not allowed to use his cell-phone and was thereby denied access to his anti-retroviral medication. Furthermore, he was required to remain barefoot and with only one layer of clothing. In addition, the toilet facilities in the holding cells were unhygienic and deplorable. At Harare Remand Prison, he was denied access to his prescribed G medication regime. Moreover, together with other inmates, he was stripped and made to jump up and down, and placed in solitary confinement for four days when he complained.

Having regard to this ill-treatment, the applicant seeks a *declaratur* to the effect that the respondents contravened ss 15(1) and 20(1) of the Constitution relative to the protection against inhuman or degrading treatment and his H

Patel JA

A freedom of expression, and that the conditions in the holding cells at Harare Central Police Station and the practice at Harare Remand Prison of requiring inmates to strip naked be declared inhuman and degrading. He also seeks an order requiring the respondents to ensure that inmates be allowed full access to their respective anti-retroviral regimes, that no inmate be required to walk barefoot or be left with inadequate clothing, and that the toilet facilities in B the holding cells at Harare Central Police Station be rehabilitated.

The respondents deny most of the applicant's assertions. As regards Harare Central Police Station, they aver that the governing Police Manual prescribes that every inmate be required to surrender all his possessions, other than clothing for personal use, so as to avoid his harming himself. Again, cell- C phones and other valuable articles are ordinarily taken for safe custody. The applicant did not

request his cell-phone and did not tell the police officers concerned about his HIV status and anti-retroviral regime. All inmates in holding cells are given three blankets each and the toilets are cleaned and inspected every day. However, the toilet flushing mechanisms are placed outside the cells and therefore cannot be used by the inmates themselves. D The respondents also concede that the conditions in the holding cells are not entirely acceptable. However, their rehabilitation is not immediately practicable.

With respect to Harare Remand Prison, the respondents aver that they employ qualified doctors to administer appropriate medication and that inmates may E only bring their own medication if it is unavailable in the prisons stock. Moreover, the applicant did not lodge any complaint about his medication either upon admission or on discharge. As regards strip searches, these are procedurally done and strict decency is observed. Finally, the respondents aver that the practice of solitary confinement has been abolished and that the applicant was never subjected to this practice.

F At the hearing of the matter, Mr *Chadambuka* submitted that the respondent's assertions and denials are based on what should be in place as a matter of practice. In effect, they have failed to ascertain and rebut what actually happened to the applicant in relation to his medication and conditions of incarceration. He further submits that these bare denials do not raise any material disputes of fact that are not resoluble on the papers. The court should G therefore take a robust view of the facts in order to do justice as between the parties. Mr *Dodo* concedes that there are certain facts, for instance, the conditions in the cells at Harare Central Police Station, which are common cause. However, apart from this, there are substantial disputes of fact that were foreseeable before this application was instituted. Consequently, he H submits that the matter should be dismissed or struck off to be instituted afresh.

Patel JA

Material disputes of fact A

As a general rule in motion proceedings, the courts are enjoined to take a robust and common sense approach to disputes of fact and to resolve the issues at hand despite the apparent conflict. The prime consideration is the possibility of deciding the matter on the papers without causing injustice to either party. See *Masukusa v National Foods Ltd & Another* 1983 (1) ZLR 232 (S) B at 235A; *Zimbabwe Bonded Fibreglass v Peech* 1987 (2) ZLR 338 (S) at 339C-D; *Ex-Combatants Security Co v Midlands State University* 2006 (1) ZLR 531 (H) at 534E-F.

The first enquiry is to ascertain whether or not there is a real dispute of fact. As was observed by Makarau JP (as she then was) in *Supa Plant Investments* C *(Pvt) Ltd v Chidavaenzi* 2009 (2) ZLR 132 (H) at 136F-G:

> "A material dispute of facts arises when material facts alleged by the applicant are disputed and traversed by the respondent in such a manner as to leave the court with no ready answer to the dispute between the parties in the absence of further evidence."

In this regard, the mere allegation of a possible dispute of fact is not conclusive D of its existence. See *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1163; *Checkers Motors (Pvt) Ltd v Karoi Farmtech (Pvt) Ltd* S-146-86; *Boka Enterprises v Joowalay & Another* 1988 (1) ZLR 107 (S) at 114B-C; *Kingstons Ltd v L D Ineson (Pvt) Ltd* 2006 (1) ZLR 451 (S) at 456C-D and 458D-E. The respondent's defence must be set out in E clear and cogent detail. A bare denial of the applicant's material averments does not suffice. The opposing papers must show a *bona fide* dispute of fact incapable of resolution without *viva voce* evidence having been heard. See *Room Hire Co supra* at 1165, cited with approval in *Villa Real Flats (Pvt) Ltd v Undenge & Others* 2005 (2) ZLR 176 (H) at 180C-D; *Van Niekerk v Van Niekerk & Ors* 1999 (1) ZLR 421 (S) at 428F-G. F

Disputes of fact in the present matter

In their opposing papers, the respondents make certain clear concessions in response to the applicant's averments concerning the conditions at Harare Central Police Station. The second respondent (Officer Commanding, G Harare Central District) admits that the toilets in the holding cells are not screened and that there is no flushing mechanism for use by inmates within any given cell. He also accepts that, although each inmate should be given three blankets, no mattresses are

provided for inmates to sleep on. Apart from this, all the other averments of the applicant are denied, either in their totality or in terms that substantially contradict the applicant's assertions. H

Patel JA

A In certain respects, the respondents' denials are not sufficiently detailed. For instance, the sixth respondent (Commissioner General of Prisons) admits that strip searches are conducted in prisons, but avers simply that they are carried out procedurally and that strict decency is observed. He also asserts, rather tersely, that the practice of solitary confinement has been abolished and that the applicant was never subjected to such confinement. Nevertheless, despite B the laconic nature of these denials and the failure to elaborate them, they are quite categorical in contradicting the applicant's averments. Taken in the overall context, they cannot be rejected or disregarded as mere fabrication.

In the final analysis, I am of the considered view that the conflicting positions of the parties *in casu* are irreconcilable on the papers in several critical C respects. The affidavit evidence does not clearly establish the veracity of all of the applicant's complaints to the extent that it can be said that there is a "ready answer to the dispute between the parties in the absence of further evidence". As was properly conceded by counsel for the applicant, all of the relief sought herein involves having to make findings of fact, and only a few of the relevant facts are resoluble on the papers. I accordingly conclude that D there are material and significant disputes of fact that can only be resolved by the calling of oral evidence in trial proceedings.

Disposition

In determining this matter, it is necessary to have regard to the primary purpose of s 24 of the former Constitution. As was succinctly explained by E Baron JA in *Mandirwhe v Minister of State* 1986 (1) ZLR 1 (S) at 7:

> "The purpose of s 24 is to provide, in a proper case, speedy access to the final court in the land. The issue will always be whether there has been an infringement of an individual's fundamental rights or freedoms, and frequently will involve the liberty of the individual; constitutional issues of this kind usually find their way to this court, but a favourable judgment obtained at the conclusion of the F normal, and sometimes very lengthy, judicial process could well be of little value. And even where speed is not of the essence there are obvious advantages to the litigants and to the public to have an important constitutional issue decided directly by the Appellate Division without protracted litigation."

The facts of the present matter do not evince any need for its speedy resolution. The applicant is no longer in custody and he does not stand in jeopardy of G any immediate harm or privation being inflicted upon him. The redress that he seeks arises from events and practices that have already occurred, but relates to the prevention of their recurrence in the future. In either case, I do not perceive any urgency warranting a rough and robust approach to the facts under consideration.

H In terms of s 24(4) of the Constitution, the court is endowed with the power to:

Patel JA

> ". . . make such orders, issue such writs and give such directions as it may consider A appropriate for the purpose of enforcing or securing the enforcement of the Declaration of Rights".

Given the factual disputes alluded to earlier, it is clearly not possible for this court to proceed with this application as it stands at this stage. Matters of evidence and credibility are generally beyond the practical remit of this B court and, without firm findings of fact, the court is unable to entertain the substantive relief sought by the applicant. It is of course open to the court to strike off or dismiss the application on the technical ground that the applicant has adopted the wrong procedure and should have instituted this matter by way of action in the High Court. However, in view of the unquestionable public importance of the issues raised, both generally and in the particular C context of persons with HIV or AIDS, I take the view that the discretion of this court should be exercised in favour of retaining this matter on the roll until the constitutional issues raised are properly resolved. I therefore consider it prudent and necessary to refer this application to the High Court for it to proceed as an action for trial and for that court to determine the D matter in its entirety.

It is accordingly ordered that:

1. This application be and is hereby referred for trial to the High Court for determination on the facts and on its merits.
2. For the purposes of trial, the notice of application and notice of opposition E filed of record herein shall respectively stand as the summons and notice of appearance to defend.
3. The plaintiff (the applicant herein) shall file his declaration within 10 days from the date of this order.
4. The matter shall thereafter proceed in accordance with the Rules of the F High Court.
5. In the event that any party is aggrieved by the decision of the High Court, whether on the facts or on the merits, he is hereby given leave to appeal to this court within 10 days from the date of that decision.
6. The costs of this application shall be costs in the cause. G

CHIDYAUSIKU CJ, MALABA DCJ, ZIYAMBI JA, GARWE JA, GOWORA JA, HLATSHWAYO JA, CHIWESHE AJA and GUVAVA AJA concurred.

Zimbabwe Lawyers for Human Rights, applicant's legal practitioners

Civil Division, Attorney-General's Office, respondent's legal practitioners H

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Document 63 of 79

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2013/Volume 2/VELA v MAGOLIS 2013 (2) ZLR 611 (H)

VELA v MAGOLIS 2013 (2) ZLR 611 (H)

Citation	2013 (2) ZLR 611 (H)
Case No	Judgment No. HH-429-13
Court	High Court, Harare
Judge	Mawadze J
Heard	14 November 2013
Judgment	14 November 2013
Counsel	*C Mavhondo,* for the applicant No appearance for the respondent
Case Type	Civil application
Annotations	No case annotations to date

Flynote

C **Legal practitioner** – *conduct and ethics – duty – establishing identity of party – need to ensure that party presenting himself to the practitioner identities himself satisfactorily*

Practice and procedure – *judgment – setting aside of – grounds – judgment procured by fraud – common law basis for setting such judgment or* D *court order aside – requirements of proof – judgment or court order procured*

by fraud a nullity

Headnote

"A party seeking to set aside a judgment procured by fraudulent evidence must prove:

(a) that the evidence was in fact incorrect; and

(b) that E it was made fraudulently and with intent to mislead; and

(c) that it diverged to such an extent from the true facts that the court would, if the true facts had been proved before it, have given a judgment other than what it was induced by the incorrect evidence to give" (*dicta per* de Villiers JP in *Swart v Wessels* 1924 OPD 187 F at 189 followed).

The applicant sought to have a decree of divorce set aside on the grounds of fraud. The divorce had been granted, purportedly by consent, after the respondent and another woman, who gave out that she was the applicant, approached a legal practitioner together. A consent paper was drawn up G and signed by the imposter and the respondent. The legal practitioner did not ask for proof of identity of the parties when they came to see him.

Held, that the proceedings would be set aside, being a nullity *ab initio*.

Held, further, that in view of the apparent increase in the number of cases of fraud of this nature in divorce proceedings, the registrar of the High Court would be directed to bring the judgment to the attention of the Secretary H of the Law Society of Zimbabwe so that legal practitioners would be

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alerted to the prevalence of this obnoxious practice which threatens to A erode confidence in our judicial system in unopposed divorce matters.

Cases referred to

Karoni & Anor v Rusere & Ors HH-304-11

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

Swart v Wessels 1924 OPD 187

Legislation considered

High Court Rules 1971 (RGN 1047 of 1971), r 449(1)

Case information

C Mavhondo, for the applicant C

No appearance for the respondent

Judgment

Mawadze J. The facts of the matter brings into focus the challenges this court will always have in unopposed divorce matters where one of the parties to the proceedings decides to act fraudulently and abuses the procedure D adopted in such matters. What leaves a bitter a taste in the mouth, as it were, is that the presiding judge acting attentively and with due diligence may not detect such fraud. It is precisely for this reason that I have decided to write this judgment in an unopposed matter so as to highlight this problem and possibly alert a number of legal practitioners who may fall prey to this type of devious conduct. E

The applicant approached this court seeking the setting aside of the judgement granted by this court on 12 February 2009 in HC 7052/09 and that the respondent pays the costs of this application on a legal practitioner and client scale. A reading of the applicant's founding affidavit suggests that the application is being made on two grounds. Firstly, the applicant relies on the F provisions of r 449 of the High Court Rules 1971, specifically r 449(1)(a), which empowers this court to rescind or set aside any judgment or order that was erroneously sought or erroneously granted in the absence of any party affected thereby. Secondly, the application is premised on the common law basis of fraud. It was because of this apparent lack of clarity on the basis upon which the application is made, that

I invited *Mr Mavhondo* to file heads G of argument in that regard and also the specific nature of the relief sought. I am indebted to *Mr Mavhondo's* brief but very useful heads of argument.

The background facts of the matter are as follows;-

The applicant is currently based in the United Kingdom where she is employed as a nurse. On 12 June 1998 the applicant married the respondent in terms H

A of the Marriage Act [*Chapter 5:11*]. The marriage was blessed with three children. The applicant relocated to the United Kingdom in 2001 and has been based there to date. The applicant has custody of the three children born of the marriage. According to the applicant she only returned to Zimbabwe for a brief period in 2005 and returned to the United Kingdom the same year. Annexure F was attached to support this fact. Since then she has never been B to Zimbabwe to date, except in May 2013.

According to the applicant, the respondent later followed her in the United Kingdom but they started to have marital problems culminating in their separation while in the United Kingdom in 2007. Thereafter the applicant only returned to Zimbabwe on 7 May 2013 when she discovered that she C had been fraudulently divorced. She returned to the United Kingdom the same month.

According to the applicant, when she discovered that she had been improperly divorced in Zimbabwe in 2009, she tasked her legal practitioners of record to find out what had happened. The following facts emerge from her founding D affidavit and annexures attached thereto;

Sometime in December 2002 the respondent, Costa Magolis, in the company of a certain woman masquerading as the applicant, approached Mr Mapondera of Mapondera and Company indicating that they wished to be divorced and also that they had agreed to the terms of the divorce. The following facts E emerged from Mr Mapondera's letter dated 16 May 2013 when he was asked by applicant's legal practitioners to explain his role in this whole saga. According to Mr Mapondera, this woman, purporting to be applicant, and the respondent agreed to use him as their legal practitioner representing both of them in the divorce matter in order to save costs. Apparently Mr Mapondera did not realise then the impropriety of representing both parties in a divorce F matter at that stage of proceedings. The conflict of interest is apparent despite the fact that the divorce was proceeding by consent.

According to Mr Mapondera, he drafted summons with this woman masquerading as the applicant being the plaintiff. The summons and declaration were issued out of this court on 15 December 2008 (Reference G No. RKAM/gm/m22128). The summons and declaration were then served on the respondent on 19 December 2008 at the Deputy Sherriff's offices. The divorce order under case no. HC 7052/09 was granted by consent on 12 February 2009 by my brother Musakwa.

The record of proceedings in HC 7052/09 (the main matter) reflects the H following;

A consent paper, purportedly signed by applicant and the respondent on 17 A September 2008, was filed with this court on 15 January 2009 indicating that the applicant and the respondent agreed to all the ancillary issues relevant to the divorce which are:

(a) that custody of the three minor children be awarded to the plaintiff (applicant) with the respondent enjoying reasonable access in consultation B with the plaintiff.

(b) the plaintiff (applicant) was to be awarded all movable assets as her sole and exclusive property. These moveable assets are however not itemised in any manner in the consent paper.

(c) that the three immovable properties were to be donated to the three C children of the marriage that is No. 34 Wyvern Avenue, Belvedere North, Harare to be registered in the joint names of two of the children. Flat No. 42 Rosewell Court, Harare and Flat No. 19 Gail Court, Harare to be registered in the name of the third child. It is important to note that there is no time frame given within which the transfer should be done, there is no indication of in whose names the three properties are D currently registered, who pays the transfer costs and the provision that the Sherriff signs all papers to effect transfer if either party fails to do so upon request.

(d) the plaintiff (applicant) was to pay maintenance for the three minor children in the sum of Zim$5 million per month. What is important E to note is that this figure is not individualised per child and was never converted to the multi-currency regime. What is of great importance, however, is that it is the plaintiff (applicant), the party awarded custody of the three minor children who was to pay maintenance for the same children, including the full school account, the purchasing of clothes twice a year in January and July and medical aid cover until all the F children are 18 years old or self supporting, whichever occurs first. The respondent, who is alleged to have perpetrated this fraud, did not shoulder any responsibility in respect of the children despite being the non custodial parent! This anomaly is not explained either in plaintiff's (applicant) affidavit of evidence or respondent's affidavit of waiver.

(e) that each party bears its own costs. G

The woman (the plaintiff in the main matter) purporting to be the applicant deposed to an affidavit of evidence on 27 January 2009. This affidavit was commissioned by a legal practitioner. It is interesting to find out how this legal practitioner would be able to explain how he/she commissioned this affidavit when the applicant was not the person before him/her. The affidavit H

Mawadze J

A of evidence as usual outlined the grounds of divorce, being that the parties had separated for five years, have irreconcilable differences and have lost love and affection for each other as they no longer share conjugal rights. The affidavit of evidence as usual refers to the affidavit of waiver and identifies the signature thereon as that of the respondent. It also refer to the consent paper and identifies the signatures of the parties thereon. The applicant denies B ever deposing to such an affidavit and states that on 27 January 2009 when the affidavit of evidence was signed and commissioned in Zimbabwe she was in the United Kingdom. The applicant also distances herself from the consent paper whose contents I have already alluded to.

The respondent, as is required, deposed to an affidavit of waiver. The C problem with this affidavit of waiver is that it is signed by the respondent on 17 September 2008. The glaring anomaly is that by 17 September 2008 the respondent had not been served with the summons, which was issued on 15 December 2008 and served on him on 19 December 2008. What is surprising is that in the affidavit of waiver the respondent alleges that by 17 September 2008 the applicant (plaintiff) had instituted divorce proceedings and that he D had by then been personally served with the summons. That cannot possibly be true. The respondent also alleges that the signature on the consent paper belongs to the applicant (plaintiff). This is disputed by the applicant.

The record of proceedings in the main matter HC 7052/09 shows that after having filed all the required papers in an uncontested divorce matter, E Mapondera & Company proceeded to set the matter down on the unopposed roll on 12 February 2009. On 12 February 2009 my brother Musakwa, after perusing the papers, hearing Mr Mapondera and being satisfied that all was in order, granted the following order;

"IT IS ORDERED THAT;

1. A decree of divorce be and is hereby granted.
2. Custody F of the three minor children . . . be awarded to the plaintiff with defendant having reasonable access to them in consultation with plaintiff.
3. The consent paper filed of record and signed by both parties and attached to this order shall regulate the following matters:
   a. The rights to maintenance and other payments and benefits for the minor children.
   b. Access to the minor children
   c. The G proprietary rights of the parties as between themselves.
4. Each party shall pay its own costs."

Mr Mapondera appeared for the plaintiff (applicant) in the main matter. It is the order which the applicant seeks to have set aside. Her reasons, which are not disputed, are confirmed in her founding affidavit and I shall briefly H summarise them.

Mawadze J

According to the applicant she only became aware of the court order in A December 2012 (she does not explain how) and was shocked to learn that she was divorced, apparently with her as the plaintiff. The applicant denies instituting the divorce proceedings in the main matter HC 7052/09 and that it is her legal practitioners of record who unearthed this fraud.

The applicant's assertions find favour with Mr Mapondera's admission B contained in his letter dated 16 May 2013. Mr Mapondera is the one who drafted the pleadings in the main matter HC 7052/09 and purportedly represented the applicant (plaintiff) in this matter. Mr Mapondera admitted that when the respondent approached him in the company of a woman who purported to be the applicant, seeking his services in instituting divorce proceedings, he made the cardinal sin of not checking the identity particulars of the persons C from whom he was taking instructions and subsequently represented. He naively admits that he assumed as he was being told that the persons were husband and wife, as reflected on the marriage certificate he was given. The applicant denies ever approaching Mr Mapondera seeking to institute divorce proceedings or instituting such proceedings. The applicant denies that she D was the plaintiff in the main matter HC 7052/09. This fact is uncontroverted.

The applicant denies ever giving instructions to Mr Mapondera in respect of HC 7052/09 or any matter. The applicant denies signing the affidavit of evidence filed in the matter. She also deny signing the consent paper. In fact it is the applicant's case that when the divorce proceedings were commenced in December 2008 until 12 February 2009 when the divorce order was E granted, she was never in Zimbabwe but was in the United Kingdom. It is the applicant's case that the respondent, who knew that she was in the United Kingdom, perpetrated the fraud. In brief, the applicant said she went to the United Kingdom in 2001 and briefly returned to Zimbabwe in 2005 and returned to the United Kingdom the same year. She attached Annexure F, her F expired Zimbabwean passport, to support these facts. In fact on 27 January 2009, when the applicant purportedly signed the affidavit of evidence in Zimbabwe, she said she was at her workplace in the United Kingdom. The applicant states that the respondent fraudulently obtained the divorce order by using an unknown woman who masqueraded as the applicant and forged her signatures on the consent papers and affidavit of evidence. G

On 7 May 2013, when the applicant returned to Zimbabwe for a month, she filed a police report CR 1358/05/13 against the respondent, which report is attached as Annexure H. The report makes interesting reading;

(i) The applicant reported the respondent for committing bigamy as the respondent in 2007 had married another woman, Jane Tonderai Mwareka H

Mawadze J

A (a copy of the marriage certificate was provided), when the marriage to the applicant solemnised on 12 June 1998 being monogamous was subsisting, and well before the alleged fraud dissolving it on 12 February 2009.

(ii) The applicant reported the respondent for fraud. The basis for fraud being B that the respondent misrepresented to the High Court in HC 7052/09 that the applicant had instituted divorce proceedings and signed the relevant affidavit of evidence and consent papers causing the High Court to act on the said misrepresentation to the prejudice of the applicant by issuing a divorce order.

(iii) In the alternative, the applicant reported the respondent for forgery C arising from the forging of the applicant's signature on the affidavit of evidence and consent paper. In the alternative, the applicant laid charges of perjury in that the respondent made a false statement under oath for purposes of judicial proceedings in HC 7052/09 in that he had entered into an agreement with the applicant as per the consent paper. These D averments are in respondent's affidavit of waiver which affidavit of waiver was signed on 17 September 2008 two months before summons were issued and served on the respondent.

In support of the allegation that applicant did not sign the affidavit of evidence and consent paper, the applicant attached Annexure J, a forensic report which concludes that the signatures on the affidavit of evidence and consent paper E in HC 7052/09 were forged and do not belong to the applicant.

The applicant in her founding affidavit explained the prejudice she suffers if the order granted in HC 7052/09 is not set aside. According to the applicant, when she married the respondent in 1998 both

parties had no property of note but through their joint efforts and, most importantly, her income when F she settled in the United Kingdom in 2001, they acquired eight immovable properties (listed on p 6 of the record) and not the three immovable properties the respondent refers to in HC 7052/09. All this immovable property is in Harare and the applicant believes they should be apportioned fairly between the parties. The applicant is of the view that the respondent may dispose of some of the property, as all the property, except the Belvedere North G property, is registered in his name, including the flats ostensibly donated to the children. The applicant said there is in no proof that the said property donated to the children had in fact been registered in their names. The applicant is staying with the children in the United Kingdom and is keen to ensure that some immovable property in Zimbabwe is provided for the H children who may later wish to settle in Zimbabwe. The applicant therefore

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believes that order granted in HC 7052/09 should be set aside so that all A these concerns are addressed.

I am not satisfied that the order granted in HC 7052/09 can be set aside on the basis of the provisions of r 449(1)(a) of the High Court Rules 1971. While the order was made in the absence of the applicant, as alleged, and that applicant is affected by that order, I am not satisfied that the order was erroneously B sought or erroneously granted. The only possible error referred to is that the affidavit of waiver was signed on 17 September 2008, well before summons was issued on 15 December 2008 and served on 19 December 2008. The respondent, in that affidavit of waiver, purports to have been served with a summons by 17 September 2008. In my view, this anomaly is not proof of an error but rather of fraud. C

I now turn to the law regarding the aspect of fraud.

It is trite law that a judgment or order may be set aside or rescinded on the common law basis that it was procured through fraud. Herbstein and van Winsen *The Civil Practice Of High Courts and the Supreme Court of Appeal of South Africa* 5 ed at p 939-940, discuss this aspect and state, *inter alia,* that: D

> "a judgment procured by fraud of one of the parties, whether by forgery, perjury or in any other way such as fraudulent withholding of documents cannot be allowed to stand … It must, however, be shown that the successful litigant was a party to the fraud or perjury on the ground of which it is sought to set aside the judgment. Furthermore, there must be proof that the party seeking rescission was unaware of the fraud until after judgment was delivered … The person E seeking relief must be able to show that because of the fraud of the other party, the court was misled into pronouncing a judgment which, but for the fraud it would not have done."

See also *Koroni & Anor v Rusere & Ors* HH-304-11 at pp 3 of the judgment *per* Makoni J.

Herbstein and van Winsen *loc cit* at pp 940-941 cite *Swart v Wessels* 1924 OPD 187 F at 189-190 which explains the nature of the onus the applicant has to discharge in seeking or setting aside of a judgment procured through fraud. A party seeking such a relief on grounds of fraudulent evidence must prove the following;

> "(1) that the evidence was in fact incorrect G
>
> (2) that it was made fraudulently and with intent to mislead, and
>
> (3) that it diverged to such an extent from the true facts that the court would, if the true facts had been proved before it, have given a judgment other than what it was induced by the incorrect evidence to give."

The facts of this case, which I have discussed at length, are on all fours with the principles enunciated above. If the applicant did not institute divorce H

A proceedings in HC 7052/09 and did not depose to the affidavit of evidence and did not sign the consent paper, it is as clear as the blue sky that the order granted or HC 7052/09 was procured through fraud and cannot stand. If the court was aware of these facts, it is clear that a decree of divorce would not have been granted.

When Mr *Mavhondo* filed heads of argument he sought to amend the relief sought to read as follows:

> "It is ordered that;
>
> 1. The rest of the court order granted by this honourable court on 12 February 2009 under case number HC 7052/09 be and is hereby confirmed save for the part regulating property rights of the parties which is hereby set aside.
> 2. The respondent to pay costs of the application on a legal practitioner – client scale."

The stance adopted by the applicant as per the amendment made by Mr *Mavhondo* while understandable, is not sustainable at law. It is understandable because the applicant concedes in the founding affidavit that by 2007 her marriage to the respondent had irretrievably broken down and the parties had separated in the United Kingdom. In fact the drama continues to unfold.

On 27 February 2009, the applicant petitioned the court in the United Kingdom for a decree of dissolution of the marriage which decree was issued on 6 May 2009 (three months after the fraudulent order in Zimbabwe in HC 7052/09). The applicant attached a copy of the order as Annexure K. Although it is not authenticated and notarised, I have no doubt that the applicant is being truthful in that regard. The applicant further explains that the issue of the assets of the parties situated in Zimbabwe was not dealt with by the United Kingdom court and that she was advised that it would be competent for her to file such a claim in Zimbabwe. When a decree for the dissolution of the marriage was granted in the United Kingdom on 6 May 2009, the applicant was unaware of the fraudulent order issued in Zimbabwe on 12 February 2009. To further complicate matters, the applicant in 2012 married another man in the United Kingdom as she was a divorcee as per the United Kingdom order of 6 May 2009. The applicant has, however, separated from this man.

Be that as it may, once the order granted on 12 February 2009 in HC 7052/09 is set aside on the basis of fraud the whole proceedings in HC 7052/09 become a nullity. Such an order cannot be partially rescinded irrespective of the circumstances of the parties. I cannot do more than to quote the wise words of Lord Denning in *McFoy v United Africa* Co Ltd [1961] 3 All ER 1169 (PC) at 1176:

> "If an act is void, then it is in law a nullity. It is not only bad but incurably bad. There is no need for an order of the court to set it aside. It is automatically null

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> and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."

Having made this finding that the order granted in HC 7052/09 was procured through fraud, it stands to reason that the whole order should be set aside. In any event the parties remain divorced as per the decree of dissolution of the marriage issued in the United Kingdom on 6 May 2009. The setting aside of the order granted by this court on 12 February 2009 would therefore not adversely affect to the rights and status of the parties. The applicant can still pursue the issue of the sharing of the immovable assets of the parties situated in Zimbabwe.

In view of the apparent increase in the number of cases of fraud of this nature in divorce proceedings (I dealt recently with a chamber application for substituted service in which I recommended an investigation as the applicant in that matter also claimed not to have instituted any divorce proceedings as *in casu*), I have directed the Registrar of the High Court to bring this judgment to the attention of the Secretary of the Law Society of Zimbabwe so that legal practitioners are alerted to the prevalence of this obnoxious practice, which threatens to erode confidence in our judicial system in unopposed divorce matters.

In the result I will make this following order:

1. The judgment granted by this honourable court on 12 February 2009 in case number HC 7052/09 be and is hereby set aside.
2. The respondent shall pay the costs of this application on a legal practitioner and client scale.

Mhishi Legal Practice, applicant's legal practitioners

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Document 64 of 79

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H v ST JOHN'S COLLEGE 2013 (2) ZLR 621 (H)

Citation	2013 (2) ZLR 621 (H)
Case No	Judgment No. HH-416-13
Court	High Court, Harare
Judge	Mafusire J
Heard	14 November 2013; *CAV*
Judgment	18 November 2013
Counsel	*T Mpofu* for the applicant *E Matinenga* for the respondent
Case Type	Urgent chamber application
Annotations	No case annotations to date

Flynote

Administrative law – *audi alteram partem rule – legitimate expectation – an extension of audi rule – when legitimate expectation arises – whether perceived right is merely a privilege – mere privilege giving no grounds* D *for legitimate expectation*

Headnote

The applicant, a pupil at a boys' senior school (the respondent), had been denied the right to attend the school leavers' dance to be held at the end of the last term of the school year. He complained that he had not been charged with any offence, but was being punished. He claimed that the E respondent had violated the rules of natural justice. It was meting out the most severe punishment without having charged him with any offence, let alone affording him the chance to be heard. The school had a code of conduct. The applicant alleged that the respondent had violated it. The respondent said that the applicant would not be barred or hindered from F completing whatever remained of his schooling component. However, the leavers' dance was purely a privilege, not a right. The school had the right to withdraw it because of the applicant's conduct, which included instances of indiscipline, disobedience to school rules, and deceit.

Held, that on the facts, the applicant had manifestly been in breach of the school rules. The respondent had been entitled to discipline him. Before G it had done so, it had called for an explanation. This had been ignored. The school had then taken measures in an effort to get a response. It had withheld the applicant's entitlement to attend the leavers' dance. That had been the only event of significance still remaining for the applicant at the school. There was no fault in the measures taken by the respondent, H which had been what the exigencies of the situation had demanded.

The applicant had spurned the opportunity that he had been afforded A to explain his absenteeism. The application failed on this basis alone.

Held, further, that the *audi alteram partem* rule holds that a man shall not be condemned without being given a chance to be heard in his own defence. The rule requires public officials, judicial and quasi-judicial officers, and really anyone entrusted with the power to make decisions B or the power to take action affecting others adversely, to exercise such powers fairly. The rule has been extended to the realm of private contracts between a private individual and a private entity. In all cases fairness is the overriding consideration.

Held, further, that the legitimate expectation doctrine is an extension of the *audi alteram partem* rule. Although it is now finding expression C in statutes, for example s 3 of the Administrative Justice Act [*Chapter 10:28*], it is a product of judicial activism meant to fill up a *lacuna i*n the law. The legitimate expectation doctrine simply extended the principle of natural justice beyond the established concept that a person was not entitled to a hearing unless he could show that some existing right of his had been infringed by the quasi-judicial body. Fairness is the D overriding factor in deciding whether a person may claim a legitimate entitlement to be heard. The *audi alteram partem* rule, and its extension, the doctrine of legitimate expectation, are flexible tenets. Their proper limits are not precisely defined. A formal charge that is followed by a formal hearing and culminating in a formal verdict and a formal penalty E are not always absolute prerequisites. The exigencies of the matter determine the situation.

Held, further, that the classification of a benefit as a right or as privilege is not necessarily the sole criterion for determining one's legitimate expectation to be heard in any given case. A regular practice may give rise to a legitimate expectation. One of the problems with the concept F of legitimate expectation has been its imprecise limits. The courts have been careful not to leave it too loose. The doctrine of legitimate expectation has no application where the perceived rights were in fact mere privileges. The leavers' dance was a tradition in the school. In the school's code of conduct, privileges and traditions were accorded the G same status. A student's attendance at the dance in question was a mere privilege that the school could withdraw at any time.

Held, finally, that the applicant failed to satisfy one of the requirements for an interdict. What he purportedly sought was simply a temporary interdict, in which case he only had to prove a *prima facie* right as opposed to a clear right. However, it was undoubtedly a final relief that was being H

A sought, where a clear or definite right must be shown. No case for a final interdict had been shown.

Cases referred to

Administrator, Transvaal & Ors v Traub & Ors 1989 (4) SA 731 (A)

Affretair (Pvt) Ltd & Anor v MK Airlines (Pvt) Ltd 1996 (2) ZLR 15 (S)

B *Airfield Investments (Pvt) Ltd v Minister of Lands & Ors* 2004 (1) ZLR 511 (S)

Council of Civil Service Unions & Others v Minister for the Civil Service [1984] 3 All ER 935 (HL)

Dube v Chairman, Public Service Commission & Anor 1990 (2) ZLR 181 (H)

C *Foreman & Anor v KLM Royal Dutch Airlines* 2001 (1) ZLR 108 (H)

Health Professions Council v McGown 1994 (2) ZLR 329 (S)

Kanonhuwa v Cotton Co of Zimbabwe 1998 (1) ZLR 68 (H)

O'Reilly v Mackman & Ors [1982] 3 All ER 1224 (HL)

D *Schmidt & Anor v Secretary of State for Home Affairs* [1969] 1 All ER 904 (CA)

Taylor v Minister of Education & Anor 1996 (2) ZLR 772 (S)

Tribac (Pvt) Ltd v Tobacco Marketing Board 1996 (2) ZLR 52 (S).

Legislation considered E

Administrative Justice Act, [*Chapter 10:28*], s 3

Case information

T Mpofu for the applicant

E Matinenga for the respondent

Judgment

F **Mafusire J**: This was an urgent chamber application. Upon reading it my instinctive reaction was to frown upon the notion that all other business in the busy schedule of the judiciary could be suspended over a mere school leavers' dance or party. At first impression it seemed such an inconsequential pre-occupation which should not warrant the attention of the machinery of State. However, for a school and its student body the dance must be a serious G matter. Such an event may be an integral part of its life and for its students as well. For sixth formers in particular an event like that, I believe, assumes greater significance. It may only happen once in their lifetimes. Among other things, it is an occasion to bid farewell to friends and staff. It is an occasion to reminisce over events in the last six years. It is an emotional occasion. I H believed the applicant when he said it was a life-time event to celebrate and

Mafusire J

commemorate the many memories and friendships of the last six years. So A I decided to treat the matter as serious and as urgent.

The applicant was in upper sixth at the respondent school. In the urgent chamber application against the school he sought a final order in the following terms:

1. That the administrative action of the respondent's authorities be declared unlawful, void and of no effect. B
2. That a final interdict be granted against the respondent, ordering it to accord applicant the normal status granted to any other student and alumni member once applicant had left the respondent institution at the end of 2013.
3. That a final interdict be granted restraining the respondent from punishing C applicant without the observance of due process.
4. That respondent pays applicant's costs on a legal practitioner and client scale.

Pending the determination of the final relief the applicant sought the following interim order:

i. That the respondents and its employees, agents and assigns be interdicted D from interfering with applicant's usual rights as a student at the respondent institution.

ii. *That within 48 hours the respondent and its employees, agents and assigns be ordered to accept payment and the registration of the applicant and his invitees for the leavers' dance to be held on 22 November 2013.* E

iii. That the respondent and its employees, agents and assigns be ordered not to hinder applicant's access to the respondent's academic and social facilities, *specifically access to the leavers' dance* and to normal academic functions.

iv. That respondent pays costs on a legal practitioner and client scale. F

The highlighted portions of the interim order sought constituted the gravamen of the relief sought.

The applicant's case was that all upper sixth students were now on study break. They would not be attending regular lessons. The school would be holding a leavers' dance on 22 November 2013. That was some fifteen days G away from the date when he had filed his application. He had been barred from attending that dance. He had come to the school on 30 October 2013 to pay for the dance. He had been in the company of a friend. Both he and his friend had not been in school uniform. But so had yet another student. The school bursar had accepted payment from that other student. She had declined to accept payment from the applicant and his friend. They had been referred H

Mafusire J

A to the director of the sixth formers. He was also the deputy headmaster at the respondent school (hereafter referred to as "the deputy head").

The deputy head would also not accept the applicant's payment. He had demanded to know why the applicant was not in school uniform on that day and why he had been absent from the two school events that had been held B on 16 and 17 October 2013. These events had been the leavers' assembly and the prize giving and speech night respectively. The applicant had told the deputy head that on 17 October 2013 he had been to South Africa to attend an interview for a flight course. The deputy head had allegedly retorted in foul language and had dismissed the applicant's story as "bullshit". The applicant had immediately dialled his mother for her to speak to him. However, the C deputy head had declined to talk to her.

The applicant felt unfairly treated. He felt that fellow students who also had not been in school uniform had been allowed to pay for the leavers' dance. According to him, since they were on study leave the wearing of school uniform was no longer compulsory. Also according to him the two events on 16 and 17 October 2013 had not been compulsory events, at least according D to the school calendar that had been issued out at the beginning of the year.

When the deputy head would not speak to his mother on the phone the applicant had gone away to fetch her. However the respondent's authorities had refused to meet with her without an appointment. The appointment had promptly been made for the following day. On that day the applicants' E parents had held a meeting with the headmaster and the deputy head. The applicant had not been called into that meeting. In his founding papers the applicant gave no details of what had transpired at that meeting except to say that his mother had emerged from it very frustrated.

The applicant felt his rights had been violated. His case was that he had not F been charged with any offence. Yet he was already being punished. He later recalled an incident when he had come to the school for an academic filming exercise in fulfilment of his academic studies. Soon after the filming he had been escorted off campus by one of the teachers. He had felt like he was being treated like a dangerous criminal or a vermin that could contaminate the society. It was on that basis that the applicant filed the urgent chamber G application for the relief set out above.

The applicant's major ground of complaint was that the respondent had violated the rules of natural justice. It was meting out the most severe punishment without having charged him with any offence, let alone affording him the chance to be heard. The school had a code of conduct. The applicant alleged H that the respondent had violated it.

Mafusire J

The respondent opposed the application. Through an affidavit deposed to A by the headmaster the respondent listed a series of misdemeanours by the applicant, including insolence and rudeness, and his unexplained failure to attend the two events on 16 and 17 October 2013. The respondent said that contrary to the applicant's assertion, those events had been compulsory. That they in deed had been compulsory had been communicated by the headmaster B on several days at assembly. Furthermore, e-mails to that effect had been sent to the applicant's parents. Then on 24 October 2013 an e-mail had been sent by the school to the applicant's parents seeking an explanation for the applicant's absence from those events. There had been no response from the applicant or his parents. So in order to elicit a response an instruction had been issued that the applicant would not be allowed to attend the leaver's C dance until he had explained his absence on the two days. No payment from him would be receipted for the dance.

With regard to the events of 30 October 2013, when the applicant had come to pay for the dance, the respondent highlighted an example of dishonesty by the applicant. It averred that after the deputy head had declined his payment the applicant had gone back to the bursar's office and had lied that he had D now been allowed to pay. The bursar had checked with the deputy head. The applicant's lie had promptly been exposed.

The respondent also highlighted that the applicant had not been registered with the school for any regular advanced ("A") level courses except for a non-examinable sports fitness course called ETA (Exercise Teachers Academy) E and the Cambridge International Diploma in Business. These were not graded at the same level as "A" level subjects. The applicant would not be barred or hindered from completing whatever remained of his schooling component. However, the leavers' dance was purely a privilege, not a right. The school had the right to withdraw it because of the applicant's conduct. His parents had signed a document, among other things, pledging the applicant's commitment F to be bound by the school rules. They had failed to explain the applicant's absence on the two days. It was only from the urgent chamber application that the respondent had learnt for

the first time of the applicant's alleged trip to South Africa on 17 October 2013. The absenteeism on 16 October 2013 had remained unexplained. The school calendar issued at the beginning of the G year was not the only source of information on compulsory events. During the meeting on 30 October 2013 between the headmaster, the deputy head and the applicant's parents, a document tabulating the applicant's violation of the school rules had been read out to them.

The respondent sought the dismissal of the application with costs *de bonis propriis* because, it said, it should have been apparent to the applicant's legal H

Mafusire J

A practitioners that the applicant had had no basis for approaching the court for the remedy which he sought.

Those were the two versions of the case. I had to decide which to believe, or which was the more probable. But the nub of the matter was whether the respondent had violated the *audi alteram partem* rule of natural justice B (hereafter referred to as "the *partem* rule") in the way it was treating the applicant. Related to that was the question whether or not it was a right that had accrued to the applicant, as a student at the respondent's institution, to attend or participate in social functions or cultural events such as the leavers' dance. Or was the attendance at, or participation in, such events a mere privilege that the school could withdraw at any time? All in all did the C applicant have a legitimate expectation that he would be allowed to attend or participate in such events or a legitimate expectation that before the school could withdraw his right to attend he ought to have been given a chance to make representations?

The issues were ably canvassed and ventilated by battle-hardened counsel D for the applicant, Mr *Mpofu*, and an old war horse Mr *Matinenga* for the respondent. I express profound gratitude for their assistance. Mr *Mpofu* argued that the applicant's entitlement to attend and participate in the school leavers' dance was a right and not a mere privilege; that the bundle of privileges for sixth formers had clearly been set out in the code of conduct and that the leavers' dance had not been one of them; that what the applicant sought was a E temporary interdict in terms of which, in relation to the requirement to prove a right, the applicant needed only to prove a *prima facie* right as opposed to a clear right, and that the punishment being meted out by the respondent to the applicant was disproportionate to the alleged misdemeanours.

Mr *Matinenga* countered that what the applicant sought was an order of F *mandamus*. As such he was required to prove a clear right, not merely a *prima facie* right; that in no way could the attendance or participation at an end-of-year leavers' dance amount to a clear right but that it was merely a privilege which could be withdrawn at any time in appropriate circumstances; that the list of privileges in the code of conduct was by no means exhaustive; that a formal hearing was not the only means by which the *partem* rule G could be observed since there were several other ways that this could be achieved depending on the exigencies of the matter; that in this case the respondent had sought an explanation for the applicant's absence at the two functions in question without getting any response and that there was nothing disproportionate in the measures taken by the respondent as they H were meant to elicit the outstanding explanation. Mr *Matinenga* expressed

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Mafusire J

the fear that if the court were to intervene in this matter it would severely A complicate matters of discipline for the school.

In my view, the applicant's case is slightly different from the plethora of cases in which concepts like the *audi alteram partem* rule, legitimate expectation and interdict were considered. The applicant's case is *sui generis*. In the large majority of cases the courts would be considering a bundle of rights B in relation to employment situations or in relation to strictly commercial agreements. *In casu* it is the bundle of rights of a school child vis-à-vis his school. The relationship was a tripartite one involving the school, the child and the parents. As I observed earlier, the event at the centre of the dispute might be relatively unimportant compared to the busy life in commerce and industry. But in a school situation I imagine it to be part of the life and blood. C It is from that angle that I approached this matter.

The *audi alteram partem* rule holds that a man shall not be condemned without being given a chance to be heard in his own defence. The rule is so basic to jurisprudence that, as Ebrahim J (as he then was) said in *Dube v Chairman, Public Service Commission & Anor* 1990 (2) ZLR 181 (H), it is D often termed a rule of natural justice. In *Taylor v Minister of Education & Anor* 1996 (2) ZLR 772 (S), Gubbay CJ stated at 780A-B:

> "The maxim *audi alteram partem represents a flexible tenet of natural justice that has resounded through the ages. One is reminded that even God sought and heard Adam's* defence before banishing him from the Garden of Eden. *Yet the proper limits are not precisely defined"* (my own emphasis). E

The rule implores public officials, judicial and quasi-judicial officers, and really anyone entrusted with the power to make decisions or the power to take action affecting others adversely, to exercise such powers fairly. In *Kanonhuwa v Cotton Co of Zimbabwe* 1998 (1) ZLR 68 (H) the rule was extended to the realm of private contracts between a private individual and a private entity. In all cases fairness is the overriding consideration. F

The legitimate expectation doctrine is an extension of the *audi alteram partem* rule. Although it is now finding expression in statutes, for example s 3 of the Administrative Justice Act [*Chapter 10:28*], in my view it is a product of judicial activism meant to fill up a *lacuna* in the law. See the reference to the 1988 *American Journal of Comparative Law* (by Prof Robert E Riggs) G in *Administrator, Transvaal & Ors v Traub & Ors* 1989 (4) SA 731 (A).

In England, in the 1960s L**ord** Denning MR, in *Schmidt & Anor v Secretary of State for Home Affairs* [1969] 1 All ER 904 (CA), at 909B, coined it as follows:

> "… an administrative body may, in a proper case, be bound to give a person who is affected by their decision an opportunity of making representations. H

Mafusire J

> A It all depends on whether he has some right or interest, *or, I would add, some legitimate expectation, of which it would not be fair to deprive him without hearing what he has to say"* (emphasis added).

In South Africa, in the 1980s, the doctrine was adopted in *Traub's* case above. Corbett CJ, after an examination of the authorities in England, Australia, New Zealand and elsewhere, said at 760I:

> B "The question which remains is whether or not our law should move in the direction taken by English law and give recognition to the doctrine of legitimate expectation, or some similar principle. The first footsteps in this direction have already been taken in certain Provincial Divisions (see the case quoted above). Should this court give its *imprimatur* to this movement; or should it stop the movement in its tracks?"

C Later on, at p 761D, the learned Chief Justice answered the question as follows:

> "In my opinion, there is a similar need in this country."

In Zimbabwe, in the 1990s, the doctrine was adopted in *Health Professions Council v McGown* 1994 (2) ZLR 329 (S) and subsequent others such as *Taylor supra* and *Kanonhuwa supra*. In *McGown's* case Gubbay CJ stated D as follows at 334B-C:

> "In short, the legitimate expectation doctrine, as enunciated in *Traub*, *simply extended the principle of natural justice* beyond the established concept that a person was not entitled to a hearing unless he could show that some existing right of his had been infringed by the quasi-judicial body… *Fairness is the overriding factor in deciding whether a person may claim a legitimate entitlement to be heard…*"(emphasis added).

E See also *Affretair (Pvt) Ltd & Anor v MK Airlines (Pvt) Ltd* 1996 (2) ZLR 15 (S), per McNally JA at 21C-D.

As observed by the Supreme Court in *Taylor's* case above, the *audi alteram partem* rule, and in my view, its extension, the doctrine of legitimate expectation, are flexible tenets. Their proper limits are not precisely defined. In F my view, a formal charge that is followed by a formal hearing and culminating in a formal verdict and a formal penalty are not always absolute pre-requisites. As Mr *Matinenga* put it, the exigencies of the matter determine the situation. In *Taylor's* case, the court made the following remark at p 778A-B:

> "I did not understand Mr *Nherere* to suggest that in this sort of case *there was* G *need for a hearing in any formal sense, that is, an oral hearing.* All that was required and sought by the appellant was simply an opportunity *to submit written representations*; to be able to put his side of the story with regards to the transfer affecting him" (my own emphasis).

In *Taylor's* case at p 784 the learned Chief Justice went on say:

> "Pickering AJ was at pains to stress that fairness is the true guide to the H circumstances in which a public official is required to afford a hearing. It is this

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Mafusire J

> concept, he said, *that operates as a limiting factor to ensure that the legitimate* A *expectation doctrine does not stray beyond its proper bounds*. I am in respectful agreement that it is helpful to look at the situation *from the stand point of fairness and reasonableness*" (emphasis added)

In the present case the applicant maintained that the two events on 16 and 17 October 2013 which the respondent complained he bunked off were not B compulsory events. He attached the school calendar for support. On that calendar, the applicant had highlighted only two events which were marked compulsory for upper sixes. These were some public speaking competition and some driver awareness talk.

I am persuaded by Mr *Matinenga's* submissions. The school calendar could not have been the exclusive source of information on what events would be C compulsory at the school and what would not be. In any event, not only was there an averment in the affidavit of the school headmaster that he had on several days announced at assembly that the two events had been compulsory, but also there were e-mails that the school had sent to the applicant and his parents to that effect. The one e-mail was on 14 October 2013. The relevant portion read: D

> "Half term starts on Thursday 17 October – lessons will end at 13h15 as usual on this day. The College Speech Night is in the evening, 17h30 for 18h00, in the school hall. Interested persons and prize winners' parents are most welcome to attend as well as leavers' parents. *Forms 3, 4, L6 and U6 students* ***should attend****, in number ones*" (my emphasis). E

The reference to "*number ones*" in the above e-mail was a reference to a type of uniform. Mr *Mpofu* interpreted the e-mail to mean that what had been compulsory had been the wearing of the number ones and not the attendance of the listed streams. This is absurd. The e-mail was clear as to whose attendance was optional. It was optional only for interested persons and the parents of the prize winners. Attendance by students in the streams F singled out was compulsory. Not only did those students have to attend, but also they had to be in their number ones.

The second e-mail had been sent to the parents of the upper sixes. In respect of the applicant, it was addressed to him. It had been sent out on 15 October 2013. In the body of that e-mail was repeated reference to the speech night G which was described as the traditional climax of their schooling. The last paragraph read as follows:

> "Please note that lessons for U6 will stop at break time this Wednesday and students will leave the campus after the Leavers' Assembly. They will not be required to attend school on Thursday the 17th, *except to come back for the Speech Night at 17:30" (*my emphasis*).* H

Mafusire J

A In my view, it was clearly the substance of the e-mail that upper sixes had to attend the leavers' assembly and the speech night. For that reason the school was breaking early on 16 October and closing completely on 17 October.

It is my finding that applicant had manifestly been in breach of the school rules. The respondent had been entitled to discipline him. However, before it had done so, it had called for an explanation. This had been ignored. The B school had then taken measures. But this had been in an effort to get that response. It had withheld the applicant's entitlement to attend the leavers' dance. That had been the only event of significance still remaining for the applicant at the school. I find no fault in the measures taken by the respondent. That had been what the exigencies of the situation had demanded. The C applicant had spurned the opportunity that he had been afforded to explain his absenteeism. In the circumstances the application fails on this basis.

The application also fails on another ground. I am satisfied that a student's attendance at the dance in question was a mere privilege that the school could withdraw at any time. It seems plain from cases such as *Council of Civil Service Unions and Others v Minister for the Civil Service* [1984] 3 All ER 935 (HL), D cited in *Traub's* case at p 756, that the classification of a benefit as a right or as privilege is not necessarily the sole criterion for determining one's legitimate expectation to be

heard in any given case. A regular practice may give rise to a legitimate expectation. For example, in *O'Reilly v Mackman & Ors* [1982] 3 All ER 1224 (HL), E also cited in *Traub's* case at p 756, it was considered that the granting of remissions of sentences under the prison rules may not be a matter of right but of indulgence, but that a prisoner may nonetheless have a legitimate expectation based on his knowledge of what the general practice is that he would be granted the maximum remission as a reward for discipline.

However, from the many authorities on the doctrine of legitimate expectation F one of the major concerns has been its imprecise limits. The courts have been careful not to leave it too loose. Whilst accepting that the law has to reach out and come to the aid of persons who may be prejudicially affected by certain decisions, Corbett CJ, at p 761E-F in *Traub's* case, concluded as follows:

> ". . . whereas the concepts of liberty, property and existing rights are reasonably well G defined, that of legitimate expectation is not. Like public policy, unless carefully handled it could become an unruly horse. And, in working out, incrementally, on the facts of each case, where the doctrine of legitimate expectation applies and where it does not, the courts will, no doubt, bear in mind the need from time to time to apply the curb."

In *Foreman & Anor v KLM Royal Dutch Airlines* 2001 (1) ZLR 108 (H), this H court, per Gwaunza J (as she then was), held that the doctrine of legitimate

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Mafusire J

expectation had no application where the perceived rights were in fact mere A privileges. Where the employer had withdrawn the employees' privilege of flying the employer's airline at reduced rates, the court held that there had been no obligation for the employer to have afforded the employees a hearing before rejecting their application for the enjoyment of that benefit.

Mr *Mpofu* sought to distinguish the *KLM Royal Dutch* case from the instant B matter on the basis that in the *KLM Royal Dutch* case the flying benefit had clearly been marked in the employees' conditions of service as a privilege which the employer had clearly spelt out could be withdrawn unilaterally, but that in the present case the respondent had listed in its code of conduct what the privileges were which could be enjoyed by the sixth formers and that the leavers' dance had not been one of them. Therefore, he argued, C there was no basis for the court to read into the code of conduct what had clearly been excluded.

On pp 42 to 45 of the respondent's code of conduct, under the heading "6th Form Privileges", was a list of 15 privileges. The code repeatedly provided that the privileges were not rights and that they could be removed or revoked D at any time by the headmaster or the deputy head. Indeed, there was nothing written about the leavers' dance.

However, whilst I recognised the force of Mr *Mpofu's* argument, I did not believe that it settled the matter. It seemed evident that the leavers' dance was a tradition in the school. To me that was the import and essence of the present application. I consider that in the code of conduct privileges and E traditions were accorded the same status. At the end of the list of privileges on p 46 of the code was this inscription:

> "It is essential that all privileges *and traditions* reinforce and add to the ethos of the school. *If it is deemed that they do not they will be done away with*. If any 'tradition' takes hold in the school which in any way belittles, disrespects or embarrasses another member of the school or the image of the College in any F way, it will be banned with immediate effect" (my emphasis).

I am satisfied that the respondent had an unfettered discretion to withdraw the applicant's entitlement to attend the leaver's dance without a formal hearing. It was no more than a mere privilege for sixth form leavers.

The *audi* rule was undoubtedly the major ground of the applicant's case. G But in case I am wrong in my conclusions on that point I am of the view that the applicant failed to satisfy one of the requirements for an interdict. Mr *Mpofu* argued that what the applicant sought was simply a temporary interdict in which case he only had to prove a *prima facie* right as opposed to a clear right. Though conceding that what was being sought was a mandatory interdict, counsel argued that it was not an order of *mandamus*. He submitted H

Mafusire J

A that a *mandamus* is a remedy sought against public or quasi- public bodies. The respondent was neither of these.

In the circumstances of this case the distinction sought to be drawn by counsel is, in my view, one without a difference. The requirements for a *mandamus* are the same as those of a mandatory interdict. These were summarised by B Gubbay CJ in the case of *Tribac (Pvt) Ltd v Tobacco Marketing Board* 1996 (2) ZLR 52 (S). At p 56 the learned Chief Justice had this to say:

> "An application for a *mandamus* or 'mandatory interdict', as it is often termed, can only be granted if all the requisites of a prohibitory interdict are established. See *Lipschitz v Wattrus NO* 1980 (1) SA 662 (T) at 673C-D; *Kaputuaza & Anor v Executive Committee of the Administration for the Hereros and Others* 1984 (4) SA 295 (SWA) C at 317E. These are:
>
> 1. A clear or definite right – this is a matter of substantive law.
> 2. An injury actually committed or reasonably apprehended – an infringement of the right established and resultant prejudice.
> 3. The absence of a similar protection by any other ordinary remedy. The alternative remedy must (a) be adequate in the circumstances; (b) be ordinary D and reasonable; (c) be a legal remedy; and (d) grant similar protection.
>
> The *locus classicus* of the cases which sets out these criteria is, of course, *Setlogelo v Setlogelo* 1914 AD 221 at 227. See also *PTC Pension Fund v Standard Chartered Merchant Bank Zimbabwe Ltd & Anor* 1993 (1) ZLR 55 (H) at 63A-C."

In an application for a temporary interdict the applicant needs only show a E *prima facie* right. That right may be open to some doubt. With regards to this requirement in particular Malaba JA, as he then was, said in *Airfield Investments (Pvt) Ltd v Minister of Lands & Ors* 2004 (1) ZLR 511 (S) at 517:

> "There are, however, requirements which an applicant for interim relief must satisfy before it can be granted. In *L F Boshoff Investments (Pty) Ltd v Cape Town Municipality* 1969 (2) SA 256 (C) at 267A–F, Corbett J (as he then was) F said an applicant for such temporary relief must show:
>
> (a) that the right which is the subject matter of the main action and which he seeks to protect by means of interim relief is clear or if not clear, is *prima facie* established though open to some doubt …"

In the applicant's draft order the right to attend the leavers' dance was part G of the interim order sought. However, one looks at the substance of the relief sought and the exigencies of the matter rather than the form. Despite the applicant's coining the relief as interim, to me it was undoubtedly a final relief that was being sought. This is so because either the dance would happen and the applicant would attend, or it would happen and the applicant would not attend. Once the dance was held and done with that would be H the end of the matter. Whatever would happen or not happen would be the

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final thing. There would be no question of any coming back on the return A day to confirm anything.

The final order sought by the applicant was, in my view, unrelated to the substance of the application. No case for it was properly made out.

The applicant was supposed to demonstrate a clear right to attend the dance. In my view he failed to do so. Therefore, the application also fails on this B ground.

With the view that I have taken on the *audi* rule and the issue of the interdict, I have found it unnecessary to consider the rest of the submissions by counsel.

In the premises the urgent chamber application is hereby dismissed with costs. However, I found no basis for the respondent's prayer for costs *de* C *bonis propriis* against the applicant's legal practitioners. There was no discernible infraction in the manner they took up the applicant's cause and prosecuted his case.

Sawyer & Mkushi, legal practitioners for the applicant

Gill, Godlonton & Gerrans, legal practitioners for the respondent D

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Document 65 of 79

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S v FATA 2013 (2) ZLR 635 (H)

Citation	2013 (2) ZLR 635 (H)
Case No	Judgment No. HH-420-13
Court	High Court, Harare
Judge	Hungwe J & Mavangira J
Heard	16 July 2013; *CAV*
Judgment	20 November 2013
Counsel	Ms *M Chimhoga*, for the appellant *E Nyazamba*, for the respondent
Case Type	Criminal appeal
Annotations	No case annotations to date

Flynote

Evidence – *circumstantial – when may be said to have established guilt of accused – only conclusion must be that accused is guilty – evidence must also be inconsistent with accused's innocence*

Headnote

D When a case rests upon circumstantial evidence, such evidence must satisfy the following tests: (a) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established; (b) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (c) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion E that within all human probability the crime was committed by the accused and no-one else; and (d) the circumstantial evidence, in order to sustain conviction, must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused; and such evidence should not only be consistent with the guilt of the accused but should be F inconsistent with his innocence.

Cases referred to

A-G v Paweni Trading Corp (Pvt) Ltd 1990 (1) ZLR 24 (S)

Bhagat Ram v State of Punjab AIR (1954) SC 621

C Chenga Reddy v State of Andhra Pradesh (1996) 10 SCC 193

G *Padala Veera Reddy v State of Andhra Pradesh AIR* 1990 SC 79

S v Hartlebury & Anor 1985 (1) ZLR 1 (H)

S v Marange & Ors 1991 (1) ZLR 244 (S)

Case information

Ms *M Chimhoga*, for the appellant

H *E Nyazamba*, for the respondent

Judgment

Hungwe J: The appellant appeals against her conviction and sentence. She A denied that she had stolen US$24 000 from her employer but, after a trial, she was convicted and sentenced to four years' imprisonment, of which six months were suspended for five years on condition of good behaviour and 36 months on condition she makes full restitution of the whole amount through the clerk of court on or before 30 April 2012. There is an order annexed B to the sentence requiring "household property to be returned to accused."

The case against the appellant was built around the claim by the complainant that she lost US$24 000 around the time the appellant worked for her as a house maid. The complainant stated in her evidence that she engaged the appellant as a maid in March 2011. She worked mornings only. She did not stay on the premises. In January the appellant told her that she had had a C miscarriage. They (the appellant and her husband) left their residence, which was across the road from hers, to proceed to their rural home. It was then that the complainant picked up a rumour concerning the appellant's sudden good fortune. As a result she checked her own treasure and found her savings, amounting to US$24 000, missing. She instantly suspected the appellant and reported her suspicion to the police. The appellant was arrested. The D complainant stated in her evidence in court that she kept her savings in a locked built-in wardrobe. She believed the appellant found her keys where she kept them and unlocked it before helping herself to this sum of money. This led the appellant to brag to those in her circle of acquaintances that she was rich. The police recovered household property. The investigating officer E told the court in evidence that the appellant told her that the complainant's husband had given her some money after they fell in love. The appellant also told her that she believed a house belonging to the appellant was recently built using the proceeds of theft since it was a newly-built three-roomed house. Another state witness, Patricia Magadu, the appellant's sister-in-law, told the court that the appellant advanced her a sum of US$3 000. According to F this witness, the complainant's husband had raped her and they were caught in the act. She paid her off in the sum of US$7 000.

In her defence, the appellant told the court that in August 2011 whilst employed by the complainant, she had been raped by the complainant's husband after which the complainant's husband gave her US$5 000. He had G given her another US$2 000 after another sexual escapade in their computer room. From the two amounts she had built her three-roomed house in the communal lands and lent her sister-in-law, Patricia Magadu, US$3 000. She bought household effects using the remainder. She stated that this happened well before the complainant allegedly lost her savings. She denied that she could have stolen the complainant's savings as she had never been left alone H

Hungwe J

A inside her main bedroom where complainant claimed she kept the money. In any event, she stated that there was a screen door to the bedroom which would always be locked. She had no knowledge of where this money was kept or how it was secured.

No-one saw the person who took the complainant's savings from wherever it was. No-one, besides the complainant, knew how much she kept and therefore B how much was stolen from her, not even her husband. No-one knows when the complainant lost her money including the complainant herself. So, at the outset, there is no proof that the complainant had the amount of money in the house that she claims she had kept locked away for a rainy day. Not even her husband, who stated that he gave her money to keep, was able to C corroborate her as to the amount she kept in the house. As to the date of the theft, whilst it is not an essential element of theft, the particulars of when the crime allegedly occurred would assist the accused in preparation of her defence. Presently, the averment is that theft occurred "during the period extending from August 2011 to 14 January 2012".

D The case against the appellant was therefore based on circumstantial evidence. The evidence tendered by the prosecution is not sufficient to prove unerringly that the accused was responsible for the crime. It has been consistently laid down by this court that, where a case rests squarely on

circumstantial evidence, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the E accused or the guilt of any other person.

In *S v Hartlebury & Anor* 1985 (1) ZLR 1 (H) at 7, McNally J (as he then was) set out what constitutes circumstantial evidence in the following terms:

> "Now, all this evidence may be described as 'circumstantial evidence'. As regards the inferences to be drawn from such evidence, I have accepted that one must F ask oneself whether a reasonable man might draw the inferences sought to be drawn by the State and it is perhaps useful in this connection to cite the remarks made in *S v Cooper & Ors* 1976 (2) SA 875 (T) at 888H-889C as follows:
>
> > 'When triers of fact come to deal with circumstantial evidence and inferences to be drawn therefrom, they must be careful to distinguish between inference and conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it is sought G to establish. In some cases the other facts can be inferred with as much practical certainty as if they had been actually observed. In other cases the inference does not go beyond reasonable probability. But if there are no positive proved facts from which the inference can be made, a method of inference fails and what is left is mere speculation or conjecture . . . One often gets cases where the facts proved in evidence – the primary facts – are H such that the tribunal of fact can legitimately draw from them an inference

Hungwe J

> one way or the other, or, equally legitimately, refuse to draw any inference A at all. But that does not mean that when it does draw an inference it is making a guess. It is only making a guess if it draws an inference which cannot legitimately be drawn; that is to say if it is an inference which no reasonable man could draw.'"

In *Attorney-General v Paweni Trading Corp (Pvt) Ltd* 1990 (1) ZLR 24 (S) at 32 the Supreme Court held (*per* Korsah JA): B

> "It seems to me that, in determining the parameters of the phrase under consideration, the court is in a way concerned with the rules governing circumstantial evidence; for the court is merely drawing inferences from the proven facts. And as Beadle CJ observed in *R v Sibanda & Ors* 1965 RLR 363 (A) at 370A-C; 1965 (4) SA 241 (SRA) at 246 B-C:
>
> > 'Generally speaking, when a large number of facts, taken together, point to C the guilt of an accused, it is not necessary that each fact should be taken in isolation and its existence proved beyond a reasonable doubt, it is sufficient if there are reasonable grounds for taking these facts into consideration and all the facts, taken together, prove the guilt of the accused beyond reasonable doubt: See *R v de Villiers* 1944 AD 493. Where, however, there is a particularly vital fact which in itself determines the guilt of an accused, D it must be proved beyond reasonable doubt.'
>
> To my mind, then, if there are reasonable grounds for taking certain facts into consideration, and all the facts, when taken together point inexorably to the guilt of an accused beyond peradventure, but the trial court nonetheless acquits the accused, then the trial court has taken a view of the facts which could not reasonably be entertained. Put another way, if, on a view of the facts, the court E could not reasonably have inferred the innocence of the accused, then the verdict of acquittal is perverse, and the Attorney-General is entitled to attack it."

In *S v Marange & Ors* 1991 (1) ZLR 244 (S) at 249 the Supreme Court (*per* Korsah JA) expressed itself on the subject thus:

> "Before I answer this question, I wish to draw attention to the dangers inherent in drawing conclusions from circumstantial evidence. Lord Normand observed F in *Teper v R* [1952] AC 480 at 489 that:
>
> > 'Circumstantial evidence may sometimes be conclusive, but it must always be narrowly examined, if only because evidence of this kind may be fabricated to cast doubt on another. Joseph commanded the steward of his house, "put my cup, the silver cup, in the sacks' mouth of the youngest", and when the cup was found there Benjamin's brethren too hastily assumed that he G must have stolen it. It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.'
>
> I ask myself, is the inference that the first appellant was hunting at Twin Tops Ranch the only one to be drawn from the circumstantial evidence? While the circumstantial evidence leaves me with a strong suspicion that he was up to no good, it cannot be said that the circumstantial evidence proffered excludes H

Hungwe J

A any other conclusion. Even if the first appellant's explanation that he was on his way to purchase vegetables from the resettlement area does not have a ring of truth about it, it still is not inconsistent with the circumstantial evidence and remains a possible explanation of his presence on a public thoroughfare adjacent to the ranch. At best, the circumstantial evidence raised no more than a very strong suspicion that the first appellant was there to hunt. The learned trial magistrate could not have been satisfied that the explanation was false. *R* B *v Difford* 1937 AD 370."

In the Indian Supreme Court matter of *Bhagat Ram v State of Punjab* AIR (1954) SC 621 it was laid down that where the case depends upon the conclusion drawn from circumstances the cumulative effect of the circumstances must be such as to negative the innocence of the accused and bring home the C offences beyond any reasonable doubt.

The same court in *C Chenga Reddy v State of Andhra Pradesh* (1996) 10 SCC 193 observed thus:

"In a case based on circumstantial evidence, the settled law is that the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature. Moreover, all the circumstances D should be complete and there should be no gap left in the chain of evidence. Further, the proved circumstances must be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence."

In *Padala Veera Reddy v State of Andhra Pradesh* AIR 1990 SC 79 at para 10 it was laid down that when a case rests upon circumstantial evidence, E such evidence must satisfy the following tests, which in my respectful view aptly summarise the approach of the courts here as well as in South Africa and in England:

"(1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

(2) those circumstances should be of a definite tendency unerringly pointing F towards guilt of the accused;

(3) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and

(4) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of G the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence."

It is important to carefully scrutinise the evidence of the complainant regarding the charge of theft faced by appellant. The complainant was unable to prove the amount of money that she claims she lost. It was critically important in H view of the explanation given by the appellant that the amount be proved. The

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period during which the theft occurred must have been proved to coincide A with the period during which the appellant became "rich". There was no proof that these periods coincided. Her claim that she built her house long before the theft remained unchallenged. The appellant stated that she had been given a total of US$7 000 by complainant's husband. She claimed this was the source of her sudden show of opulence. It was incumbent to show by B evidence that this explanation was not only improbable, but in all respects false. The falsity of her explanation, given her known income at the time, would have gone a long way towards giving a lie to her whole evidence thereby creating an only reasonable inference that she, and only she, stole the complainant's money. The complainant's husband confirmed the appellant's evidence that there were other maids who worked for the complainant during C the same period the money was lost. There was no proof that, unlike the appellant, they did not enjoy access into the main bedroom where the money was kept. Her evidence, that there were other maids who were employed at the same time with her and even after she left complainant's employ, sticks out like a sore thumb. The State did not exclude the possibility raised by this fact of other possible suspects having had the same opportunity as the D appellant to access the complainant's savings.

In any event, her explanation of the resources suddenly available to her were not seriously challenged. As conceded by the State, her explanations to how she acquired the assets found at her residence could not be said to be reasonably beyond all probability untrue. In fact it was reasonably

possibly E true. In that event, the court was not entitled to reject it as false or improbable, let alone convict her of theft.

What I am required to determine is whether there is any possibility that any reasonable court could draw the inferences which the prosecution sought to be drawn from the facts that I have just outlined. It seems to me that no reasonable person could possibly draw inferences of any kind or any relevant F kind from the evidence I have referred to and it seems to me to be beyond a shadow of doubt that one can only speculate. The trial magistrate fell into error when he concluded that the circumstantial evidence adduced led irresistibly to the conclusion that the appellant was guilty of theft of US$24 000.

In light of the above observations I respectfully find that there was no proof G beyond a reasonable doubt. I am unable to conclude that the facts proved at trial are consistent only with the guilt of the appellant and no-one else and inconsistent with her innocence. The fact that the appellant bragged about being rich, or that she had acquired substantial assets or built a three-roomed house in the rural areas could only lead to very strong basis for the suspicion that she stole complainant's money. To hold her liable for the theft could H

Hungwe J

A only be based on such speculation and conjecture as revealed in the trial nothing more. The conviction is totally unsafe as there are other inferences which could reasonably be drawn from the same facts besides that the appellant stole US$24 000. She said she sold a piece of diamond. This was not rebutted. It was not an impossibility for her at the time to achieve such wealth this way at the time.

B In the result therefore the appellant's conviction for theft is quashed and her sentence is set aside.

MAVANGIRA J concurred.

Goneso & Associates, appellant's legal practitioners

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

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Document 66 of 79

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2013/Volume 2/MUSHOSHO v MUDIMU & ANOR 2013 (2) ZLR 642 (H)

MUSHOSHO v MUDIMU & ANOR 2013 (2) ZLR 642 (H)

Citation	2013 (2) ZLR 642 (H)
Case No	Judgment No. HH-443-13
Court	High Court, Harare
Judge	Chigumba J
Heard	4 November 2013; CAV
Judgment	27 November 2013
Counsel	*T Mudambanuki,* for the applicant *W Pasipanodya,* for the first respondent *No appearance* for the second respondent

Case Type Opposed application

Annotations No case annotations to date

Flynote

Practice and procedure – *judgment – rescission – judgment granted in absence of affected party – different methods of seeking rescission – distinction between such methods – rescission of default judgment – strict time limits and requirement to show good and sufficient cause for rescission – judgment granted in error – nature of error which may* D *allow rescission – no specific time limits – court's common law powers to rescind judgment*

Headnote

There are three separate ways in which a judgment in default of one party may be set aside. This can be done in terms of r 63 or r 449(1)(a) of the E High Court Rules, or in terms of the common law. An applicant is at liberty to elect to use whichever one of those three vehicles best suits the circumstances of the case. Whichever one he chooses, the court will have to consider the question of length of time that has elapsed since the judgment sought to be rescinded was granted.

To qualify for relief under r 63 a litigant must show that: F

- judgment was given in the absence of the applicant under these rules or any other law;
- the application for rescission was filed and set down for hearing within one calendar month of the date when the applicant acquired knowledge of the judgment; G
- condonation of late filing has been sought and obtained where the applicant fails to apply for rescission within one month of the date of knowledge of the judgment;
- there is "good and sufficient cause" for the granting of the order.

"Good and sufficient cause" has been construed to mean that the applicant must (a) give a reasonable and acceptable explanation for his default; H

(b) prove A that the application for rescission is *bona fide* and not made with the intention of merely delaying the plaintiff's claim; and (c) show that he has a *bona fide* defence to the plaintiff's claim.

To qualify for relief under r 449(1)(a) a litigant must show that:

- the judgment was erroneously sought or erroneously granted;
- the judgment was granted in the absence of the applicant or one of B the parties; and
- the applicant's rights or interests were affected by the judgment.

To qualify for relief in terms of the High Court's common law power to rescind its own judgments a litigant must show that:

- the court' discretion that it is being asked to exercise is broader than C the requirements of both rr 449 and 63; and
- whether, having regard to all the circumstances of the case, including the applicant's explanation for the default, it is a proper case for the grant of the indulgence.

The question is, what sort of error will suffice to bring an applicant squarely D within the ambit of r 449(1)(a)? Is it an error of fact, an error of law, or both? An "error", in common and ordinary parlance, is defined as a mistake, fault, blunder, slip, slip-up, inaccuracy or miscalculation. The law is settled on the issue of if or when and whether the court ought to grant rescission of its own judgments in terms of r 449. A party against whom default judgment had been granted is entitled to place before the E correcting, varying or rescinding court facts which had not been before the court granting the default judgment. It is not necessary for a party seeking relief under r 449 to show "good cause". If a court holds that the default judgment was erroneously granted, it may be corrected, rescinded or varied without further enquiry. Rule 449 is one of the

exceptions to F the general principle that once a court has pronounced a final judgment or order it is *functus officio* and has itself no authority to correct, alter or supplement it. Mistakes of fact are not precluded, although the mistakes must not be trivial or petty clerical ones. The mistake must have been made on the part of the party seeking the judgment in default, or of the judge who granted it, and the applicant ought to show that he was G prejudiced as a result, or that there was a miscarriage of justice. In other words, despite having a good defence on the merits, judgment was given against him in error, as a result of such mistake. Any fact which was not brought to the attention of the court at the time judgment in default was given may be placed before the court dealing with an application H to rescind judgment in terms of r 449.

It would be a proper exercise of the court's discretion to rule that, even if A the applicant proved that the rule applied, the application could not be heard after the lapse of a reasonable time.

Rule 63 has strict time limits which must be adhered to and a litigant who falls foul of the time limits will not be heard unless condonation is first sought and obtained. The phrase "good and sufficient cause" is seemingly B wide-ranging and all encompassing. The explanation for the default must be reasonable or acceptable. The applicant must show that he has a *bona fide* defence to the claim.

On the other hand, the court's common law discretion to rescind its own judgment is wide and requires that regard be had to all the circumstances of the case, including the explanation for, and the length of, the delay in C bringing the application, and the prospects of success of the applicant in the main matter. Rule 63 is more in tandem with the court's common law discretion to rescind its own judgments. This is because, when regard is had to the wording of r 63, that "A party against whom judgment has been given in default, whether under these rules or under any other law", it becomes clear that r 63 recognizes the possibility that judgments may D be rescinded under other laws which may not necessarily fall under the rules, such as the common law discretion that the court has to rescind its own judgments.

Cases cited E

Bakoven Ltd v G J Howes (Pty) Ltd 1992 (2) SA 466 (E)

de Wet & Ors v Western Bank Ltd 1979 (2) SA 1031

Gondo & Anor v Syfrets Merchant Bank Ltd 1997 (1) ZLR 201 (H)

Grantully (Pvt) Ltd & Anor v UDC Ltd 2000 (1) ZLR 361 (S)

Highline Motor Spares (1933) (Pvt) Ltd & Ors v Zimbank Corp Ltd 2002 (1) ZLR 514 (S) F

Motor Cycle (Pvt) Ltd v Old Mutual Property Invstm Corp Ltd HH-45-07

Mutebwa v Mutebwa & Anor 2001 (2) SA 193 (Tk)

Moyo & Ors v Sibanda & Anor 2011 (2) ZLR 186 (H)

Sibanda v Ntini 2002 (1) ZLR 264 (S)

Viking Woodwork (Pvt) Ltd v Blue Bells Enterprises (Pvt) Ltd 1988 (2) ZLR 249 (S) G

Legislation considered

High Court Rules 1971 (RGN 1047 of 1971), rr 63 & 449

Case information

T Mudambanuki, for the applicant

W Pasipanodya, for the first respondent H

Chigumba J

A *No appearance* for the second respondent

Judgment

Chigumba J: This is an application for rescission of judgment in two cases, HC 6627/10 and HC 3805/08, brought in terms of r 449(1)(a) of the High Court Rules 1971. The relief sought by the applicant, is for an order in the following terms:

1. The B judgments obtained by the first respondent against the applicant in the two cases be and are hereby set aside.
2. The title deeds to stand no. 2819 Bluffhill Township, Bluffhill which the first respondent obtained as a result of an order granted to him in case no. HC3508/08 be and are hereby nullified.
3. The C applicant be and is hereby declared the sole owner of stand No. 2819 Bluffhill Township, Bluffhill, held under Deed of Transfer No. 004804/98 in his favour.
4. The first respondent and any person claiming occupation through him of stand No. 2819 Bluffhill Township, Bluffhill, be and are hereby ordered D to vacate the property within seven days of the date of service of this order.
5. The first respondent pay costs of suit on a legal practitioner and client scale.

In the founding affidavit, the applicant averred that: he is the lawful owner E of stand 2819 Bluffhill Township, Bluffhill (hereinafter referred to as "the Bluffhill stand"), in terms of Deed of Transfer No. 004804/98. On or about 9 April 2007 he discovered that there was construction going on at this property, despite there not having been an agreement entered into by him to sell this property to anyone. On making inquiry, he found out that the F first respondent was responsible for the construction, on the basis that he had bought the stand from "an old man and pensioner Jonas Mushosho of Matepatepa in Mashonaland Central".

During an initial telecommunication with the first respondent, he advised him that he was Jonas Mushosho and that he had not sold the Bluffhill stand to anyone. The first respondent in turn advised him that he had already G taken transfer of the property, and referred him to his legal practitioner, Dinha Bonongwe & Partners. On the plaintiff's instructions, his legal practitioners wrote to the first respondent on 12 April 2007 advising him to cease construction on the Bluffhill stand and to vacate within twenty four hours. He reported the matter to the police who accompanied him to the H stand on 28 April 2007.

Chigumba J

On 30 April 2007 the parties met at the Criminal Investigations Department A at Ahmed House in Harare. According to the applicant, the first respondent admitted that he did not know him and had never had dealings with him, and that he had been cheated by a person impersonating the applicant, the real "Jonas Mushosho". The applicant averred that the first respondent voluntarily surrendered the keys to the property that he had built on the Bluffhill stand. B Detective Sergeant Rodwell Mwandayi, the investigating officer in this matter, deposed to an affidavit on 28 May 2007, in which he confirmed the applicant's version of events.

On 8 May 2007 the first respondent applied for, and was granted, a spoliation order in the magistrates court, in case 3877/07. He attached to that application an agreement of sale entered into by him and Jonas Mushosho of house No. C 37 Matepatepa, Bindura. The agreement is dated 28 June 2006 and it states that Jonas Mushosho was the owner of stand 2819 Bluffhill, Harare, which he sold to the first respondent for Zim$1,2 billion. The agreement was signed and witnessed before legal practitioners. Attached to the agreement of sale was an affidavit in which Jonas Mushosho confirmed that he had sold the D stand to the first respondent. The affidavit was commissioned before the same firm of legal practitioners. Deed of Transfer No. 4804/98 was attached, which showed that the registered owner of the Bluffhill stand was Jonas Mushosho, born on 24 November 1958.

On 4 July 2007, in case No. HC 3878/07 in the High Court, the applicant filed for the first respondent's eviction from the Bluffhill stand, and for a E declaration that the agreement of sale relied on by him was null and void. Judgment was entered in favour of the applicant, in default of filing a plea by the first respondent. The first respondent applied for rescission of this judgment and the applicant admits that he did not oppose that application. The first respondent then applied for an order compelling the applicant to F sign transfer documents to transfer the Bluffhill stand into his name, in case HC 2775/07. The applicant opposed that application. On 8 February 2008, in case HC 538/08, it was ordered that:

1. The first respondent be interdicted from carrying on further developments on stand 2819 Bluffhill until the matter was finalized.
2. The applicant and the Deputy Sheriff stay execution of the default judgment granted in HC 3878/07.
3. Cases HC 2775/07 and HC 3878/07 be joined as one action.

The two matters which were joined were eventually set down for a pre-trial conference on 8 April 2010. The applicant averred that the first respondent's legal practitioners of record at the time, Manase & Manase, refused to

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Chigumba J

accept service of the notice of set down of the pre-trial conference. It would appear, from the letter written to the Law Society by the applicant's legal practitioners, that service of the notice was attempted to be made at 9:30 a.m. indicating that a pre-trial conference was set down before Hungwe J at 12:30 pm that day. He made the following order, on 8 April 2008, in cases HC 3878/07 and HC 2775/07:

> "1. The respondent in case HC 2775/07 withdrew its case and tendered wasted costs on 26 February 2008.
> 2. The Hon F Chatukuta J's order in case HC 3878/07 is hereby revived, thereby superceding the Hon Bhunu's order in case HC 538/08.
>
> IT IS ORDERED THAT:
>
> (a) The respondent (Mudimu) and any person claiming occupation through him of stand 2819 Bluffhill Township be and are hereby ordered to vacate the property within seven days of the date of this order.
> (b) The agreements of sale between the respondent and an impersonater "Jonas Mushosho" dated 23 June 2006, and 28 June 2006, be and are declared null and void.
> (c) The applicant be and is hereby declared the sole owner of stand no. 2819 Bluffhill Township, held under Deed of Transfer No. 004804/98 in his favour.
> (d) The spoliation order granted in case HC 3877/07 be and is hereby set aside.
> (e) The respondent pays costs of this suit on an attorney and client scale."

The applicant averred that his attempts to enforce this order were met with stiff resistance, and that the first respondent refused to vacate the premises on the basis that he had since taken transfer, and now held the Bluffhill stand under Deed of Transfer no. 0005304/09. The first respondent then applied for rescission of the judgment made by Hungwe J, and for stay of execution pending determination of the application for rescission of judgment. These two applications were filed under case Nos. HC 6627/10 and HC 6794/10. The applicant opposed both applications and filed a counter-application to the application sfor rescission of judgment. On 11 October 2010 Makoni J issued an order dismissing the first respondent's application in case HC 6794/10 and the order to stay execution.

The applicant averred that he opposed the first respondent's application for rescission of Hungwe J's judgment granted in the joined cases HC 3878/07 and 2775/07. The applicant's notice of opposition to the application for rescission appears to have been filed of record on or about 6 October 2010. His counter-application was filed on the same date. He counter-claimed for a declaratory order that he is the sole and legal owner of the Bluffhill stand, and for an order that Deed of Transfer 0005304/09 be declared null and void.

Chigumba J

The application by the first respondent to rescind Hungwe J's order was set down on the unopposed roll on 1 December 2010, and the following order was granted unopposed by Bhunu J:

> "1. Default judgment entered against applicant (Mudimu) in the consolidated case HC2775/10 be and is hereby rescinded.
> 2. Costs of suit shall be borne by the respondent (Mushosho)."

The applicant denied ever having been served with papers in case HC 3508/08, in which the first respondent obtained an order from Mavangira J, in default of appearance by the applicant, on 24

September 2008, to the effect that the applicant sign all necessary documents to effect transfer of the Bluffhill stand into the first respondent's name within seven days of the C date of that order or, failing which, the Deputy Sheriff was authorized to sign the documents on his behalf. The applicant averred that he suspects that deed of transfer no. 0005304/09 came into existence that way. The applicant contended that the first respondent obtained the order in case HC 3508/08 fraudulently and under unclear circumstances. The applicant averred that he was never served with any papers and that had he been served, he would D have vigorously opposed the granting of the order. The applicant averred that the first respondent never approached him and requested that he sign transfer documents within seven days of 24 September 2008, as directed by the order. The applicant averred that as at 24 September 2008, when the first respondent obtained the order from Mavangira J, the consolidated matters under HC 538/08 were still pending determination on similar issues. E

The applicant contended further that the order under HC 6627/10, which rescinded judgment in the consolidated cases determined by Hungwe J, was obtained irregularly and in unclear circumstances. He contended that his counter-claim was not determined or referred to. He reiterated that he was not in default, and that the matter was erroneously set down on the F unopposed roll without his knowledge. The applicant's claim is that the orders obtained by the first respondent in HC 3508/08 before Mavangira J, and HC 6627/10 before Bhunu J were obtained fraudulently and irregularly and ought to be rescinded.

The first respondent, in his opposing affidavit, raised a preliminary point G that the application is without merit and should be dismissed as it seeks the rescission of a judgment entered against the applicant on 25 September 2008 four years later, and on 1 December 2010 in HC6627/10, two years later. The preliminary point raised is that an applicant has a period of one month, from the date when he becomes aware of a judgment, to apply for its rescission, and may not do so thereafter unless he first applies for condonation of the H

Chigumba J

A late filing. The first respondent averred that the applicant, in bringing this application, is in breach of r 63 of the rules of this court. The first respondent averred that the applicant ought to be ordered to pay costs *de bonis propriis* because his legal practitioners were advised of the apparent breach of the rules of this court on 3 December 2012, but have persisted with their application.

B Regarding the merits of the application, the first respondent averred that the applicant sold the Bluffhill stand to him on 23 June 2006 through Dinha Bonongwe & Partners, legal practitioners. He averred that the applicant received the full purchase price and tendered a letter dated 24 October 2012 in which Mr Bonongwe confirms that the parties entered into an agreement of sale in respect of stand 2819 Bluffhill, and that the sale was perfected. C The letter states that a Mr Robert Nyawasha, a paralegal with that firm, was able to positively identify both parties as being the parties who entered into the agreement of sale. Both parties' ID numbers were supplied.

The first respondent contended that he was forcibly despoiled of the property by the applicant, and that he was intimidated into handing over the keys to the D property, a cottage that he had constructed and which he was in occupation of. The first respondent averred that the applicant attempted to serve a notice of set down of the pre-trial conference before Hungwe J, a mere thirty minutes before the set down time, and confirmed that the receptionist at Manase and Manase, his legal practitioners of record, refused to accept service E of the notice of set down. The first respondent averred that the applicant produced a fake notice to Hungwe J, indicating that the first respondent had withdrawn his claim and tendered wasted costs, at the pre-trial conference, in the absence of the first respondent, who had not been correctly served with notice of set down.

F The first respondent averred that he applied for rescission of the judgment handed down by Hungwe J. He confirmed that the title deeds in his name were obtained as a result of the order granted by Mavangira J in HC 3508/08. The first respondent contended that the court in HC 3508/08 would not have granted the order had it not been satisfied that the papers had been duly served on the applicant and that he was indeed in default. He challenged the G applicant to state whether a perusal of that record failed to show that there was adequate proof of service of the process on him. The first respondent reiterated that the applicant failed to file opposition in time in both matters, and that he was justified in setting down HC 6627/10 on the unopposed roll for

determination. He contended that no evidence of error on the part of those H two courts had been alluded to or provided by the applicant.

2013 (2) ZLR p650

Chigumba J

The applicant filed an answering affidavit in which he denied that this A application is devoid of merit. He contended that his application is not premised on r 63, but on r 449(1)(a) of the rules of this court. According to him, an application in terms of r 449 is not time specific, and all that one has to show is that the order sought to be rescinded was erroneously sought or erroneously obtained, in the absence of the applicant. He contended that B the first respondent's point *in limine* ought to be dismissed and urged the court not to accede to the request for an order of costs *de bonis propriis.* The applicant contended that Dinha Bonongwe & Partners participated in the fraud perpetrated against him by the first respondent, and caused the illegal transfer of the Bluffhill stand into the first respondent's name.

The issue that falls for determination is this: is there sufficient evidence C before the court on the basis of which the court should grant rescission of the two judgments in cases HC 3508/08, and HC 6627/10 and, if so, should the court be guided by the provisions of r 63 or of r 449(1)(a).

Put simply, the first issue to be determined is that of which of the provisions of the High Court Rules, out of those that provide for rescission of judgments D granted in default of one of the parties, is best suited to determine the dispute between the parties in this case. The second issue for determination after that will be whether, in the circumstances of this case, on the evidence before the court, the applicant should be granted the relief that he seeks.

Rule 63 provides as follows:

> **"63. Court may set aside judgment given in default** E
>
> (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 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 F 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.

Rule 449 provides as follows:

> **"449. Correction, variation and rescission of judgments and orders**
>
> (1) The court or a judge may, in addition to any other power it or he may have G *mero motu* or upon the application of any party affected, correct, rescind, or vary any judgment or order –
>
> (a) that was erroneously sought or erroneously granted in the absence of any party affected thereby; or
>
> (b) …
>
> (c) …" H

2013 (2) ZLR p651

Chigumba J

A The applicant relied on *Motor Cycle (Pvt) Ltd v Old Mutual Property Investments Corp Ltd* HH-4-07 at pp 5-6, where Chatukuta J said:

> "… Mr *Mushonga* submitted that the applicant was seeking rescission in terms of r 449 as read together with Order 9 r 63. Firstly, the applicant does not refer to r 63 in its pleadings. Rule 63 was first mentioned in the oral submissions and therefore was not pleaded. Secondly, I am not sure whether the two rules B can be read together. It is my view that there are three separate ways in which a judgment in default of one party may be set aside. This can be done in terms of r 63 or r 449(1)(a) or in terms of the common law".

There are two noteworthy issues that distinguish the *Motor Cycle* case *supra* and the issue under consideration. The first is that in the *Motor Cycle* case, it was not in dispute that a defective notice of entry of appearance to defend C had been filed of record. In the matter under consideration, it is not clear what the error was, and whether it was an error relating to the pleadings filed, or on the part of the court in accepting such pleadings. The second distinguishing factor is that in the *Motor Cycle* case, the alleged error was defined as an error of law and was clearly spelt out as such in the pleadings.

D It is my view that, in order to qualify for relief under r 449(1)(a), a litigant must show that:

1. the judgment was erroneously sought or erroneously granted;
2. the judgment was granted in the absence of the applicant or one of the parties;
3. the applicant's rights or interests were affected by the judgment: see E *Mutebwa v Mutebwa & Anor* 2001 (2) SA 193 (Tk); and
4. there has been no inordinate delay in applying for rescission of the judgment.

It is my view that, in order to qualify for relief under r 63, a litigant must show that:

1. judgment F was given in the absence of the applicant under these rules or any other law;
2. the application was filed of record and set down for hearing within one calendar month of the date when the applicant acquired knowledge of the judgment;
3. condonation G of late filing had been sought and obtained where the applicant fails to apply for rescission within one month of the date of knowledge of the judgment;
4. there is "good and sufficient cause" for the granting of the order. See *Viking Woodwork (Pvt) Ltd v Blue Bells Enterprises (Pvt) Ltd* 1988 (2) ZLR 249 (S) at 251B-D, *Highline Motor Spares 1933 (Pvt) Ltd & Ors v Zimbank Corp* H *Ltd* 2002 (1) ZLR 514 (S) at 516C-E and 518A-B, *Sibanda v Ntini* 2002 (1) ZLR 264 (S)

Chigumba J

and *Moyo & Ors v Sibanda & Anor* 2011 (2) ZLR 186 (H); A and

5. the phrase "good and sufficient cause" has been construed to mean that the applicant must:
   (a) give a reasonable and acceptable explanation for his/her default;
   (b) prove that the application for rescission is bona fide and not made B with the intention of merely delaying the plaintiff's claim; and
   (c) show that he orshe has a *bona fide* defence to the plaintiff's claim: see *Songore v Olivine Industries (Pvt) Ltd* 1988 (2) ZLR 210 (H).

It is also my view that, in order to qualify for relief in terms of this court's common law power to rescind its own judgment, a litigant must show that: C

1. the court's discretion that it is being asked to exercise is broader than the requirements of both rr 449 and 63; and
2. whether, having regard to all the circumstances of the case, including the applicant's explanation for the default, this is a proper case for the grant of the indulgence: see *Gondo & Anor v Syfrets Merchant Bank* D *Ltd* 1997 (1) ZLR 201 (H), and *de Wet & Ors v Western Bank Ltd* 1979 (2) SA 1031 (A) at 1043.

The question is, what sort of error will suffice to bring an application squarely within the ambit of r 449(1)(a). Is it an error of fact, an error of law or both? An "error", in common and ordinary parlance, is defined as: a mistake, fault, blunder, boo-boo, slip, slip-up, inaccuracy or miscalculation. The law is settled E on the issues of if or when and whether this court ought to grant rescission of its own judgment in terms of rule 449. In South Africa, in *Bakoven Ltd v G J Howes (Pty) Ltd* 1992 (2) SA 466 (E) at 471F, Erasmus J said of the almost identically worded r 42(1)(a) of the South African Uniform Rules:

> "It is an abuse of the process of the court to bring such an application some five F years and eight months later. Matters must have some finality and r 42 was not designed to let defendants have a second bite at the cherry by raising a defence which should have been raised when the summons was issued."

The Zimbabwe courts have followed some aspects of the South African position and rejected others.

In *Grantully (Pvt) Ltd & Anor v UDC Ltd* 2000 (1) ZLR 361 (S) the court G held that:

> "the judgment had been granted because at the time of its issue the judge was unaware of a relevant fact, the provisions of the clause in the acknowledgment of debt. Had he known of the clause, he would not have granted the judgment he did. There was ample precedent for the proposition that a court to which application is made for rescission is not confined to the record of proceedings in deciding H

Chigumba J

A whether a judgment was erroneously granted. The wording of r 449(1)(a) of the High Court Rules make it clear that a party against whom default judgment had been granted was entitled to place before the correcting, varying or rescinding court facts which had not been before the court granting the default judgment. It was held, further, that it is not necessary for a party seeking relief under r 449 to show 'good cause'. If a court holds that the default judgment was erroneously granted, it may be corrected, rescinded or varied without further enquiry. The B court also found that r 449 is one of the exceptions to the general principle that once a court has pronounced a final judgment or order it is *functus officio* and has no authority to correct, alter or supplement it … *See Firestone SA (Pty) Ltd v Genticuro AG* 1977 (4) SA 298 (A) at 306F-G; *Stumbles & Rowe v Mattinson; Mattinson v Stephens & Ors* 1989 (1) ZLR 172 (H) at 174D-F; *Tshivhase Royal Council & Anor v Tshivhase & Anor; Tshivhase & Anor v Tshivhase & Anor* C 1992 (4) SA 852 (A) at 862I-J."

It is clear that, to qualify for relief under r 449(1)(a), mistakes of fact are not precluded, although it is apparent that the mistakes referred to are not trivial or petty clerical ones. The mistake must have been made on the part of the party seeking the judgment in default, or of the judge who granted it, D and the applicant ought to show that he was prejudiced as a result, or that there was a miscarriage of justice. In other words, despite having a good defence on the merits, judgment was given against him in error, as a result of such mistake. The law is also clear that any fact which was not brought to the attention of the court at the time judgment in default was given, may be placed before the court dealing with the application to rescind judgment E in terms of r 449. The allegations of fraud made by the applicant were not placed before the courts that determined the judgments that the applicant seeks to have set aside. The applicant is now entitled to place evidence of such fraud before this court.

Disposition

F It is my view that the differences in the requirements of the two High Court rules are clear. Rule 63 has strict time limits which must be adhered to and a litigant who falls foul of the time limits will not be heard unless condonation is first sought and obtained. The phrase "good and sufficient cause" is seemingly wide ranging and all encompassing. The explanation for the default must be reasonable or acceptable. The applicant must show that he has a *bona fide* G defence to the claim. On the other hand, the court's common law discretion to rescind its own judgment is wide and requires that regard be had to all the circumstances of the case, including the explanation for, and the length of, the delay in bringing the application, and the prospects of success of the applicant in the main matter. In my view, r 63 is more in tandem with H this court's common law discretion to rescind its own judgment. I say so

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Chigumba J

because, when regard is had to the wording of r 63, that "A party against A whom judgment has been given in default, whether under these rules *or under any other law"*, (my emphasis) it becomes clear that r 63 recognizes the possibility that judgments may be rescinded under other laws which may not necessarily fall under the rules of this court, such as the common law discretion that this court has, to rescind its own judgments. Rule 449(1)(a) B is narrower than r 63. It does not require evidence of "good and sufficient cause", although it appears to require some consideration of the applicant's prospects of success in the main matter. It appears deceptively simple in its requirement of evidence of an error that caused or induced a court to grant judgment in default in circumstances where it would not have ordinarily granted such judgment. C

It is my view that the law is clear on the question of which vehicle a party seeking rescission of judgment given in default may use. There are three vehicles, r 63, r 449 and the common law discretionary power. Depending on the circumstances of the case, an the applicant is at liberty to elect to utilize whichever one of those three vehicles best suits the circumstances of D the case. See the *Gondo* case *supra.* In my view, whichever vehicle a litigant chooses, the court will have to consider the question of length of time that has elapsed since the judgment sought to be rescinded was granted. It follows that the first respondent's preliminary point cannot be upheld. The applicant is not duty bound to proceed in terms of r 63. However, the court's scrutiny E of the circumstances of this case will show whether the applicant was wise in electing to proceed in terms of r 449(1)(a).

Having disposed of the point *in limine,* I now turn to the merits of the matter. The applicant contended that its non-appearance in both instances was caused by the first respondent's fraudulent or irregular set down of the matters without notice, despite clear opposition, and despite the

absence of proof of F service on him. Rule 449(1)(a) requires that an the applicant demonstrates a simple error, either in the *seeking* of the default judgment or on the part of the court in *granting* it. My reading of the applicant's papers is that the applicant does not expressly state that the error lay in the erroneous seeking of the judgments. It is implied, in the applicant's papers, that the allegation G is that the error lay with the court in being influenced by papers fraudulently or irregularly filed, being almost "duped" as it were, into granting the two judgments when it normally or ordinarily would not have done so. The court must decide, having regard to the papers filed of record by the applicant, whether there was any mistake or blunder or miscalculation on the part of the court in granting the two judgments that are being impugned. H

Chigumba J

A The applicant, correctly in my view, sought to rely on the *Gondo* case *supra* as authority for the proposition that any type of error will suffice for purposes of entitling an the applicant to relief under r 449(1)(a). It would appear that this case is distinguishable from the one under consideration because, in that case, judgment had been granted by consent and its rescission was sought on the basis of an error common to both parties in terms of r 449(1)(c). The B error related to a question of law, the debtors had not opposed the granting of the judgment because they were not aware of the *in duplum* rule. It was held that, even assuming that the parties were laboring under a common mistake, the applicants would have had to go further and prove that the amount of the judgment debt had breached the *in duplum rule*. In other words, the C defence in the main matter must have merit. I accept that the sort of error that entitles a litigant to proceed in terms of r 449(1)(a), can be one of fact or of law, as long as there is evidence that the court was influenced by such error in granting the default judgment. I also accept that before rescinding the judgment a court must consider whether the applicant has prospects of success on the merits of the matter.

D In seeking the rescission of the two judgments granted, in default of appearance by himself or his legal practitioner of record, in terms of r 449(1)(a), the applicant contended that, in case HC 3508/08 the first respondent obtained judgment in default of the applicant's appearance. The applicant averred that the error that occurred was that judgment was granted despite the fact that

> E "… court papers leading to the grant of such default judgment were never served on the applicant … neither did the first respondent serve papers on the applicant's legal practitioners of record".

It is my view, based on the papers filed of record, that the applicant did not provide any explanation, let alone an acceptable or reasonable explanation, as to why or how the court which granted the judgment in default did so in F the alleged clear absence of proof of service, on him or his legal practitioner, or a certificate of service as required in terms of r 42B(1)(b) of the rules of this court. It is my view that the presumption that the judgment granted in default was done so on the basis of adequate proof of service to the court, was not adequately rebutted in the papers filed of record by the applicant.

The applicant contended further that, in case HC 6627/10, an "absurdity" G occurred, in that the applicant had filed his opposing papers to the application with the Registrar of this court and served the same on the first respondent's legal practitioners, who then erroneously set the matter down for hearing on the unopposed roll as if no opposition had been filed, and a default judgment was erroneously granted by the court. The notice of opposition filed of record H as part of the applicant's papers appears to have been filed of record with

Chigumba J

the Registrar of this court on 6 October 2010. Judgment in this matter was A granted in 2012, a good two years after the opposing papers were allegedly filed of record. Yet nowhere on those papers is there a date stamp to show that the opposing papers were served on the first respondent's legal practitioners of record. The presumption that arises is that the notice of opposition may have been filed of record with the Registrar, but there is no proof that it was B served on the first respondent. Not even a certificate of service by the applicant was filed of record in terms of r 42B(1)(b). In the absence of service on the first respondent, and assuming that some administrative error was made, and that there was no copy of the opposing papers in the record, I fail to see the mistake made by the court in granting judgment in default. The judgment of the court was based on the papers before it at the time. The court could not C have guessed that opposing papers had been filed of record and somehow fallen out of the record. No explanation at all has been given as to why those opposing

papers were not served on the first respondent. The matter would not have been set down on the unopposed roll had the first respondent been aware that it was opposed. The applicant has not rebutted the presumption that opposing papers were not served on the first respondent. D

It is my view that no mistake was alluded to or proved from the papers filed of record. There is evidence that the applicant is the one who sold the Bluffhill stand to the first respondent. There is a witness who can identify him at Dinha Bonongwe & Partners legal practitioners, as being the seller of the Bluffhill stand. The applicant has not proved fraud on the part of the E first respondent or Dinha Bonongwe & Partners. In the absence of proof of fraud, the agreement of sale is valid and binding on him. There is evidence that the sale was perfected. In my view, the applicant has no prospects of success in the main matter.

I find that the applicant has failed, in the circumstances of this case, on the F papers before me, to furnish adequate proof of fraud, irregularities or any fault in respect of both judgments sought to be impugned, on the part of the court in granting each judgment. None of the elements of fraud were expressly averred or pleaded. Fraud is a criminal offence. It is not clear whether there was a misrepresentation and if so who made it to the court. There is no evidence that the courts relied on any misrepresentation when the G two judgments were granted. There is a bald assertion that there was fraud in the filing of the papers, there is a vague reference to "irregularities" and to an "absurdity". But there is nothing in the way of proof of these allegations, not even *prima facie* evidence. All the applicant tells us is that the papers were not in order. We are not treated to the courtesy of being told what exactly it is that was allegedly done, and by whom. We are not provided with evidence H

Chigumba J

A that indeed the two courts proceeded to grant judgment on the unopposed roll when the papers before it clearly showed that it ought not to have done so. We are not told that, despite proof that there was a notice of opposition duly filed of record and served on all interested parties, the court erred in overlooking it and proceeded to grant judgment in default. There is simply no evidence of any error on the part of the court in both instances, whether B an error of fact or an error of law. It is my view that r 449(1)(a) does not apply to the circumstances of this case and, to borrow the phrase in the *Gondo* case *supra,* "… the judgments in fact reflected the true decision of the court on the basis of the evidence presented". It is my considered view that the applicant is not entitled to the relief that he seeks.

C In the never-ending quest for justice, litigants are becoming increasingly indefatigable in approaching the well of justice to quench their thirst for justice. Uppermost in my mind in considering the merits of the application before me, was a question the answer to which I knew would only be resolved by resorting to that vague and elastic notion, discretion. The parties before me have made numerous applications and counter-applications, in D regard to the same piece of property, stand 2819 Bluffhill Township, over a considerable period of time, from 2006 to date. Surely there comes a time when justice and fairness demands that both the victor and the vanquished act sensibly and accept that the matter has been conclusively resolved? I can do no better than other esteemed courts have done before me, in expressing E my disquiet at the manner in which proceedings were conducted between these parties in such a protracted way and over such a lengthy period, with no light at the end of the tunnel. In *Grantully supra,* the court expressed the view that a judge would be:

> "… justified, in the exercise of his discretion, in dismissing the application by reason of the inordinate lapse of time. Rule 449 was a procedural step, designed F *to correct expeditiously an obviously wrong judgment or order* (my emphasis).
>
> It is in the interests of justice that there should be relative certainty and finality as soon as possible concerning the scope and effect of court orders. It would be a proper exercise of the court's discretion to rule that, even if the applicant proved that the rule applied, it could not be heard after the lapse of a reasonable time. The length of time the appellants waited in this case, whatever the explanation, G was unreasonable and the application was an abuse of the court's process".

The court has already found that r 449(1)(a) is not applicable to the circumstances of this case. Even if r 449(a)(a) had been applicable to this case, no reasonable or acceptable explanation was given as to why the applicant waited so long to apply to rescind these judgments.

H For these reasons, the application is dismissed with costs.

Chigumba J

Mudambanuki & Associates, the applicants' legal practitioners A

Manase & Manase, the first respondent's legal practitioners

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Document 67 of 79

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JAMES v ZIMBABWE ELECTORAL COMMISSION & ORS 2013 (2) ZLR 659 (CC)

Citation	2013 (2) ZLR 659 (CC)
Case No	Judgment No. CC-4-13
Court	Constitutional Court, Harare
Judge	Chidyausiku CJ, Malaba DCJ, Ziyambi JA, Gwaunza JA, Garwe JA, Gowora JA, Patel JA, Hlatshwayo JA & Chiweshe AJA
Heard	28 June 2013; *CAV*
Judgment	28 November 2013
Counsel	*T Mpofu*, for the applicant *T M Kanengoni*, for the first respondent *M Chimombe*, for the fifth respondent No appearance for the second, third or fourth respondents
Case Type	Constitutional application
Annotations	No case annotations to date

Flynote

Constitutional law – *Constitution of Zimbabwe 2013 – Declaration of Rights – s 67(3)(b) – right of citizen to stand for election for public office – local government councillor suspended from office by Minister* D *of Local Government – Electoral Act [Chapter 2:13] – s 119(2)(i) – disqualification of such councillor from being re-elected – provision unconstitutional – no rational connection between object of provision and interests protected by s 86(2) of Constitution*

Local government – *councillor – suspension of by Minister – no subsequent* E *investigation to establish any wrong doing – disqualification of suspended councillor from being re-elected – provisions of s 119(2)(i) of Electoral Act [Chapter 2:13] proving for such disqualification unconstitutional*

Headnote

The applicant was an urban councillor. He had been suspended on unclear grounds from his position as councillor by the second respondent, the F Minister of Local Government, under s 114(1) of the Urban Councils Act [*Chapter 29:15*] on allegations of misconduct. Following the Minister's failure to investigate those allegations within 45 days as required by s 114(3), the applicant challenged

his continuing suspension before the High Court. That matter had yet to be determined at the time of the current application.

G The applicant wished to stand as a candidate in the council elections to be held on 31 July 2013. However, s 119(2)(i) of the Electoral Act [*Chapter 2:13*] disqualifies a suspended councillor from being re-elected. The applicant averred that this provision infringed his fundamental right to stand for election to public office in terms of s 67(3)(b) of the H Constitution. He argued that the provision was unfair, unreasonable and

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2013 (2) ZLR p660

arbitrary, because it imputed guilt where it is not proven and operated A without interrogating the circumstances of the suspension. It was also unjustifiable, as it presupposed that the person suspended was not suitable for public office. Moreover, it was illogical and inutile and did not serve any public interest, because a suspended councillor could still stand as a candidate for parliamentary or presidential elections. It had B dire consequences since there was no remedy once the elections were held, even if the councillor were subsequently vindicated and absolved of guilt. It was argued for the Minister that the disqualification of a suspended councillor could be justified under s 86(2) of the Constitution, which allows derogations from the fundamental rights enshrined in the Constitution if such derogation is in the general public interest. C

Held, that any derogation from a fundamental right or freedom must be strictly and narrowly construed. There must be a rational connection between the objective of the derogation and the implementing law. Moreover, the means employed should not impair the right in question more than is necessary to achieve the declared objective. Section 86(2) of the Constitution is essentially a restatement of the criteria for permissible D derogation from constitutional rights as previously enunciated by the Supreme Court. The reasons advanced as justifying the electoral disqualification of a suspended councillor did not stand the test of these established criteria or those set out in s 86(2). Firstly, there was no rational connection between the valid objective of protecting and preserving E public assets and the need to disqualify a suspended councillor from standing for re-election. The fact that a councillor is suspended on mere suspicion of misconduct could not possibly justify the inference that he must have committed some unspecified wrongdoing or that he posed a threat to public assets. The very suggestion of any such inference is an affront to the time-honoured presumption of innocence. It could only F apply, depending on the facts, where the suspended councillor was found guilty of misconduct after due process. The impugned provision penalises a councillor, even though no finding of guilt has been established, and even where he might subsequently be exonerated and absolved of any guilt. It undoubtedly goes considerably further than is necessary to G achieve any legitimate public interest objective. Secondly, the effect of the provision is irreversible, conceivably for the ensuing period of five years. If the suspension of a councillor is nullified and set aside at any time after nomination day, he is nevertheless disqualified from standing for re-election until the next council election is held. The law cannot justifiably be allowed to disenfranchise a presumptively innocent citizen H

2013 (2) ZLR p661

A for five years. This is particularly pertinent to the impugned provision, which is open to the possible abuse of eliminating a political opponent from candidature by the simple expedient of suspension and, more pointedly, suspension founded on mere suspicion. This possibility of the provision being applied *mala fide* served to further attenuate its rationality.

Held, further, that the purpose of s 119(2)(i) was unquestionably noble and B eminently defensible: it is to ensure that individuals who have a proven record of corruption or dishonesty in the management of public funds or public assets do not qualify for council office. On the other hand, the constitutional right to stand for and hold public office is a fundamental right of paramount political and civic importance. Any curtailment of that C right must be very closely circumscribed so as to avoid the right being rendered nugatory. The impugned provision could not be justified as being necessary in the general public interest nor as serving any other interest alluded to in s 86(2)(b) of the Constitution. The nature and extent of the limitation imposed by the provision far exceeded the means necessary to achieve its primary purpose. The effect of the provision was to abridge D a fundamental right in a manner that is not reasonably justifiable in a democratic society based on respect for civic liberties and freedom.

Held, further, that the provision could not be struck down in its entirety but only to the extent that it applied to persons who were suspended from council office in terms of s 157 of the Rural District

Councils Act [*Chapter 29:13*] or s 114 of the Urban Councils Act. It remained E unimpeachable insofar as it applies to those who have been dismissed in terms of either of those sections and are for that reason disqualified from nomination or election as councillors.

Cases referred to

F *Min of Home Affairs & Ors v Dabengwa & Anor* 1982 (1) ZLR 236 (S)

Nyambirai v NSSA & Anor 1995 (2) ZLR 1 (S)

S v Hartmann & Anor 1983 (2) ZLR 186 (S)

S v Ncube & Ors 1987 (2) ZLR 246 (S)

Thappar v State of Madras [1950] SCR 594 (SC)

Legislation considered G

Constitution of Zimbabwe 2013, s 67(3)(b), s 86(2)

Electoral Act [*Chapter 2:13*], s 119(2)(i)

Rural District Councils Act [*Chapter 29:13*], s 157

H Urban Councils Act [*Chapter 29:15*], s 114

2013 (2) ZLR p662

Patel JA

Case information

T Mpofu, for the applicant A

T M Kanengoni, for the first respondent

M Chimombe, for the fifth respondent

No appearance for the second, third or fourth respondents

Judgment

Patel JA: After hearing argument from counsel, the court was unanimous B in granting this application in the following terms:

> "1. It is declared that the applicant is not disqualified from standing as a candidate for election as a councillor in the forthcoming municipal elections.
>
> 2. There shall be no order as to costs." C

We further indicated that our reasons would follow in due course and these are those reasons.

Background

The applicant is a registered voter who was duly elected as a councillor and mayor of Mutare in 2008. He was suspended from his position as D councillor in January 2012 by the second respondent, the Minister of Local Government, on allegations of misconduct under s 114 of the Urban Councils Act [*Chapter 29:15*]. Following the second respondent's failure to determine those allegations within 45 days, the applicant challenged his continuing suspension before the High Court in Case No. HC 3875/12. That matter is awaiting set-down for hearing and is yet to be determined. E

The applicant has been requested by his constituents to stand as an independent candidate in the council elections to be held on 31 July 2013. However, s 119(2)(i) of the Electoral Act [*Chapter 2:13*] disqualifies a suspended councillor from being re-elected. The applicant avers that this provision infringes his fundamental right to stand for election to public office in terms of s 67(3)(b) of the Constitution. He further avers that the provision is unfair, F unreasonable and arbitrary because it imputes guilt where it is not proven and operates without interrogating the circumstances of the suspension. It is also unjustifiable as it presupposes that the person suspended is not suitable for public office. Moreover, it is illogical and inutile and does not serve any public interest because a suspended councillor can still stand as a candidate G for parliamentary or presidential elections. It

has dire consequences since there is no remedy once the elections are held, even if the councillor is subsequently vindicated and absolved of guilt.

For all of these reasons, the applicant contends that the provision is unconstitutional insofar as it disqualifies suspended councillors from standing for re-election. The matter is not only of personal importance but also of H

Patel JA

A national importance. The applicant accordingly seeks an order striking out the provision as being inconsistent with the Constitution. He also seeks an order directing the relevant nomination court to accept and not reject his nomination papers on the ground of his suspension.

The first respondent, the Zimbabwe Electoral Commission, has stated that it would abide the decision of the court as it has no factual basis to controvert B the applicant's position. The second respondent, despite his obvious and direct interest in the matter, has not filed any notice of opposition. Nevertheless, the fifth respondent, the Attorney-General, has opposed the application and the relief sought. He avers that suspension under s 114 of the Urban Councils Act is designed to safeguard the integrity and well-being of the C urban council concerned. A councillor who is suspended, so it is argued, must have committed some wrong. Consequently, to allow the re-election of a suspended councillor would circumvent and defeat the purpose and effect of suspension. Section 119(2)(i) of the Electoral Act is intended to protect the public interest, public confidence and public assets. Accordingly, the restriction against re-election imposed by that provision is not unreasonable D but necessary in a democratic society.

Relevant constitutional and statutory provisions

Section 67 of the Constitution guarantees the political rights of all Zimbabwean citizens. Subsection (3) deals specifically with electoral rights as follows:

> "Subject to this Constitution, every Zimbabwean citizen who is of or over eighteen E years of age has the right –
>
> (a) to vote in all elections and referendums to which this Constitution or any other law applies, and to do so in secret; and
>
> (b) to stand for election to public office and, if elected, to hold such office."

The limitation of any fundamental right or freedom enshrined in the F Constitution must conform with subs (2) of s 86 which provides that:

> "The fundamental rights and freedoms set out in this Chapter may be limited only in terms of a law of general application and to the extent that the limitation is fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom, taking into account all relevant factors, including –
>
> (a) the G nature of the right or freedom concerned;
>
> (b) the purpose of the limitation, in particular whether it is necessary in the interests of defence, public safety, public order, public morality, public health, regional or town planning or the general public interest;
>
> (c) the nature and extent of the limitation;
>
> (d) the need to ensure that the enjoyment of rights and freedoms by any person H does not prejudice the rights and freedoms of others;

Patel JA

> (e) the relationship between the limitation and its purpose, in particular whether A it imposes greater restrictions on the right or freedom concerned than are necessary to achieve its purpose; and
>
> (f) whether there are any less restrictive means of achieving the purpose of the limitation."

Section 114 of the Urban Councils Act regulates the suspension and dismissal B of councillors as follows:

> "(1) Subject to this section, if the Minister has reasonable grounds for suspecting that a councillor –
>
> (a) has contravened any provision of the Prevention of Corruption Act [*Chapter 9:16*]; or

(b) has contravened section one hundred and seven, section one hundred and C eight or section one hundred and nine; or

(c) has committed any offence involving dishonesty in connection with the funds or other property of the council; or

(d) has been responsible –

(i) through serious negligence, for the loss of any funds or property of D the council; or

(ii) for gross mismanagement of the funds, property or affairs of the council;

whether or not the councillor's responsibility is shared with other councillors or with any employees of the council; or E

(e) has not relinquished office after his seat became vacant in terms of this Act;

the Minister may, by written notice to the councillor and the council concerned, suspend the councillor from exercising all or any of his functions as a councillor in terms of this Act or any other enactment.

(2) Any allowance that is payable to councillors in terms of this Act shall continue to be paid to a councillor who has been suspended in terms of subsection (1) F for so long as he remains a councillor, unless the Minister, by notice in writing to the council concerned, directs otherwise.

(3) As soon as is practicable after he has suspended a councillor in terms of subsection (1), and in any event within forty-five days, the Minister shall cause a thorough investigation to be conducted with all reasonable dispatch to determine whether or not the councillor has been guilty of any act, omission or conduct G referred to in that subsection.

(4) If, following investigation, the Minister is satisfied that the grounds of suspicion on the basis of which he suspended a councillor in terms of subsection (1) have been established as fact, he may, by written notice to the council and the councillor concerned, dismiss the councillor, and the councillor's seat shall thereupon become vacant. H

2013 (2) ZLR p665

Patel JA

A (5) A person who has been dismissed in terms of subsection (3) shall be disqualified from nomination or election as a councillor for a period of five years."

It seems necessary at this juncture to note in passing the procedure to be followed before and after the suspension of a councillor in terms of s 114. Subsection (1) requires that the suspension must be effected by written B notice. It is trite that any administrative decision adversely affecting the rights of another must be accompanied by the reasons for that decision. The letter of suspension *in casu*, dated 19 January 2012, is vague in that it refers to an earlier cautionary letter but does not itself spell out the reasons for suspension. This omission renders questionable its procedural validity.

C Additionally, subs (3) enjoins the Minister to cause a thorough investigation to be conducted in order to determine the guilt or otherwise of the councillor, within 45 days of his or her suspension. Thereafter, upon being satisfied of his or her guilt, the Minister must decide under subs (4) whether to dismiss the councillor for misconduct. The precise time limit for the making of such D decision is not specified. However, having regard to the drastic nature of suspension and its highly prejudicial effects, it seems that the decision must be taken with reasonable expedition.

In the instant case, although all the relevant facts are not before us, it would appear at first glance that the second respondent has failed to comply with E the procedural requirements of s 114.

Subsections (1) and (2) of s 119 of the Electoral Act prescribe the qualifications and disqualifications for election as a councillor. The relevant provisions stipulate that:

"(1) Any person who –

(a) is F a citizen of Zimbabwe; and

(b) has attained the age of twenty-one years; and

(c) is enrolled on the voters roll for the council area concerned; and

(d) is not disqualified in terms of subsection (2);

shall be qualified to be elected as a councillor.

(2) A G person shall be disqualified from being nominated as a candidate for or

from election as a councillor if –

(a) – (h) …; or

(i) he or she is suspended in terms of section 157 of the Rural District Councils Act [*Chapter 29:13*] or section 114 of the Urban Councils Act [*Chapter 29:15*], as the case may be, from exercising all his or her functions as a H councillor or, having been dismissed in terms of either of those sections,

he or she is disqualified under the section concerned from nomination or A election as a councillor."

Constitutionality of s 119(2)(i) of the Electoral Act

As I have already stated, s 67(3)(b) of the Constitution entrenches the right of every citizen to stand for and hold public office. There is no doubt that s 119(2)(i) operates to derogate from that right in relation to a councillor B who is either suspended or dismissed from office. The crux of the present matter is whether or not that derogation falls within the bounds of permissible limitation under s 86(2) of the Constitution. The fifth respondent contends that it is justifiable in the general public interest, while the applicant argues that the public interest only applies where a councillor is dismissed and not where he or she is merely suspended. C

As has been held with respect to the Declaration of Rights in the former Constitution, any derogation from a fundamental right or freedom must be strictly and narrowly construed. There must be a rational connection between the objective of the derogation and the implementing law. Moreover, the means employed should not impair the right in question more than is D necessary to achieve the declared objective. See *Minister of Home Affairs & Others v Dabengwa & Another* 1982 (1) ZLR 236 (S) at 244B-C; *S v Hartmann & Another* 1983 (2) ZLR 186 (S) at 192H; *S v Ncube & Others* 1987 (2) ZLR 246 (S) at 264F.

Section 86(2) of the Constitution is essentially a restatement of the criteria for permissible derogation from constitutional rights as enunciated by the E Supreme Court in *Nyambirai v National Social Security Authority & Another* 1995 (2) ZLR 1 (S). In the words of Gubbay CJ at 13C-F:

> "In effect the court will consider three criteria in determining whether or not the limitation is permissible in the sense of not being shown to be arbitrary or excessive. It will ask itself whether: F
>
> (i) the legislative objective is sufficiently important to justify limiting a fundamental right;
>
> (ii) the measures designed to meet the legislative object are rationally connected to it; and
>
> (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective." G

In my view, the reasons advanced by the fifth respondent as justifying the electoral disqualification of a suspended councillor do not stand the test of these established criteria or those set out in s 86(2) of the Constitution. First and foremost, the fifth respondent has failed to demonstrate any rational connection between the undeniably valid objective of protecting and preserving public assets and the need to disqualify a suspended councillor H

A from standing for re-election. The fact that a councillor is suspended on mere suspicion of misconduct cannot possibly justify the inference that he or she must have committed some unspecified wrongdoing or that he or she poses a threat to public assets. The very suggestion of any such inference is an affront to the time-honoured presumption of innocence. It can only apply, depending on the facts, where the suspended councillor is found B guilty of misconduct after due process. The impugned provision penalises a councillor, even though no finding of guilt has been established, and even where he or she might subsequently be exonerated and absolved of any guilt. It undoubtedly goes considerably further than is necessary to achieve any legitimate public interest objective.

C Secondly, the effect of the provision is irreversible, conceivably for the ensuing period of five years. If the suspension of a councillor is nullified and set aside at any time after nomination day, he or she is nevertheless disqualified from standing for re-election until the next council election is held. The law cannot justifiably be allowed to disenfranchise a presumptively innocent citizen for five years. This is particularly pertinent to the impugned provision, inasmuch as it is open to the

possible abuse of eliminating a political opponent from candidature by the simple expedient of suspension and, more pointedly, suspension founded on mere suspicion. This possibility of the provision being applied *mala fide* serves to further attenuate its rationality. As was aptly observed by the Indian Supreme Court in *Thappar v State of Madras* E [1950] SCR 594 (SC) at 603:

> "So long as the possibility (of a limitation) being applied for purposes not sanctioned by the Constitution cannot be ruled out, it must be held to be wholly unconstitutional and void".

In conclusion, the constitutionality of s 119(2)(i) as it is presently framed cannot be sustained for the following reasons. The purpose of the provision is F unquestionably noble and eminently defensible. It is to ensure that individuals who have a proven record of corruption or dishonesty in the management of public funds or public assets do not qualify for council office. On the other hand, there can be no doubt that the constitutional right to stand for and hold public office is a fundamental right of paramount political and civic importance. Any curtailment of that right must be very closely circumscribed G so as to avoid the right being rendered nugatory. As I have already indicated, the impugned provision cannot be justified as being necessary in the general public interest. Nor can it be recognised as serving any other interest alluded to in s 86(2)(b) of the Constitution. Moreover, the nature and extent of the limitation imposed by the provision far exceed the means necessary H to achieve its primary purpose. In short, the effect of the provision is to

abridge a fundamental right in a manner that is not reasonably justifiable A in a democratic society based on respect for civic liberties and freedom.

Obviously, the provision cannot be struck down in its entirety but only to the extent that it applies to persons who are suspended from council office in terms of s 157 of the Rural District Councils Act [*Chapter 29:13*] or s 114 of the Urban Councils Act [*Chapter 29:15*]. It remains unimpeachable insofar B as it applies to those who have been dismissed in terms of either of those sections and are for that reason disqualified from nomination or election as councillors. It is accordingly declared that s 119(2)(i) of the Electoral Act is unconstitutional *pro tanto*.

CHIDYAUSIKU CJ, MALABA DCJ, ZIYAMBI JA, GWAUNZA JA, GARWE JA, GOWORA JA, HLATSHWAYO JA and CHIWESHE AJA C concurred.

Zimbabwe Lawyers for Human Rights, applicant's legal practitioners

Nyika Kanengoni & Partners, first respondent's legal practitioners

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

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Document 68 of 79

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2013/Volume 2/PRACTICE DIRECTIVE 3 OF 2013 2013 (2) ZLR 669 (S)

PRACTICE DIRECTIVE 3 OF 2013 2013 (2) ZLR 669 (S)

Citation	2013 (2) ZLR 669 (S)
Case No	Details not supplied
Court	Supreme Court, Harare
Judge	Chidayusiku CJ
Heard	29 November 2013

Judgment 29 November 2013

Counsel Details not supplied

Case Type Details not supplied

Annotations No case annotations to date

Flynote

Practice and procedure – *court roll – removal of matters from – different ways in which matter may be removed from roll – nomenclature clarified*

Headnote

C In this practice directive, the Chief Justice clarifies the different ways in which matters may be removed from the court roll and the correct name to be attached to each method.

The term "struck off the roll" is used to effectively dispose of matters which are fatally defective and should not have been enrolled in that form in D the first place. Where a matter has been struck off the roll for failure by a party to abide by the rules of court, the party will have 30 days within which to rectify the defect, failing which the matter will be deemed to have been abandoned. However, a judge may, on application and good cause shown, reinstate the matter on such terms as he thinks fit.

E The term "postponed *sine die*" is used where a matter is adjourned indefinitely without the court specifying the date when the matter shall be heard again. The term "removed from the roll" has the same meaning. Where a court either postpones a matter *sine die* or removes it from the roll, the court must direct what a party must do and the time frames by which the directive must be complied with. If no directive is given, or if a matter F is not set down within three months of the postponement or removal, the matter will be treated as having been abandoned.

Proper use and application of the terms "struck off the roll'; "postponed *sine die*" and "removed from the roll"

G Application

1. This practice direction applies to all the Superior Courts of Zimbabwe.

General Note

2. With a view to ensuring the uniform use and application of the H terms "struck off the roll"; "postponed *sine die"* and "removed from

---

the roll", the following changes to the current practice take effect from A 1 January, 2014.

Struck off the roll

3. The term shall be used to effectively dispose of matters which are fatally defective and should not have been enrolled in that form in the first place. B
4. In accordance with the decision in *Matanhire v BP & Shell Marketing Services (Pvt) Ltd* 2004 (2) ZLR 147 (S) and *S v Ncube* 1990 (2) ZLR 303 (S), if a court issues an order that a matter is struck off the roll, the effect is that such a matter is no longer before the court [1].
5. Where a matter has been struck off the roll for failure by a party to abide C by the rules of the court, the party will have 30 days within which to rectify the defect, failing which the matter will be deemed to have been abandoned:

   Provided that a judge may on application and for good cause shown, reinstate the matter, on such terms as he deems fit. D

Postponed *sine die* **/ Removed from the roll**

6. The term "postponed *sine die*" shall be used where a matter is adjourned indefinitely without the court specifying the date when the matter shall be heard again.
7. The term 'removed from the roll' shall have the same meaning as E "postponed *sine die*".
8. Where a court either postpones a matter *sine die* or removes it from the roll, the court shall direct what a party must do and the time frames by which the directive must be complied with.
9. On the expiry of the time frame set, the Registrar shall advise a F party of the non-compliance and call upon the party to rectify the defect within 30 days, failing which the matter shall be deemed to have been abandoned.
10. Where directives have not been given in terms of paragraph 8 above, and a matter postponed *sine die* or removed from the roll is not set down within three months from the date on which it was postponed *sine die* G or removed from the roll, such matter shall be regarded as abandoned and shall be deemed to have lapsed. H

A Inactive matters

11. Currently, there are matters that were either "postponed *sine die*" or "struck off the roll" in all the courts and which have been in that state for long periods of time. Heads of courts are requested to direct Registrars to set those matters down and have them finalised.

B Hon Mr Justice G G Chidyausiku

Chief Justice of Zimbabwe

HARARE

29 November 2013

1 Such a matter can only be re-enrolled following an application for which an appropriate court order is issued. The Registrar shall not reset the matter without a court order.

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Document 69 of 79

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2013/Volume 2/AFRICAN EXPORT-IMPORT BANK v RIOZIM LTD 2013 (2) ZLR 672 (H)

AFRICAN EXPORT-IMPORT BANK v RIOZIM LTD 2013 (2) ZLR 672 (H)

Citation	2013 (2) ZLR 672 (H)
Case No	Judgment No. HH-464-13
Court	High Court, Harare
Judge	Chigumba J
Heard	23 October 2013; *CAV*
Judgment	4 December 2013
Counsel	*T Magwaliba,* for the plaintiff *S Takundwa,* for the defendant

Case Type Opposed application

Annotations No case annotations to date

Flynote

Bills of exchange and negotiable instruments – *promissory note – what is – construction of terms of note – normal rules for interpretation of contracts applicable*

Headnote

The plaintiff claimed provisional sentence in the amount of USD8 million, D based on a liquid document, a promissory note which was executed and issued on behalf of the defendant in favour of the plaintiff, in terms of which the defendant promised to pay to the plaintiff, or its order, the sum of US$8 million. When the plaintiff presented the note for payment, the bank confirmed that the defendant's account with it was not funded E and that consequently they were unable to pay the amount on the note. The defendant resisted the claim, on the grounds that the note ousted the jurisdiction of the High Court in Zimbabwe in favour of the courts of England. It was alleged that not only had the plaintiff approached the wrong court, it had applied the wrong laws in construing the terms of the promissory note. The defendant averred further that the *domicilium* F *citandi et executandi* specified in the note made it clear that summons ought to have been served in England, and consequently, service of the summons in Zimbabwe was improper and invalid at law. Finally, the defendant claimed that the amount owed had been reduced by some USD600 000, as it has repaid part of the loan secured by the note. The G note stated, *inter alia*, that it should "be governed by and construed in accordance with the laws of England. The courts of England are to have exclusive jurisdiction to settle any disputes which may arise out of or in connection with this promissory note. The holder at its discretion may bring any suit, action or proceeding in the courts of whatever jurisdiction that it may select and the issuer submits for this purpose to the jurisdiction H

A of each court selected as aforesaid." The note also nominated a company in England as its agent to accept service on behalf of the defendant. Finally, the note stated that the defendant undertook to pay the stated amount "without set off, counterclaim, restrictions or conditions of any nature and free and clear of deductions or withholdings".

Held, that a promissory note is a negotiable instrument. It is an unconditional B promise in writing, made by one person to another, signed by the maker, and engaging to pay on demand, or at a fixed or determinable future time, a sum certain in money, to a specified person or his order, or to the bearer. In interpreting written contracts, the courts look for the intent of the parties at the time they entered into the contract. The mutual C intention of the parties at the time of the contract will govern the court's resolution of a contractual dispute if that intention can be determined. If the language of the contract is clear and definite, that language will determine the mutual intent of the parties. In determining whether the contract language is clear and definite, the court will give the words their ordinary and common meaning. Contracts are interpreted as a whole, if D possible, in order to give effect to all parts of the contract. The court will not look outside the contract unless there is ambiguity in a provision.

Held, further, that *in casu*, the wording of the relevant clauses was clear and unambiguous. The language used was plain and ordinary. The clauses, read together, and with the rest of the note, clearly did not purport to E exclude the jurisdiction of the Zimbabwean courts in favour of the courts of England. The parties clearly intended that the holder of the note, at its sole and exclusive discretion, had a right to elect to bring any action or suit in the courts of any jurisdiction of its choice, but that the laws of England be used to govern and interpret the note whenever a dispute arose in regards to the terms of the promissory note.

F *Held,* further, that with regard to the service of process in Zimbabwe, there was nothing which supported the contention that any and all legal process in regards to the promissory note ought to

be served in England at the agent's address. In any event, the defendant accepted service of the letter at its Harare address addressed to it by the plaintiff, in which the plaintiff advised that the promissory note had been dishonoured by G non-payment. No effort was made to disabuse the plaintiff of the notion that it had effectively placed the defendant *in mora* by delivery of the letter to that address. The defendant ought to have advised the plaintiff to deliver the letter to its *domicilium citandi et executandi.*

Held, further, that when a plaintiff sues on a liquid document, the court will H ordinarily grant provisional sentence unless the defendant produces

proof that the probability of success in the principal case is against the A plaintiff. It is therefore necessary to decide whether or not there is a balance of probabilities in favour of the defendant in this case, which would justify the refusal of an order for provisional sentence. If there is no balance of probabilities in favour of either party in any principal case that may eventuate, then the law is that the plaintiff is entitled to B provisional sentence. The question of onus is therefore important in determining whether or not there is a balance of probabilities in favour of either party. There are two distinct aspects or types of onus. Firstly, there is the onus in the provisional sentence proceedings and, secondly, there is the onus in the principal case. If the onus in the principal case is on the plaintiff, then of course it may be easier for the defendant to C discharge the onus resting upon him in provisional sentence proceedings of showing that there is a balance of probabilities in his favour. The question to be answered would therefore be whether the plaintiff was likely to succeed in its claim in the main matter, or if the defendant had a valid defence to that claim, which was likely to succeed, rendering the D granting of provisional sentence premature and incompetent.

Held, that the promissory note was valid and binding on the parties. It was a liquid document at law, and valid for purposes of r 20 of the High Court Rules. The defendant did not deny that the promissory note was dishonoured by non-payment. The plaintiff had discharged the onus on it to show that it has a good case in the main matter. With regard E to the averment that the defendant would be prejudiced if provisional sentence were granted in the sum of US$8 million, such a quibble about the quantum because the defendant owed less than that fell short of the requirement to show cause why the defendant had not honoured the promissory note. The question of quantum was not a valid defence, capable at law of defeating a claim for provisional sentence, regard F being had to the terms of the promissory note. Provisional sentence would therefore be granted.

Cases referred to

Abraham v du Plessis 1962 (3) SA 162 (T) G

Allied Holdings Ltd v Myerson 1948 (2) SA 961 (W)

Hicks v Dobriskey 1976 (1) RLR 218 (G); 1976 (2) SA 792 (R).

NRZ Contributory Pension Fund v NRZ 1984 (1) ZLR 322 (H)

Legislation considered

High Court Rules 1971 (RGN 1074 of 1971), rr 21, 27 and 33 H

Chigumba J

Case information

A *T Magwaliba,* for the plaintiff

S Takundwa, for the defendant

Judgment

Chigumba J: On 23 October 2013, on the unopposed roll, provisional sentence was granted in favour of the plaintiff against the defendant in the sum of US$8 000 000, together with interest thereon at the prescribed rate B of 5 percent per annum calculated from 29 December 2010, being

the due date of the promissory note to the date of payment in full, as well as costs of suit. The order was granted after hearing full argument by counsel for both parties. The court granted the order on the basis that the signature on the promissory note had not been denied, the promissory note was valid C and binding, no viable defence had been placed before the court, and the question of jurisdiction raised by the defendant had no merit. The court has now been asked to provide detailed reasons for its judgment. These are they:

Summons (provisional sentence) was filed out of the High Court on 1 October 2013. The plaintiff's claim was for provisional sentence in the amount of US$8 000 000. The plaintiff's claim was based on a liquid document, a D promissory note which was executed and issued on behalf of the defendant on 29 December 2010, in favor of the plaintiff, in terms of which defendant promised to pay to the plaintiff, or its order, the sum of US$ 8 000 000. In terms of the promissory note, the defendant waived demand, diligence, presentment, protest and notice of every kind and confirmed that the promissory E note represented its legal and valid obligation to pay the plaintiff that sum.

The plaintiff claimed that the capital amount it claimed had become due and payable because it had presented the promissory note for payment at BancABC, Endeavour Crescent, Mount Pleasant, Harare on 9 August 2013, and it was not discharged. The plaintiff attached a letter dated 9 August 2013 in which BancABC confirmed that defendant's account with it was F not funded and that consequently they were unable to pay the amount on the promissory note. The plaintiff also attached its letter to the defendant dated 9 August 2013 in which it advised that the promissory note had been dishonored by non-payment, on presentation to BancABC on that same date.

Summons (provisional sentence) was served on the defendant on 4 October G 2013. On 17 October 2013, the plaintiff issued a notice of set down of the matter on the unopposed roll on 23 October 2013. On 18 October 2013, the defendant filed a notice of opposition, deposed to by its finance director, in which the following points were raised. The defendant submitted that thethird paragraph of the promissory note ousted the jurisdiction of the High Court in Zimbabwe in favour of the courts of England. It was alleged that H not only had the plaintiff approached the wrong court, it had applied the

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wrong laws in construing the terms of the promissory note. It was submitted A further, that the plaintiff had misconstrued para 4 of the promissory note, in that the courts of whatever jurisdiction referred to are the courts of England.

The defendant averred further that the *domicilium citandi et executandi* specified in the promissory note in para 2 makes it clear that summons ought to have been served in England, and consequently, service of the summons B in Zimbabwe was improper and invalid at law. The defendant also averred that its liability to the plaintiff had been reduced from US$7 642 523, as at 31 December 2012, to US$7 398 856 as at 31 August 2013. It was submitted that a claim for the full amount of US$8 000 000 would result in the plaintiff being unjustly enriched at the defendant's expense. The defendant attached a term sheet to prove that the loan facility in terms of which the promissory C note was issued had been replaced by subsequent loan facilities.

Rules 21 and 27 of the High Court Rules 1971 provide as follows:

> **"21. Contents of summons for provisional sentence**
>
> A summons claiming provisional sentence shall state the amount and any interest due by virtue of the said liquid document or other such demand as by virtue of D the said liquid document is legally claimable, and shall call upon the defendant to satisfy the plaintiff's claim, or in default to appear before the court at the hour and on the day and at the place stated in the summons to show why he has not done so, and to acknowledge or deny the signature to the said liquid document or the validity of the said claim."
>
> **"27. Court may permit personal appearance of person summoned** E
>
> Notwithstanding anything hereinbefore contained, the court may permit any person, summoned to answer a claim for provisional sentence, to appear personally on the floor of the court and acknowledge or deny the same."

The defendant is required to show cause why it has not satisfied the plaintiff's claim, and to acknowledge or deny the signature to the liquid document, and F to acknowledge or deny the validity of the claim.

The question that the court must answer is whether there is anything in the opposing affidavit filed of record on the defendant's behalf and the attachments thereto, or in the oral submissions made by counsel on the defendant's behalf on 23 November 2013, that satisfies the requirements stipulated by Order G 4 of the rules of this court, to show cause why the plaintiff's claim has not been satisfied, or that constitutes a denial of the signature on the promissory note, or a denial of the validity of the claim.

The promissory note was issued in Harare, Zimbabwe, on 29 June 2010. It was typed on the defendant's letterhead, and signed by the defendant's authorized signatory. It reads as follows: H

2013 (2) ZLR p677

Chigumba J

A "For valuable consideration, receipt of which is hereby acknowledged, RioZim Limited the "issuer" hereby promises to pay or to the order of African Export-Import Bank the sum of US$8 000 000 (US dollars eight million) on 29 December 2010 without set off, counterclaim, restrictions or conditions of any nature and free and clear of any deductions or withholdings.

The issuer hereby waives demand, diligence, presentment, protest and notice B of every kind and represents to the holder that this promissory note constitutes its legal, valid independent and binding obligations.

This promissory note shall be governed by and construed in accordance with the laws of England. The courts of England are to have exclusive jurisdiction to settle any disputes which may arise out of or in connection with this promissory note.

The holder at its discretion may bring any suit, action or proceeding in the courts C of whatever jurisdiction that it may select and the Issuer submits for this purpose to the jurisdiction of each court selected as aforesaid.

To the extent that the issuer may be entitled in any jurisdiction to claim for itself or its assets immunity or protection of whatever nature in respect of its obligations under this promissory note from service of process, jurisdiction, suit, judgment, execution, attachment(whether before judgment, in aid of execution D or otherwise) or legal process or to the extent that in any such jurisdiction there may be attributed to the issuer or to its property or assets such immunity or protection (whether or not claimed) the issuer hereby irrevocably agrees not to claim and hereby irrevocably waives any such immunity (including sovereign immunity) or protection.

The issuer hereby appoints Law Debenture Corporate Services Limited of Fifth Floor, 100 Wood Street, London EC2V 7EX England to accept service of process E on its behalf in England.

This promissory note shall be presented for payment at: BancABC, Endeavour Crescent, Mount Pleasant Business Park, Mount Pleasant, Harare, Zimbabwe".

A promissory note is a negotiable instrument. It has been defined as an unconditional promise in writing, made by one person to another, signed F by the maker, and engaging to pay on demand, or at a fixed or determinable future time, a sum certain in money, to a specified person or his order, or to the bearer. See Cowen & Gering *The Law of Negotiable Instruments in South Africa* 4 ed p 35.

There are rules for interpreting written contracts in the event of a dispute among the parties to the contract. The courts look for the intent of the parties G at the time they entered into the contract. The mutual intention of the parties at the time of the contract will govern the court's resolution of a contractual dispute if that intention can be determined. If the language of the contract is clear and definite, that language will determine the mutual intent of the parties. In determining whether the contract language is clear and definite, H the court will give the words their ordinary and common meaning. Contracts

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2013 (2) ZLR p678

Chigumba J

are interpreted as a whole, if possible, in order to give effect to all parts of A the contract. The court will not look outside the contract unless there is ambiguity in a contract provision. In *NRZ Contributory Pension Fund v NRZ* 1984 (1) ZLR 322 (H) at 325D and the question of interpretation of a written contract was considered. Korsah J (as he then was) stated:

"A cardinal rule of construction, which is in accordance with reason and with B common sense, was stated thus by Lord Halsbury in *Leader v Duffey* (1888) 13 AC 294 at p 301

'. . . whatever the instrument, it must receive a construction according to the plain meaning of the words and sentences therein contained. But I agree that you must look at the whole instrument, and, inasmuch as there may be inaccuracy and inconsistency, you must, if you can, ascertain what

is the meaning of the instrument taken as a whole, in order to give effect, if it be C possible to do so, to the intention of the framer of it. . .'"

In my view, the wording of clauses 3 and 4 of the promissory note is clear and unambiguous. The language used is plain and ordinary. The clauses, read together, and with the rest of the promissory note, clearly do not purport to exclude the jurisdiction of the Zimbabwean courts in favour of the courts D of England. The clauses state that:

> "This promissory note shall be *governed by and construed in accordance with the laws of England.* The courts of England are to have exclusive jurisdiction to settle any disputes which may arise out of or in connection with this Promissory Note.
>
> *The holder at its discretion may bring any suit, action or proceeding in the courts of whatever jurisdiction that it may select* and the Issuer submits for this E purpose to the jurisdiction of each court selected as aforesaid."

In *Leader v Duffey supra*, we are enjoined to construe the promissory note as a whole, and to look at the plain meaning of the words. A consideration of the plain meaning of the operative words of clause three is instructive. Clause 3, "…governed by and construed in accordance with the laws of F England…" together with clause 4 "The holder may at its discretion bring any suit, action or proceeding in the courts of whatever jurisdiction that it may elect.." My construction of these clauses is that the parties intended that the holder of the promissory note, at its sole and exclusive discretion, had a right to elect to bring any action or suit in courts of any jurisdiction of its choice, but that the laws of England be used to govern and interpret the G promissory note. I am unable to agree with the defendant's contention that the jurisdiction being referred to is the territorial jurisdiction of England. Clause 4 clearly belies this argument. In my view, the parties intended that the English law that governs promissory notes be used, to the exclusion of laws in other jurisdictions, whenever a dispute arose in regards to the terms of the promissory note. In other words, that the applicable law be the English H

2013 (2) ZLR p679

Chigumba J

A law of negotiable instruments. If the holder of the promissory note has exclusive discretion to decide to bring an action or suit in any jurisdiction, then the plain and ordinary meaning of clauses 3 and 4 is that only the laws of England may be used to govern the promissory note, in whichever court of whatever jurisdiction the holder of the promissory note elected to bring B its suit or action.

A reading of clause 4 will show that the defendant gave an undertaking to submit to a court of any jurisdiction as elected by the plaintiff and is accordingly precluded from reneging and seeking to challenge the unfettered discretion of the plaintiff to elect to bring this suit in this court. The wording of the promissory note is clear and unambiguous. The literal meaning of the C words and sentences does not give rise to an absurdity. There is no need to invoke any other cannons of construction in my view.

The defendant contended that the summons ought to have been served on the *domicilium citandi et executandi,* at Law Debenture Corporate Services Ltd of Fifth Floor, 100 Wood Street, London EC2V 7EX England. With respect, I disagree. The defendant appointed that agent to accept service of process D on its behalf in England. There is nothing in the wording of that clause which supports the contention that any and all legal process in regards to the promissory note, ought to be served in England, at that address. Clause 4 clearly gives unfettered discretion to the plaintiff to choose any court in any jurisdiction. Even if I am wrong in my view on this issue, I note that E the defendant accepted service of the letter dated 9 August 2013 addressed to it by the plaintiff, in which the plaintiff advised that the promissory note had been dishonored by non- payment, at its Harare address. No effort was made to disabuse the plaintiff of the notion that it had effectively placed the defendant *in mora* by delivery of the letter to that address. The defendant ought to have advised the plaintiff to deliver the letter to its *domicilium citandi* F *et executandi.* In the absence of such warning, the plaintiff was entitled to rely on previous conduct between the parties and continue to serve process at that address.

It is trite that provisional sentence may be granted where "When a plaintiff sues on a liquid document, the court will ordinarily grant provisional sentence G unless the defendant produces proof that the probability of success in the principal case is against the plaintiff". It is therefore necessary to decide whether or not there is a balance of probabilities in favor of the defendant in this case, which would justify the refusal of an order for provisional sentence. If there is no balance of

probabilities in favour of either party in any principal case that may eventuate, then the law is that the plaintiff is H entitled to provisional sentence. See *Allied Holdings Ltd v Myerson* 1948

2013 (2) ZLR p680

Chigumba J

(2) SA 961 (W) at 966; *Abraham v du Plessis* 1962 (3) SA 162 (T) at 169. A It follows that the question of onus is important in determining whether or not there is a balance of probabilities in favour of either party. There are two distinct aspects or types of onus. Firstly, there is the onus in the provisional sentence proceedings and, secondly, there is the onus in the principal case. If the onus in the principal case is on the plaintiff, then of course it may B be easier for the defendant to discharge the onus resting upon him in these proceedings of showing that there is a balance of probabilities in his favour. See *Allied Holdings Ltd v Myerson supra* at p. 966). These cases were followed in this jurisdiction in *Hicks v Dobriskey* 1976 (1) RLR 218 (G); 1976 (2) SA 792 (R).

The question that the court must answer is whether the defendant has C discharged the onus on it in the provisional sentence proceedings, and whether the plaintiff has discharged its onus in the main proceedings. Put simply, is the plaintiff likely to succeed in its claim in the main matter, or does the defendant have a valid defence to that claim, which is likely to succeed, rendering the granting of provisional sentence premature and incompetent?

Based on the papers filed of record, it is my view that the promissory D note is valid and binding on the parties. The defendant has not challenged its authenticity. The defendant has not denied that a promissory note, by definition a negotiable instrument, is a liquid document at law, and valid for purposes of r 20 of the rules of this court. The defendant has not denied that the promissory note was dishonored by nonpayment, on 9 August 2013. It E follows that the plaintiff has discharged the onus on it to show that it has a good case in the main matter. The plaintiff is more likely than not to succeed in the main matter. The defendant's submissions in regards to jurisdiction have already been dismissed by the court. We are left with averments that the defendant will be prejudiced if provisional sentence is granted in the sum of US$8 million, because the defendant owed less than that, it owed F US$7 398 856 as at 31 August 2013. The defendant is quibbling with the quantum of the plaintiff's claim. Does this constitute a balance of probabilities in the defendant's favour that would defeat a claim for provisional sentence?

Rule 21 requires that a defendant show cause why he has not honored the liquid document, or acknowledged or denied the validity of the claim. The G defendant impliedly acknowledged its signature on the promissory note, by failing to deny the same. The question of the quantum of the debt due in my view falls short of the requirement to show cause why the defendant has not honored the promissory note. It falls short of the requirement that the defendant deny the validity of the plaintiff's claim. In my view the defendant has failed to discharge the onus on it to prove that it has a good defence to the H

2013 (2) ZLR p681

Chigumba J

A validity of the plaintiff's claim. It is my view that the question of quantum is not a valid defence capable at law of defeating a claim for provisional sentence in the circumstances of this case, regard being had to the terms of the promissory note. Further, the defendant has not tendered payment of the US7 398 856 that it admits to owing.

Paragraph 7 of the notice of opposition is an admission by the defendant that B it was indebted to the plaintiff in the sum of US$7 398 856 as at 31 August 2013. If regard is had to the terms of the promissory note, the defendant, as the issuer, in clause two, waived "demand, diligence, presentment, protest and notice of every kind". In my view, this entitles the plaintiff to claim in terms of the promissory note as at 29 June 2010. The terms of the promissory C note as at that date were deemed to constitute "legal, valid, independent and binding obligations".

A look at clause one of the promissory note will reveal that the defendant promised to pay US$8 million to the order of the plaintiff "without set off, counterclaim, restrictions or conditions of any nature and free and clear of deductions or withholdings". In my view, the defendant effectively bound D itself to pay $8 million first, and then ask questions later. It cannot defeat a claim for provisional sentence for the reason that it has paid off some of the $8 million dollars. That is an issue that can be ironed out at trial. The defendant entered appearance to defend on 18 October 2013. In terms of r 33:

"33. Where provisional sentence granted and defendant enters E appearance to defend action

Where a defendant against whom a provisional sentence has been granted enters appearance to defend the action, the summons shall stand as the plaintiff's declaration, and the defendant shall file his plea within ten days after his entry of appearance, and thereafter the matter shall proceed as in an ordinary action."

The defendant ought to have filed its plea on or about 1 November 2013. F After that, the matter proceeds as an ordinary action where the question of the actual amount due and owing can be thrashed out and witnesses can testify and be cross-examined to test the efficacy of their evidence. As it is, on the papers filed of record, the court is unable to test the veracity of the contention that the defendant has discharged part of its indebtedness to the G plaintiff, or to determine the actual amount allegedly paid by the defendant. A defendant against whom provisional sentence has been granted is not without rights. Such rights are provided for in r 28. The defendant already entered appearance to defend the matter, so the effect of that is to ensure that the provisional sentence remains an interlocutory judgment until the trial determines whether it should be made into a final judgment, and on H what terms.

Chigumba J

In conclusion, this court finds that, in the absence of a denial of the signature A by the defendant on the promissory note, in the face of an unsatisfactory and legally unsustainable defence to the dishonouring of a promissory note, which is a negotiable instrument, and in the lack of a viable defence to the plaintiff's claim, provisional sentence be and is hereby granted in favor of the plaintiff against the defendant in the sum of US8 000 000, together B with interest thereon at the prescribed rate calculated from 29 December 2010, to the date of payment in full, and to costs of suit.

Dube, Manikai & Hwacha, plaintiff's legal practitioners

Takundwa & Co, defendant's legal practitioners C

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Document 70 of 79

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2013/Volume 2/MUTANDA v ATTORNEY-GENERAL & ANOR 2013 (2) ZLR 683 (S)

MUTANDA v ATTORNEY-GENERAL & ANOR 2013 (2) ZLR 683 (S)

Citation	2013 (2) ZLR 683 (S)
Case No	Judgment No. S-55-13
Court	Supreme Court, Harare
Judge	Malaba DCJ, Garwe JA & Gowora JA
Heard	5 February 2013; *CAV*
Judgment	5 December 2013
Counsel	*T Mpofu*, for the appellant *S Fero*, for the respondents
Case Type	Civil appeal

Annotations No case annotations to date

Flynote

Legal practitioner – *conduct and ethics – duty to client – allegation of possible breach of law by magistrate and prosecuting authorities – practitioner informing Attorney-General of allegations – no impropriety in so doing*

Headnote

D The appellant and a co-accused were arrested on allegations of fraud and theft, the complainant being their employer. They were placed on remand and granted bail on condition, *inter alia*, that they would not go back to their place of employment. The appellant later went to his place of work. The State considered that to be a breach of his bail conditions and that led to an application being made for the reversal of the relaxed E bail conditions.

A hearing commenced before a magistrate to determine whether the appellant had breached his bail conditions. The investigating officer was called to testify but proceedings were stopped before he was cross-examined. The appellant was at the time represented by a legal practitioner, who F made an application for refusal of further remand. The decision of that application was reserved. Before the hearing resumed, the appellant withdrew his instructions from his first legal practitioner and engaged another, who wrote to the Attorney-General to say that the allegations made against the appellant on the request for remand form were contrary to the evidence on hand. She alleged that the appellant was therefore G wrongly placed on remand on the basis of false information. While aware of the fact that an application had already been made for refusal of further remand and that a decision was pending on the matter, she suggested to the prosecutor that the appellant be removed from remand. She was also aware of the fact that evidence on the statement of bail H had not been completed as the investigating officer was still to be cross

examined. She concluded her letter to the Attorney-General by saying A that her client had received information that

> ". . . a ruling may already have been prepared in anticipation of the next hearing date, wherein the application for refusal of further remand shall be dismissed and our client found guilty of breaching bail conditions [and] being sentenced to one year in custody with B six months being suspended on the usual conditions …"

She said that in that event she would bring proceedings against all parties concerned for violation of her client's rights, miscarriage of justice, abuse of office, and damages.

When the hearing resumed before the magistrate, the prosecutor brought to the attention of the magistrate the allegations made in the letter. He said C that the letter amounted to contempt of court and criminal defamation, as well as being abusive, mischievous and malicious. The matter was postponed, and when it resumed the magistrate announced his decision to recuse himself from the proceedings, because the allegations made in the letter to the Attorney-General by the appellant through his legal D practitioners were serious and that whatever decision he made would not be accepted by either party as being impartial. He forwarded the record of proceedings to the High Court with a request that it be placed before a judge for quashing of the proceedings so that fresh proceedings could commence before another magistrate.

When the referral came to the notice of the appellant's legal practitioner, she E filed an application in the High Court for review of the same proceedings on the ground that there was no real and substantial justice. In the application, she alleged that the appellant had been placed on remand on false information. The High Court dismissed the application. In so doing, the judge *a quo* said that the legal practitioner had used abrasive, coarse, intemperate language unbecoming of a legal practitioner both F in her *viva voce* submissions in court and written communications to the Attorney-General's Office. He said that her conduct was unethical and an abuse of process. He directed that a copy of the judgment be served on the Attorney-General, the Judicial Services Commission and Secretary of the Law Society. G

It was against this direction that the appellant appealed.

Held, that the letter was originally not intended for public consumption was not intended for the magistrate to know. It expressed fear by the legal practitioner on behalf of her client, of something he said he had been told by people he met. The letter also showed that investigations of the truthfulness of the allegation made by the appellant had to be made. H

A Having come across information like that, it was difficult to say that the legal practitioner ought not to have brought this information to the attention of the Attorney-General. The Attorney-General represents public interests and is entrusted with the responsibility of having matters of breach of law investigated. The magistrate himself appreciated the seriousness of the allegations and did not take them against the legal B practitioner. The magistrate gave the legal practitioner the opportunity to put forward her version of what happened to him.

Held, further, that lawyers should represent their clients, competently, diligently, promptly and without any conflict to their duty to court. There was nothing in the record to support the accusation of the legal C practitioner being combative and hostile. She had a duty to her client and the only forum to address her client's concerns was to approach the Attorney-General's Office as she rightfully did. A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer and take whatever lawful and ethical measures may be required to vindicate a client's cause. The appellant's D legal practitioner could not to be faulted for the course of action she took. If due consideration was given to her conduct before the court when the first respondent's representative drew the court's attention to the letter in question, there was nothing to indicate she compromised her duty to the court as a court official.

Case referred to E

Pertsilis v Calcaterra & Anor 1999 (1) ZLR 70 (H)

Case information

T Mpofu, for the appellant

S Fero, for the respondents

Judgment

F **Malaba DCJ**: This is an appeal against the judgment of the High Court by which an application for review against the decision of the magistrates court was dismissed and an order made that the judgment be referred to the Attorney-General, Judicial Service Commission (JSC) and the Secretary of the Law Society of Zimbabwe.

G At the hearing of the appeal, Mr *Mpofu*, who appeared for the appellant, indicated that the appellant was not challenging the correctness of the decision dismissing the application for review of the magistrates court proceedings. He however, persisted with the grounds of appeal against para 2 of the court *a quo'*s order, relating to the referral of the judgment to the bodies stated H therein. The facts of the case are as follows.

Malaba DCJ

The appellant and a co-accused were arrested on 26 November 2011 on A allegations of fraud and theft relating to CAPS Holdings. The appellant was charged on his own with 3 counts of fraud as defined in s 136 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] (Criminal Law Code) and two counts of theft as defined in s 113 of the Criminal Law Code. He was jointly charged with one Justice Mujaka on one count of fraud. B

On 29 November the appellant and his co-accused were placed on remand. The Form 242, on the basis of which the magistrates court was satisfied that there was reasonable suspicion of the appellant having committed the offences charged against him, contained allegations which were later challenged by the appellant. In respect to the fraud charge he was facing alone, it was alleged that the appellant withdrew money from the company's bank accounts at C Stanbic Bank and Commercial Bank of Zimbabwe Ltd respectively, upon a misrepresentation that the money was

required for the purchase of drugs, when in fact the money was for his own use, to the prejudice of CAPS Holdings. In respect to the charge of theft he was facing it was alleged that the appellant had intentionally withdrawn a total of ZAR169 000 from two D CAPS Holdings bank accounts held in South Africa knowing that CAPS Holdings was entitled to own, possess or control its funds and he converted the funds to his own use.

The allegation against the appellant and his co-accused was that they misrepresented to the Medicines Control Authority of Zimbabwe (MCAZ) that E they had authority to de-register 50 drugs. They did not have such authority. In fact, once the drugs were de-registered they intended to re-register the same drugs in Europe at Liechtenstein.

The appellant and his co-accused were granted bail on condition they did not interfere with witnesses, that they would surrender passports and would not go back to CAPS Holdings. Later the conditions were altered to have the F appellant given back his passport. The appellant later went to his place of work. The State considered that as a breach of his bail conditions and that led to an application being made on 13 January 2012 for the reversal of the relaxed bail conditions.

A hearing commenced before magistrate Mr Jarabini to determine whether G the appellant had breached his bail conditions. The investigating officer was called to testify but proceedings were stopped before he was cross-examined. The appellant was at the time represented by Mr Samukange of Venturas and Samukange Legal Practitioners. At the hearing Mr Samkange had also made an application for refusal of further remand. The decision of that application was reserved. H

Malaba DCJ

A The allegations of the bail breach were to be continued on 25 January 2012. The matter was remanded for continuation on 17 February 2012. Meanwhile the appellant withdrew his instructions from Mr Samkange and mandated Linda Chipato of Linda Chipato Legal Practitioners. On 15February 2012, Ms Chipato wrote a letter to the Attorney-General in which she alleged that allegations made against the appellants on Form 242 were contrary to the B evidence on hand. She alleged that the appellant was therefore wrongly placed on remand, on what she called false information.

While aware of the fact that an application had already been made by Mr Samkange for refusal of further remand and that a decision was pending on the matter, she suggested to the prosecutor that the appellant be removed C from remand. She was also aware of the fact that evidence on the statement of bail had not been completed as the investigating officer was still to be cross examined. In the last paragraph of the letter Ms Chipato then wrote:

> "It has also since been brought to our client's attention that a ruling may already have been prepared in anticipation of the next hearing date, wherein the application for refusal of further remand shall be dismissed and our client found guilty of D breaching bail conditions with him being sentenced to one year in custody with six months being suspended on the usual conditions. We are not certain whether [Mr] Mutevedzi is aware of this. Whilst we find this to be shocking, we would be grateful if you look into it. Should this be the case, we shall not hesitate to immediately make the necessary application to the Supreme Court for violation of our client's rights, miscarriage of justice, abuse of office, coupled with a claim for damages against all parties concerned. Kindly revert to us on E the urgent aspect of this case."

At the commencement of the proceedings on 17 February 2011 the prosecutor brought to the attention of the magistrate the allegations made in the letter. It was the prosecutor's opinion that the letter amounted to contempt of court and criminal defamation. He went on to say the letter was abusive, F mischievous and malicious. The prosecutor alleged that Ms Chipato should have checked the record of proceedings at the clerk of court's office to satisfy herself whether any judgment had been written in advance. On her part, Ms Chipato indicated to the court that there was no intention to insult the court or to be in contempt of the proceedings.

She indicated it was unfortunate that the prosecutor had brought it to the G attention of the court in public proceedings when the intention was to allay her client's fears on the basis of information he had received. She indicated it had not been the intention to bring it to the attention of the courts until the facts had been proven. She further highlighted that her client had met with Mr Mutevedzi who indicated that his ruling had been prepared. In addition H that her client had photographic evidence of the meeting he held with Mr

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Malaba DCJ

Mutevedzi and another gentleman on the 21December 2011 at a service A station along Chiremba Road in the Chadcombe area in Hatfield.

It was agreed by consent on that day for the matter to be postponed to 20 February 2012 because the investigating officer who was to continue leading evidence on allegations of breach of bail conditions was ill. Ms Chipato also indicated that the next remand on 6 March 2011 her client intended to apply B for refusal of remand.

When proceedings resumed on 20 February the magistrate delivered a judgment in which he had made a decision to recuse himself from the proceedings. The magistrate indicated that it was in the interests of justice for him to recuse himself because the allegations made in the letter to the C Attorney-General by the appellant through his legal practitioners were serious. It was the magistrate's view that, in the circumstances, whatever decision he made would not be accepted by either party as being impartial. In his ruling he stated:

> "The general approach to a recusal is also expounded in the case of *President of RSA v SA Rugby Union* 1999 (4) SA 147 (CC) at 177B-E. At the root of this rule D (recusal) lies the very concept of judicial independence. *In casu* either way the decision goes, eyebrows will be raised on the ruling by either party or the public given the nature and magnitude of accusations traded between the state and the defence counsel for the first accused which has spilled to the bench … Given the circumstances, a decision which represents the true interests of justice can only be achieved by another independent and impartial (so to speak) judicial officer." E

On 1 March 2012 the magistrate forwarded record of proceedings to High Court with the request that it be placed before a judge for quashing of proceedings so that fresh proceedings could commence before another magistrate.

When the referral came to the notice of the appellant's legal practitioner, she filed an application in the High Court for review of the same proceedings on F the ground that there was no real and substantial justice. In the application she went on to allege that the appellant had been placed on remand on false information contained in Form 242. She placed documents to show that the allegations were not supported by evidence.

She also went further to ask the reviewing judge to determine the legality G of the order of remand. She then sent a letter to the Registrar of the High Court, for the attention of the reviewing judge, in which she alleged that referral by the magistrate for quashing of proceedings was unlawful. She said the appellant had not been heard before the decision to recuse himself by the magistrate was made. The court *a quo* dismissed the application on 23 May 2012. H

2013 (2) ZLR p689

Malaba DCJ

A As already indicated, there was no misdirection on the part of the learned judge on the question of the validity of the grounds on which the application was based. It is clear that the learned judge would not have had the power to consider whether there were grounds for a reasonable suspicion of the accused having committed the offences charged against him. That was a matter which had been decided upon by the magistrate who first remanded B the appellant on 29 November 2011. If there were any changed circumstances requiring a review of that decision the magistrates court was the correct forum to entertain an application for refusal of remand.

In the course of the judgment the learned judge made reference to issues relating to the letter. He said that the appellant's legal practitioner had adopted C a hostile combative mood. He stated:

> "A perusal of the record shows proceedings were conducted in a rather acrimonious, hostile and aggressive atmosphere not conducive to the due administration of justice. Counsel for the accused Ms *Chipato* did not help matters by resorting to abrasive, coarse, intemperate language unbecoming of a legal practitioner both in her *viva voce* submissions in court and written communications to the D Attorney-General's office."

He stated further:

> "It thus emerges quite clearly that after succeeding in hounding the presiding magistrate from the proceedings by levelling apparently unsubstantiated, defamatory and contemptuous allegations against the trial magistrate, they now seek to use the High Court to avoid trial and gain immunity from prosecution E by devious means. This type of conduct is unethical and an extreme abuse of the review process requiring some sort of censure from the Law Society and the prosecuting authorities should the allegations against the presiding magistrate turn out to be baseless and unfounded. Sight should not be lost that apart from their mere say-so, wild speculation and conjecture, the applicant and his lawyer have proffered no shred of evidence tending to show that the presiding magistrate F is indeed guilty of serious allegations they have

levelled against him. They have not bothered to disclose the source of their information or suspicion. They have therefore not laid any basis for the serious allegations they have levelled against the trial magistrate."

The learned judge then went on at p 5 to say:

"Litigants and legal practitioners must be warned strongly against making G idle, unsubstantiated, malicious, slanderous and scurrilous allegations against judicial officers and court officials. That type of conduct can only bring the due administration of justice into disrepute. The need to protect the dignity and integrity of the courts and judicial officials cannot be over emphasised. This is for the simple reason that the courts and judicial officers derive their right to preside over affairs of the subjects of the State from the Constitution and to that H extent the people of Zimbabwe."

2013 (2) ZLR p690

Malaba DCJ

The judge concluded by saying: A

"I hasten to point out that nothing must be swept under the carpet in this case. There must be a proper investigation of the allegations levelled against the presiding magistrate. If he is guilty as alleged, then the law should take its course and the same should apply to the legal practitioner and her client should allegations be found to be baseless."

It is clear that it was on the basis of the interpretation of the letter that the B learned judge made his findings above. In addition, the judge's perception of the conduct of the appellant's legal practitioner, was to him sufficient enough evidence upon which he gave the direction in para 2 of the order that:

"2. That the Registrar be and is hereby directed to serve a copy of this judgment on the Attorney-General, the Judicial Services Commission and Secretary of C the Law Society."

The question is therefore whether or not the interpretation of the letter and the proceedings in the court *a quo* justify the conclusion by the learned judge. There is no doubt that the letter was originally not intended for public consumption, and also that it was not intended, rightly or wrongly, for the magistrate to know. The letter expresses fear by the legal practitioner on D behalf of her client, of something he said he had been told by people he met. The letter also showed that investigations of the truthfulness of the allegation made by the appellant had to be made.

Furthermore, a close examination shows it is not as if the legal practitioner has accepted the allegations for truth. Having come across information like that, E it is difficult to say that the legal practitioner ought not to have brought this information to the attention of the Attorney-General. The Attorney-General represents public interests and is entrusted with the responsibility of having matters of breach of law investigated. While the learned judge points out that the allegations needed to be investigated in the administration of justice, he also seems to chide the legal practitioner for having done so. F

The basis for criticism by the learned judge of the legal practitioner is based on the belief that the letter is contemptuous and defamatory of the magistrate. An examination of the course of events during proceedings shows clearly that the magistrate appreciated the seriousness of the allegations and did not take them against the legal practitioner. The magistrate gave the legal G practitioner the opportunity to put forward her version of what happened to him. Although having been taken by surprise by the revelation of the contents of the letter to the magistrate by the prosecutor and the allegation that she was guilty of contempt of court, Ms Chipato remained calm. She appreciated the gravity of the matter and took time to explain how she had come to write the letter. H

2013 (2) ZLR p691

Malaba DCJ

A According to *IBA International Principles on Conduct for the Legal Profession commentary* adopted on 28 May 2011 by the International Bar Association at p 25:

"Lawyers should represent their clients, competently, diligently, promptly and without any conflict to their duty to court."

There is nothing in the record to support the accusation of Ms Chipato being B combative and hostile. She had a duty to her client and the only forum to address her client's concerns was to approach the Attorney-General's office, as she rightfully did.

It is trite that a lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer and take C whatever lawful and ethical measures may be

required to vindicate a client's cause. In *Pertsilis v Calcaterra & Anor* 1999 (1) ZLR 70 (H) at 74B-D Smith J stated:

> "Legal practitioners owe their clients a duty of loyalty. They are duty bound to advance and defend their client's interests. A legal practitioner is expected to devote his or her energy, intelligence, skill and personal commitment to the D single goal of furthering the client's interests as those are ultimately defined by the client."

In light of the above statement, the appellant's legal practitioner ought not to be faulted for the course of action she took. If due consideration is given to her conduct before the court when the first respondent's representative drew the court's attention to the letter in question, there is nothing to indicate she compromised her duty to the court as a court official.

The court is satisfied that the learned judge misdirected himself in the view he took of the effect of the letter and conduct of the legal practitioner during proceedings in the magistrates court. It was for this reason that para 2 of the court *a quo's* order was set aside.

F Accordingly it is ordered as follows:

1. The appeal is allowed only to the extent that para 2 of the court *a quo's* order is hereby set aside.
2. There shall be no order as to costs.

G GARWE JA and GOWORA JA concurred.

Linda Chipato Legal Practitioners, appellant's legal practitioners

H *Attorney-General's Office,* respondent's legal practitioners

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Document 71 of 79

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2013/Volume 2/NDAVA v TAKARUWA & ANOR 2013 (2) ZLR 692 (S)

NDAVA v TAKARUWA & ANOR 2013 (2) ZLR 692 (S)

Citation	2013 (2) ZLR 692 (S)
Case No	Judgment No. S-56-13
Court	Supreme Court
Judge	Malaba DCJ, Ziyambi JA & Gowora JA
Heard	17 June 2013; CAV
Judgment	5 December 2013
Counsel	*A Muchandiona,* for the applicant *R H Goba,* for the respondents
Case Type	Details not supplied
Annotations	No case annotations to date

Flynote

Delict – *negligence – driving – driving a vehicle without requisite licence* C *and having an accident – presumption created that manner of driving resulted from lack of requisite skill and experience*

Headnote

Whilst driving a motor vehicle without the requisite licence is not on its own sufficient evidence of negligence when considered in light of D all the circumstances of the case, driving requires a special skill and experience commensurate with the standard of due care which a driver owes to his passengers as well as other road users. Where a person has no driver's licence for the vehicle in question, there is a presumption that his manner of driving which forms part of the particulars of negligence E was as a result of lack of the requisite skill and experience expected of a reasonable driver in possession of an appropriate driver's licence.

Cases cited

Hirsch Appliance Specialists v Shield Security Natal (Pty) Ltd 1992 (3) SA 643 (D) F

S v Mauwa 1990 (1) ZLR 235 (S)

Case information

A Muchandiona, for the applicant

R H Goba, for the respondents

Judgment

Malaba DCJ: This is an appeal against the judgment of the High Court G dated 25 October 2012 by which a claim for damages amounting to US$36 475 in respect of injuries received in a car accident was dismissed with costs.

The facts of the case are these. On 12 February 2010 at about midnight the appellant was a passenger in a 25 seater minibus belonging to the second respondent and driven by the first respondent, in the scope and course of H

Malaba DCJ

A his employment, from Beitbridge to Harare plying the Harare-Masvingo highway. At the 45 km peg the minibus was involved in a collision with the rear right side of a trailer being pulled by a Malawian registered horse truck. As a result of the collision the minibus overturned and lay on its right side in the lane for on-coming traffic. The appellant, who had fallen asleep, woke up to find herself trapped under the back seat where she had been sitting. She B sustained severe injuries to the right forearm in respect of which she later received treatment in the form of debridement and skin grafting.

On 10 September 2010 the appellant issued summons against the respondents, claiming damages for the injuries sustained in the sum of US$71 050 with interest at the prescribed rate of 5 per cent per annum with effect from 12 C February 2010 and costs of suit. The amount of damages was later reduced to US$36 475. The appellant alleged in the declaration that the cause of the injuries she sustained was the negligence of the first respondent. She gave the particulars of negligence as being the following:

"1. he was not a holder of a class one driver's licence which is a requirement for one to drive the 25 seater commuter omnibus which he was driving;

2. he D was following too close to the Toyota Dyna motor vehicle which was travelling in front of him in the same direction along the Beitbridge-Masvingo road;

3. he failed to keep a proper lookout in the circumstances;

4. he was travelling at an excessive speed in the circumstances;

5. he E failed to keep his vehicle under proper control; and

6. he failed to stop or act reasonably when the accident seemed imminent."

The respondents denied liability, particularly that the first respondent was negligent in any way in the manner he drove the vehicle or as alleged by the appellant. They pleaded that the omnibus was hit by a passing motor vehicle F with a Malawian registration number. In their summary of evidence

the first respondent repeated the allegation that his motor vehicle was hit by a trailer with a Malawian registration number. He suggested that the motor vehicle was involved in a side swiping collision.

The evidence before the court *a quo* was, briefly, as follows. Liah Mugonapanja, the first witness to testify for the appellant, said that she was seated on the G front seat by the window behind the driver's seat. She saw the trailer which was ahead of them. The first respondent had been driving fast and had not seen that the trailer was stationary. She said that she drew the attention of the driver to the fact that he was about to collide with it. He swerved to the right to avoid colliding with the trailer. The omnibus overturned and H lay on its right side in the lane for oncoming traffic. She said that the first

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respondent did not apply brakes and that the road where the accident took A place was straight.

The second witness for the appellant was Cedon Moyo. He said that on 11 February 2010 he boarded a minibus in Harare going to South Africa. In that minibus the first respondent was a conductor, since he was collecting the tickets. When Cedon Moyo boarded the same minibus around midnight B at Beitbridge to return to Harare he noticed that the first respondent was now the driver of the vehicle. He was sitting in the front seat between the wheels on the left side of the vehicle. He said that at the 45 km peg he saw the trailer which appeared to have stopped in front of the minibus. The first respondent was driving at an excessive speed. As he was sitting next to the left front door he was able to see what was happening. When his attention C was drawn to the presence of the trailer the first respondent panicked and swerved to the right without applying brakes. The minibus hit the trailer and overturned and rested on its right side. He said that it appeared as if the first respondent had fallen asleep and had not kept a safe distance between his car and the vehicle ahead of him.

The appellant produced a report which showed that the minibus was damaged D on the front grill, the head lamps and park lights and the windscreen.

In what was a clear procedural irregularity, Mr *Goba,* the respondent's legal practitioner, called a witness to give evidence in support of the respondents' case before any of the respondents gave evidence. It is not clear from the E record why the learned judge allowed this to happen, notwithstanding the objections by Mr *Muchandiona,* the appellant's legal practitioner. The witness, one Elina Ruvengo, said she was sitting in the front seat on the right by the aisle. At the 45 km peg she saw the trailer which was being pulled ahead of them. The first respondent wanted to overtake the trailer. As he moved to the lane for oncoming traffic to prepare to overtake, the trailer uncoupled F from the horse and moved to its incorrect side of the road, thereby partially blocking their way. The minibus hit the trailer with its left side and fell on its right side on the lane for oncoming traffic.

The first respondent then gave evidence. He said he was driving behind the trailer until he was 80 metres from it. He said that he indicated his intention G to overtake. As he was preparing to overtake, the trailer unhooked and moved towards the left side of his vehicle. He applied brakes as people screamed. As he held on to the steering wheel while applying brakes, the right rear side of the trailer hit the front left side of his vehicle. He said that the impact was from the front left side of his vehicle towards the left door. As a result of the force of the impact, his vehicle overturned and lay on its right side on the H

A lane for oncoming traffic. He said he was driving at a safe speed of 60 km/h and blamed the accident on the trailer that he alleged uncoupled from the horse. He admitted that he held a class two driver's licence but did not have a class one driver's licence to drive the minibus in question.

The court *a quo* made a finding that the appellant's witnesses were not B credible because of contradictions in their versions of what they said had happened. The contradictions related to the fact that Cedon Moyo said that the minibus collided with the trailer while Liah Mugonapanja did not mention any collision. The court also found that their evidence of the trailer being stationary in front of the minibus was contrary to the evidence of Elina Ruvengo and the first respondent, who said the

trailer was in motion. It was C also put to Liah in cross-examination by Mr *Goba* that a statement by the driver of the vehicle with a Malawian registration number plate which was pulling the trailer was to the effect that the trailer was moving slowly.

Although the court *a quo* found the first respondent and his witness credible it clearly misdirected itself on the evidence on the basis of which it made the D assessment. The learned judge summarised the evidence of Elina Ruvengo as follows:

> "She first noticed the truck about a kilometre before the scene of the accident. There were no reflectors on the trailer but it visible (*sic*). The driver was travelling at a slow speed or average speed. The accident was caused by a pickup truck which was travelling in front of the bus. The driver of the bus tried to overtake the truck pulling the trailer and at that moment, the trailer unhooked from E the truck and the trailer encroached onto the side of the minibus. When this happened the minibus was about 20 metres from the trailer. The trailer was moving backwards towards the minibus. The driver moved from left to right and the trailer followed him. She told the court that the driver braked and tried to avoid the trailer. The passengers screamed when the driver applied brakes and that it is at this moment that the minibus collided with the trailer and the F bus fell on its right side and began to slide on the tarmac. The trailer remained in the middle of the road. After the accident the driver of the truck parked his vehicle and came to where the minibus was. The witness was consistent in her story and gave a clear and straight forward story. She maintained under cross-examination that the cause of the accident was the trailer that disengaged from the truck and collided with the minibus."

G It is clear that the events as described by the learned judge relating to the behaviour of the trailer just before the collision of the minibus is not supported by the evidence of Elina. There is nowhere in her evidence that mention is made of the "trailer moving backwards towards the minibus" and the driver moving from left to right with the trailer following him.

H In respect of the first respondent the learned judge said:

Malaba DCJ

> "The driver did not see the other vehicle or trailer at the last moment but had A been following the other vehicle and seeing it. I am satisfied that the defendant kept a proper lookout. He insisted that when he was faced with an accident, he swerved to the right in order to avoid the accident and applied brakes to control the vehicle. That in my view shows that the driver acted reasonably to avoid an accident when one seemed imminent."

After referring to *S v Mauwa* 1990 (1) ZLR 235 (S) on the test of a reaction B by a reasonable driver faced with an emergency, the learned judge said:

> "The first defendant was placed into danger by the wrongful act of the Malawian driver ahead of him or the disengaging of the trailer from the truck. Looking at the reaction and conduct of the first defendant, it is clear that what he did in response to the accident that was imminent is something which a reasonable person ought to have done. He applied his brakes and swerved to the right in C order to avoid the accident. I am satisfied that the first defendant exercised such care as was expected of him when an accident seemed imminent. He took evasive action by swerving to the right. The evidence of the plaintiff's witnesses does not support a finding of negligence on the grounds relied upon."

The finding by the learned judge that the first respondent swerved to the right to avoid the collision is clearly not supported by his evidence. He D never said he swerved to the right. The evidence was that he held on to the steering wheel, with his foot on the brakes, until the rear part of the trailer hit the left rear side of his vehicle causing it to overturn. It was therefore on the evidence adduced by the witness that the learned judge made a wrong finding on the credibility of the witnesses. This court is at large.

What is clear from the evidence is that the first respondent was driving his E motor vehicle following the motor vehicle that was pulling the trailer. The evidence also shows that he came up to the trailer, whether it was stationary or moving slowly, without having had enough time to ensure that the two vehicles continued to drive on safely. The evidence of Liah and Elina was to the effect that people screamed before the collision. Elina's evidence at F first was that there were screams followed by the braking, and the attempt to overtake immediately and then the collision. It was only after being asked a leading question by Mr *Goba* that she changed the sequence of the events to say that the braking came first, followed by the screaming, the attempt to overtake and then the collision.

The evidence of the screaming coming first supports the testimony by Liah G to the effect that she alerted the first respondent to the presence of the trailer in front of them. That evidence of the first

respondent having been driving without keeping a proper lookout of what was happening in front of him is supported by Cedon, who said the first respondent panicked suggesting that he had momentarily fallen asleep. All the witnesses who gave evidence of the trailer and of the collision show that the minibus hit the trailer. That H

2013 (2) ZLR p697

Malaba DCJ

A evidence is from both Cedon and Elina. The evidence of Cedon supports that of Liah to the effect that the first respondent executed a swerve to the right before colliding with the rear right part of the trailer. Whilst Liah's evidence does not make reference to a collision it clearly refers to a swerve to the right which was not completed because the motor vehicle overturned.

The incomplete swerve to the right, which Liah refers to, was clearly a result B of the collision between the minibus and the rear right side of the trailer. Even Elina said that when the minibus hit the trailer the latter had moved to occupy a portion of the road in front of the minibus. The evidence of the first respondent is to the effect that the minibus hit the trailer. He said that the impact between the right rear side of the trailer and the left front side C of the minibus was from the trailer going backwards towards the left front door. That, clearly, is not descriptive of an impact caused by a trailer moving towards the minibus which had already started the overtaking manoeuvre. If the minibus was hit by the trailer while it already had a portion of its left side parallel to the right rear side of the trailer then the direction of the force of the impact would have been from the door to the front.

D The evidence that the trailer was hit by the minibus while it was in front of it is supported by the location of the damages to the minibus. The evidence shows that the damage was concentrated on the front part of the minibus. The story of the minibus having been hit by the trailer whilst in the process of overtaking it is a fabrication. The respondents did not mention in their E plea that the minibus was overtaking the trailer at the time it collided with it They knew that the appellant was alleging that the minibus had hit the rear part of the trailer as a result of the negligent driving of the first respondent as particularised. Instead of alleging that the collision took place when the minibus was overtaking the trailer, they instead alleged that the minibus was hit by a passing motor vehicle. There was no mention at all of overtaking. F The first respondent paid the driver of the motor vehicle that was pulling the trailer US$1 500 as compensation for the damage caused to the trailer. He would not have paid that amount if he believed that the trailer was the cause of the accident.

The first respondent admitted that he was driving the motor vehicle in G question when he was not a holder of a class one driver's licence. The evidence of Cedon that the first respondent was a conductor on the minibus the previous day supports the finding that he was not licensed to drive the motor vehicle. Whilst driving a motor vehicle without the requisite licence is not, on its own, sufficient evidence of negligence, when considered in light of all the circumstances of the case, driving requires a special skill and H experience commensurate with the standard of due care which a driver owes

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2013 (2) ZLR p698

Malaba DCJ

his passengers as well as other road users. Where a person has no driver's A licence for the vehicle in question, there is a presumption that his manner of driving which forms part of the particulars of negligence was as a result of lack of the requisite skill and experience expected of a reasonable driver in possession of an appropriate driver's licence.

In this case, not only was it shown that the first respondent drove the motor B vehicle in the manner alleged in the particulars of negligence, it must be assumed that he did so because he lacked the skill of a reasonable driver possessed of a licence to drive the class of the vehicle in question.

It is clear from the evidence that the appellant succeeded in establishing, on a balance of probability, that the damages she suffered were a result of the negligent driving by the first respondent in the course and within the C scope of his employment with the second respondent. In *Hirsch Appliance Specialists v Shield Security Natal (Pty) Ltd* 1992 (3) SA 643 (D) at 647-648 it is stated that:

> "In general the law does not hold one liable for the wrongs of another but sometimes it does. So, for example, it holds one vicariously liable when one's servant commits a wrong in the course and scope of his employment. That this D is so today is well settled."

The court *a quo* ought therefore to have awarded the appellant the damages she claimed.

The appeal is allowed with costs. The judgment of the court *a quo* is set aside and substituted with the following: E

"1. The claim is granted with costs.

2. The defendants shall pay the plaintiff the sum of US$36 475 with interest thereon at the prescribed rate from 12 February 2010, the one paying the other to be absolved." F

ZIYAMBI JA and GOWORA JA agreed.

Danziger & Partners, appellant's legal practitioners

Venturas & Samkange, respondents' legal practitioners G

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Document 72 of 79

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2013/Volume 2/NYEMBA & ORS v ALSHAMS BUILDING MATERIALS 2013 (2) ZLR 699 (S)

NYEMBA & ORS v ALSHAMS BUILDING MATERIALS 2013 (2) ZLR 699 (S)

Citation	2013 (2) ZLR 699 (S)
Case No	Judgment No. S-58-13
Court	Supreme Court, Harare
Judge	Malaba DCJ, Ziyambi JA & Gowora JA
Heard	18 June 2013; *CAV*
Judgment	5 December 2013
Counsel	*T Mpofu*, for the appellants *F Girach*, for the respondent
Case Type	Civil appeal
Annotations	No case annotations to date

Flynote

Appeal – *grounds – amendment of – point of law being raised on appeal for first time – court's discretion to allow such amendment, provided no unfairness to other party is occasioned*

Headnote

D The applicants sought to amend their grounds of appeal by raising the issue of the legality of the contract out of which the matter arose. The respondent, although accepting that a point of law going to the root of the matter can be raised at any time, provided it does not occasion any unfairness to the other party, argued that an amendment is not availed for E the mere asking. It was argued that the amendment sought it would result in unfairness and that prejudice would be

occasioned to the respondent in the conduct of its case. The respondent also disputed the suggestion that illegality appeared *ex facie* the papers.

Held, that in an application to amend pleadings, the court has a wide discretion, which discretion should, however, be exercised judicially. The discretion F reposed in the court in respect of amendments must be exercised in a manner which allows the issues between the parties to be fairly tried, and the possibility that an amendment to the pleadings might lead to the defeat of the other party is not the kind of prejudice that should weigh with the court. The question whether the transaction relied upon was a valid transaction was a question of law. Any such question may be G advanced for the first time on appeal, if its consideration involves no unfairness to the party against whom it is directed. The duty of a court on appeal is to ascertain if the court below came to a correct conclusion on the case submitted to it. An appeal court therefore has regard to the issues placed before it in the pleadings filed by the parties to the dispute. H Parties will be kept strictly to their pleas where any departure would

cause prejudice or would prevent full inquiry, but within those limits A the court has wide discretion. The mere fact that a point of law which is brought to the applicants' attention was not taken earlier will not, on its own, be sufficient grounds for a court refusing to give effect to it. There was no indication that the respondent would have conducted its case differently. Not to allow the amendment might result in prejudice B to the appellants, while the respondent had not established that any prejudice apart from the issue of costs would ensue if the amendment were to be granted.

Cases referred to

Morobane v Bateman 1918 AD 460 C

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

Ncube v Ndhlovu 1985 (2) ZLR 281 (S)

Shill v Milner 1937 AD 101

van Rensburg v Fouriesburg Hotel (Edms) Bpk 1980 (2) SA 26 (O)

Legislation considered D

Supreme Court Rules 1964 (RGN of 380 of 1964), r 32(3)

Case information

T Mpofu, for the appellants

F Girach, for the respondent

Judgment

Gowora JA: The respondent (to be hereinafter referred as "Alshams") E issued summons out of the High Court wherein it claimed the payment of US$1 560 437.68 against all the three appellants jointly and severally arising from personal sureties allegedly executed by them. The High Court found in favour of Alshams and granted judgment against all three appellants. The appellants have appealed to this court against the judgment on several F grounds. The appellants have sought to amend the grounds of appeal by raising a point of law on the following grounds:

1.1 Having made findings which established that respondent sued on a *pactum commissarium* "in that the respondent was to appropriate as its own", the pledged shares upon default and the claim before the court rested upon the inadequacy of the appropriation), the court *a quo* erred G in giving effect to a claim founded upon an illegality.

1.2 The court *a quo a fortiori* countenanced an illegality and its judgment is contrary to the public policy of the land and therefore void.

The appellants premise this application on the provisions of s 32(3) of the Supreme Court Rules 1964. Mr *Mpofu* contended that the issue sought H

Gowora JA

A to be raised in the amendment to the grounds of appeal raises an issue of law which goes to the root of the matter. He contended, however, that the amended grounds seek to deal with the legality of the transaction between the appellants and the respondent.

Mr *Girach* accepts the contention that a point of law going to the root of the matter can be raised at any time provided it does not occasion any unfairness B to the other party. He argued further that an amendment is not availed for the mere asking. His opposition to the amendment being afforded to the appellants *in casu* is that it would result in unfairness and that prejudice would be occasioned to the respondent in the conduct of its case. He also disputed the suggestion that illegality appeared *ex facie* the papers.

The principle relied upon by counsel in this application have been applied C over the years. In an application to amend pleadings, the court has a wide discretion, which discretion should however be exercised judicially. The discretion reposed in the court in respect of amendments must be exercised in a manner which allows the issues between the parties to be fairly tried, and the possibility that an amendment to the pleadings might lead to the defeat of D the other party is not the kind of prejudice that should weigh with the court.

In *Morobane v Bateman* 1918 AD 460, Innes CJ, in dealing with a similar application, said:

> "… The question whether the transaction relied upon was a valid transaction is a question of law. And any such question may be advanced for the first time on appeal, if its consideration then involves no unfairness to the party against E whom it is directed. No such unfairness is here involved."

See also *van Rensburg v Fouriesburg Hotel (Edms) Bpk* 1980 (2) SA 26 (O) at 29G-H; *Ncube v Ndhlovu* 1985 (2) ZLR 281 (S) at 284D-F.

The point was put in more succinct terms by Korsah JA in *Muchakata v Netherburn Mine* 1996 (1) ZLR 153 (S) where he said:

> F "Provided it is not one which is required by a definitive law to be specially pleaded, a point of law, which goes to the root of the matter, may be raised at any time, even for the first time on appeal, if its consideration causes no unfairness to the party against whom it is directed."

It is well accepted that the duty of a court on appeal is to ascertain if the court below came to a correct conclusion on the case submitted to it. A court G therefore has regard to the issues placed before it in the pleadings filed by the parties to the dispute. For as stated by de Villiers JA in *Shill v Milner* 1937 AD 101 at 105:

> "The object of pleadings is to define the issues; and parties will be kept strictly to their pleas where any departure would cause prejudice or would prevent full inquiry. But within those limits the court has wide discretion. For pleadings are H made for the court, not the court for pleadings. Where a party has had every

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Gowora JA

> facility to place all the facts before the trial court and the investigation into all A the circumstances has been as thorough and as patient as in this instance, there is no justification for interference by an appellate tribunal merely because the pleading of the opponent has not been as explicit as it might have been."

Contrary to the assertions by Mr *Girach*, it would seem that the declaration upon which the claim is founded might be understood to reflect an illegal enterprise. It suggests that the respondent was entitled to appropriate the B security in terms of the agreement. There is a suggestion on the part of the respondent that if the question of the *pactum commissorium* had been raised in the court *a quo* by the appellants, the respondent would have dealt with it.

I am not convinced that a *pactum commissorium* is one of the issues of law that specifically requires to be pleaded. In the event, the failure by the C appellants to have pleaded it has not caused prejudice to the respondent. The mere fact that a point of law which is brought to its attention was not taken earlier will not, on its own, be sufficient grounds for a court refusing to give effect to it. Although it is argued on behalf of the respondent that if it had been raised in the court *a quo*, the respondent would have structured its D case appropriately, there is no indication as to how the case would have been dealt with differently. Put differently, the respondent, apart from disputing the allegation that the agreement was a *pactum commissorium* has not placed before this court a different manner of structuring its case. In *Paddock Motors (Pty) Ltd v Igesund* 1976 (3) SA 16 (A) Jansen JA stated:

> "If for example, the parties were to overlook a question of law arising from the E facts agreed upon, a question fundamental to the issues they have discerned and stated, the court could hardly be bound to ignore the fundamental problem and only decide the secondary and dependent issues actually mentioned in the special case. This would be a fruitless exercise, divorced from reality, and may lead to a wrong decision … If the contention the appellant seeks to revive is good, and the other two bad, it means that this court, by refusing to investigate F it, would be upholding a wrong order."

The appellants seek to introduce a point of law that raise a very pertinent aspect of the transaction between the parties. The respondent has not established that any prejudice, apart from the issue of costs, would ensue if the amendment were to be granted. There is no unfairness that has been argued and to deny the amendment might result in prejudice to the appellants. G

It seems to me that in order to determine the real question in controversy, it is proper, and in the interests of justice, that the amendment sought be allowed. Accordingly the application for amendment is allowed. The appellant's grounds of appeal are amended in terms of the draft. There will be no order as to costs. H

2013 (2) ZLR p703

Gowora JA

A MALABA DCJ and ZIYAMBI JA concurred.

Gill, Godlonton & Gerrans, appellants' legal practitioners

B *Atherstone & Cook*, respondent's legal practitioners

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Document 73 of 79

Source:
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DEPUTY SHERIFF, HARARE v MAKETSHEMU & ORS 2013 (2) ZLR 704 (H)

2013 (2) ZLR p704

Citation	2013 (2) ZLR 704 (H)
Case No	Judgment No. HH-491-13
Court	High Court, Harare
Judge	Zhou J
Heard	5 December 2013
Judgment	5 December 2013
Counsel	*R Tsvakwi* for the judgment debtor and claimants Judgment creditor in person Ms *B Rupapa* at the invitation of the court No appearance for the Deputy Sheriff
Case Type	Civil application
Annotations	No case annotations to date

Flynote

Legal practitioner – *conduct and ethics – calling on judicial officer in* C *connection with contested matter – obligation to notify other parties and invite them to attend – such obligation extending to calling on judicial officer for practitioner to introduce himself – renunciation of agency – requirement to give reasonable notice – payment of wasted costs if unreasonably short notice given – practitioner absenting himself from* D *postponed proceedings – need to obtain leave of court*

Headnote

The need for the legal profession to reclaim and assert its position as a profession which was matched only by the consecrated priesthood requires continuing introspection and thorough training on ethical standards. It E is a cardinal rule of ethics that whenever a legal practitioner wants to see a judge or other judicial officer in chambers in connection with a contested matter he is ethically obliged to notify the other parties to the litigation or their legal representatives and invite them to attend together with him to see the judicial officer. It is improper for a legal practitioner or a party involved in a contested matter to see a judicial F officer in chambers in connection with that matter in the absence of the other parties to the matter unless those other parties have elected not to attend after being duly informed. This practice extends even to cases where a legal practitioner in a contested case intends to pay a courtesy call upon the judicial officer for the purpose of introducing himself. G

A legal practitioner may for good cause renounce agency by giving reasonable notice to his client, the registrar and all other parties to the proceedings. Late notice, or no notice, resulting in postponement of the case, could result in the legal practitioner concerned paying the wasted costs personally.

Similarly, it is inexcusable for a legal practitioner who has had a matter stood down to just absent himself from the postponed proceedings without the H

A leave of the court. Such conduct could result in an order that he should not recover his fees as he failed to properly represent the clients.

Cases referred to

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

B *Techniquip (Pvt) Ltd v Allan Cameron Engineering (Pvt) Ltd* 1994 (1) ZLR 246 (S).

Trador (Pvt) Ltd v Chidzambwa 1999 (1) ZLR 528 (H).

Case information

R Tsvakwi for the judgment debtor and claimants

Judgment creditor in person

C Ms *B Rupapa* at the invitation of the court

No appearance for the Deputy Sheriff

Judgment

Zhou J: The need for the legal profession to reclaim and assert its position as a profession which was matched only by consecrated priesthood requires continuing introspection and thorough training on ethical standards. I D have been constrained to write a judgment in this matter in a request for a postponement because of the circumstances of the case. Having heard the parties, I made an order which appears below, and indicated that my written reasons would follow. These are the reasons.

There are ten matters involved between the parties. Following an order of E this court given on 12 July 2013, all the matters were placed before me. The issues which arise in the matters are essentially the same. They are ten separate interpleader proceedings instituted by the Deputy Sheriff. The background to the matters is that the judgment creditor, Naume Maketshemu, is a former employee of the judgment debtor, Hamilton Finance. Following a labour dispute between the two the matter went to arbitration in terms of F the Labour Act [*Chapter 28:01*]. An arbitral award

was rendered in favour of the judgment creditor. The award was registered as an order of this court for enforcement in terms of the provisions of the Labour Act on 15 November 2012. A writ of execution was issued on 23 November 2012. The Deputy Sheriff then attached the various motor vehicles which were in the possession of or were found at the premises of the judgment debtor. The ten claimants G claimed ownership of those motor vehicles, hence the ten cases.

The matters were set down for hearing on 19 November 2013, but were postponed by consent to 5 December 2013 at 1000 hours. That date fell during the vacation but the parties consented to the matter being heard on vacation. The judgment creditor was representing herself. Ms *Rupapa* from H Mutumbwa Mugabe & Partners legal practitioners represented the judgment

debtor and the claimants. On the date that the matter was postponed Ms *Rupapa* A wrote a letter addressed to the Registrar and copied to the judgment creditor confirming postponement by consent of the matter to 5 December 2013.

On 5 December 2013 just before 10 a.m. a Mr *R Tsvakwi* came and requested to see me in chambers. He had with him copies of a notice of renunciation of agency by Mutumbwa Mugabe & Partners and a notice of assumption B of agency by Chinyama & Partners legal practitioners. The two documents had apparently been filed simultaneously on that date. Mr *Tsvakwi* was not properly dressed for court. He was without the other parties to the litigation. It is important for me to restate the cardinal rule of ethics that whenever a legal practitioner wants to see a judge or other judicial officer in chambers in connection with a contested matter he or she is ethically obliged to notify C the other parties to the litigation or their legal representatives and invite them to attend together with him to see the judicial officer. It is improper for a legal practitioner or a party involved in a contested matter to see a judicial officer in chambers in connection with that matter in the absence of the other parties to the matter unless those other parties have elected not to attend after being duly informed. This practice extends even to cases where D a legal practitioner in a contested case intends to pay a courtesy call upon the judicial officer for the purpose of introducing himself or herself. In this case I advised the legal practitioner of the need to invite the other parties to the matter to my chambers as well.

At the meeting Mr *Tsvakwi* submitted that he was applying for postponement E of the matter as he had only received instructions from the judgment debtor and the claimants that very morning. He had assumed agency just before 10 a.m., and had not been furnished with the papers relating to the matters. He indicated, too, that Mutumbwa Mugabe and Partners had renounced agency that same morning for professional reasons. There was no legal practitioner from Mutumbwa Mugabe & Partners in attendance to explain F the decision to renounce agency just a few minutes before the matter was to be argued. I indicated to the parties in attendance that I would not postpone the matter until I had been furnished with a reasonable explanation as to why the erstwhile legal practitioners had renounced agency a few minutes before the hearing and never attended to explain their conduct to the court. G Accordingly, I stood down the matter to 11:30 hours and ordered that the legal practitioner at Mutumbwa Mugabe and Partners who was handling the matter must attend to explain her conduct.

At 11:30 a.m. Ms *Rupapa* attended to explain why she had renounced agency. Surprisingly, Mr *Tsvakwi* was not in attendance. He did not ask to be excused by the court from attending; neither did he advise the court that H

A he would not attend at 11:30 when the matter was stood down to that time. A lady who introduced herself as Melisa Mafunga was in attendance. She said that she was employed by the judgment debtor as a loans officer. Even she did not know what had happened to Mr *Tsvakwi.* She stated that he had said that he was attending to some other case. Thus there was no legal B practitioner representing the judgment debtor and the claimants. The conduct of the lawyer is unacceptable in the circumstances and must be censured. The court had no choice but to postpone the matter indefinitely.

I need to point out that the manner in which this matter was handled showed disregard for the duties of legal practitioners. In terms of r 6 a "legal practitioner may for good cause renounce

agency by giving *reasonable notice* to his C client, the registrar and all other parties to the proceedings". In the instant case no notice was given at all of the renunciation of agency. The notice of renunciation of agency was brought to court at about the time when the hearing should have commenced. There was no attempt by the erstwhile legal practitioner for the judgment debtor to attend at court to explain the D late renunciation of agency. She only came upon being asked to come by the court. I invited Ms *Rupapa* to address me on why I should not order her to pay the wasted costs occasioned by the postponement of the matter. I am not persuaded that her explanation for renouncing agency so late in the day was reasonable. The fact of whether she was being briefed by the client she thought she was representing could have been established long before the E date of the hearing. In any event, even if she had discovered late that the clients had taken a position that they wanted to be represented by another law firm, the least that she should have done was to attend at court and ask to be excused from appearing. For the above reasons, I find it appropriate that she should pay the wasted costs personally. See *Doelcam (Pvt) Ltd* F *v Pichanick & Ors* 1999 (1) ZLR 390 (H); *Techniquip (Pvt) Ltd v Allan Cameron Engineering (Pvt) Ltd* 1994 (1) ZLR 246 (S).

As regards the conduct of Mr *Tsvakwi*, it was inexcusable for a legal practitioner who had a matter stood down to 11:30 to just absent himself from the proceedings without the leave of the court. He would have known G that a loan officer could not competently represent a company. In the circumstances, the court should penalise him by an order that he should not recover his fees as he failed to properly represent the clients: *Trador (Pvt) Ltd v Chidzambwa* 1999 (1) ZLR 528 (H).

In the result, I make the following order:

1. The H matter be and is hereby postponed *sine die*.

2013 (2) ZLR p708

Zhou J

2. The judgment creditor's wasted costs shall be paid by Ms *B Rupapa* of A Mutumbwa Mugabe & Partners *de bonis propriis.*
3. Mr *R Tsvakwi* shall not recover from his clients, the judgment debtor and the claimants, the costs of his attendance at court on 5 December 2013.
4. The Registrar shall send a copy of this judgment to the Council of the B Law Society of Zimbabwe.

Chinyama & Partners, judgment debtor and claimants' legal practitioners C

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Document 74 of 79

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2013/Volume 2/DREAMOSS INVESTMENTS (PVT) LTD v NATIONAL HOUSING DELIVERY TRUST & ORS 2013 (2) ZLR 709 (H)

DREAMOSS INVESTMENTS (PVT) LTD v NATIONAL HOUSING DELIVERY TRUST & ORS 2013 (2) ZLR 709 (H)

2013 (2) ZLR p709

Citation	2013 (2) ZLR 709 (H)
Case No	Judgment No. HH-490-13
Court	High Court, Harare
Judge	Zhou J
Heard	3 December 2013; *CAV*

Judgment 11 December 2013

Counsel *M Hogwe* and Ms *M Magorimbo*, for the applicant
F G Gijima, for the respondents

Case Type Application for spoliation order

Annotations No case annotations to date

Flynote

Property and real rights – *spoliation – application for mandament van spolie – must satisfy requirements for matter to be heard on urgent basis – counter-application – not permissible – onus on applicant – must* D *prove entitlement to order – prima facie right only established – courses open to court*

Headnote

Notwithstanding the urgent nature by which a *mandament van spolie* must be dealt with, an applicant is nevertheless enjoined to prove that the E circumstances of his case require the urgent intervention of the court. The *mandament van spolie* is a unique and summary procedure by which a dispute must be resolved expeditiously in order to prevent self-help. In other words, if an applicant seeks a spoliation order on an urgent basis he must satisfy the requirements for the matter to be heard on an urgent basis.

F The difficulty of instituting an application for a spoliation order as an ordinary court application or by way of summons is that the applicant might be confronted with a counter-application or a counterclaim for the *rei vindicatio* which would negate the whole purpose of the *mandament,* which was designed to restore the *status quo ante* before the equities or merits of the case are considered. In order to deal with a situation of a G counter-application the approach of the court is to invoke the principle *spoliatus ante omnia restituendus est* – the person who has been despoiled must first be restored to his former position before the merits of the case can be considered. By application of this principle the court will not countenance a counter-application in an application for the *mandament*. H An applicant who seeks a *mandament van spolie* on an urgent basis

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must show that he acted with due expedition and did not wait until the A day of reckoning came. A spoliation order is a final order. Before it is granted the respondent must be allowed to state his case. The applicant, on the other hand, must, just as in other civil cases, prove on a balance of probabilities that he is entitled to the order for the return of property. Where the applicant's right is only *prima facie* established, the appropriate B interim order should not be the return of the property (because that is a final order), but an interim interdict restraining the respondent from alienating the thing or some such similar relief, coupled with an order for the respondent to show cause, if any, why he must not be ordered to restore possession at a future date. The rationale for such an approach is that a respondent should not be allowed to obtain a final order on the C basis of *prima facie* proof.

Cases referred to

Botha & Anor v Barrett 1996 (2) ZLR 73 (S)

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

Dilwin Invstms (Pvt) Ltd v Jopa Eng Co (Pvt) Ltd HH-116-98 D

Fredericks & Anor v Stellenbosch Divisional Council 1977 (3) SA 113 (C)

General Transport & Engineering (Pvt) Ltd & Ors v Zimbabwe Banking Corporation Ltd 1998 (2) ZLR 301 (H)

Kama Construction (Pvt) Ltd v Cold Comfort Farm Co-Operative & Ors 1999 (2) ZLR 19 (S)

Karori (Pvt) Ltd & Anor v Mujaji 2007 (1) ZLR 105 (H) E

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

Mutsotso & Ors v Commr of Police & Ors 1993 (2) ZLR 329 (H)

Schagan Bros v Lewis & Anor 1911 TPD 417

Triple C Pigs & Anor v Comr-Gen ZRA 2007 (1) ZLR 27 (H)

Case information

M Hogwe and Ms *M Magorimbo*, for the applicant F

F G Gijima, for the respondents

Judgment

Zhou J: This is an application for a *mandament van spolie*. The applicant is a company which carries on business as a land developer. The first respondent is a company in the same business as the applicant. The second respondent G controls the first respondent. His position in that company is not described in the papers.

The applicant alleges the following. In September 2012 it entered into a written agreement with an organisation called Mutare Housing Consortium. The first respondent is a member of the Mutare Housing Consortium. In terms of that agreement the applicant was to service and develop into residential H

Zhou J

A stands a piece of land owned by the Mutare Housing Consortium. The piece of land is known as Gimboki South and is located in the Dangamvura area of Mutare. Pursuant to that agreement the applicant took occupation of the land on 10 September 2012 and commenced work on it.

On 13 November 2013 the respondents through their agents moved onto the construction site and commenced some work thereon the following day. B The applicant alleges that the respondents' agents are excavating on the site which was under the control of the applicant from September 2012, thereby interfering with the applicant's occupation of the site.

The respondents filed papers in opposition to the application. The respondents contest the agreement concluded between the applicant and Mutare Housing C Consortium. They have attached to the opposing affidavit documents, including minutes of meetings, which show that there was disagreement among members of the Mutare Housing Consortium which resulted in a split regarding whether or not to contract the applicant to carry on development work at the disputed site. Meetings were held at which the Mutare City Council, the local authority for the area in question, tried to bring the D members of the Consortium together. At those meetings the issue of the involvement of the applicant in the development featured prominently. The respondents and some members of the Mutare Housing Consortium disputed the decision taken on behalf of the Consortium to engage the applicant in the development of Gimboki South.

E The respondents objected to the hearing of the application on an urgent basis and argued that the certificate of urgency and papers filed did not justify the making of an urgent application. Both parties accept as settled the principle that an application for spoliation is urgent by its very nature, as "it exists to preserve law and order and to stop and reverse self-help in resolution of disputes between the parties". See *Karori (Pvt) Ltd & Anor v Mujaji* 2007 (1) ZLR 105 (H) F at 108B-C. Based on that principle, Mr *Hogwe* for the applicant submitted that an application for a *mandament van spolie* does not need to satisfy the requirements of urgency which an ordinary urgent application must satisfy. He argued, in the alternative, that in the circumstances of this case the facts clearly justify determination of the matter on an urgent basis. G For the respondents, Mr *Gijima* submitted that, notwithstanding the urgent nature by which a *mandament van spolie* must be dealt with, an applicant is nevertheless enjoined to prove that the circumstances of his case require the urgent intervention of the court. I agree with the submission by Mr *Gijima*. The *mandament van spolie* is a unique and summary procedure by which a dispute must be resolved expeditiously in order to prevent self-help. In H other words, if an applicant seeks a spoliation order on an urgent basis he

Zhou J

or she must satisfy the requirements for the matter to be heard on an urgent A basis. As to the principles relating to urgency, see *Triple C Pigs & Anor v Commissioner-General ZRA* 2007 (1) ZLR 27 (H) at 30A-31E; *General Transport & Engineering (Pvt) Ltd & Ors v Zimbabwe Banking Corporation Ltd* 1998 (2) ZLR 301 (H) at 302A-E; *Dilwin Investments (Pvt) Ltd v Jopa Engineering Co (Pvt) Ltd* HH-116-98. B

The difficulty of instituting an application for a spoliation order as an ordinary court application or by way of summons is that the applicant might be confronted with a counter-application or a counterclaim for the *rei vindicatio* which would negate the whole purpose of the *mandament* which was designed to restore the status quo ante before the equities or merits of the case are considered. In order to deal with a situation of a counter-application C the approach of the court is to invoke the principle *spoliatus ante omnia restituendus est* – the person who has been despoiled must first be restored to his former position before the merits of the case can be considered. By application of this principle the court will not countenance a counter-application in an application for the *mandament*: C G van der Merwe & M D J de Waal *The Law of Things and Servitudes* p 68. An applicant who seeks a *mandament van spolie* on an urgent basis must show that he acted with due expedition and did not wait until the day of reckoning came. A spoliation order is a final order. Before it is granted the respondent must be allowed to state his case: *Schagan Bros v Lewis & Anor* 1911 TPD 417. The applicant, on the other hand, must, just as in other civil cases, prove on a balance of E probabilities that he is entitled to the order for the return of property. See *Chisveto v Minister of Local Government and Town Planning* 1984 (1) ZLR 248 (H) at 250C; *Karori (Pvt) Ltd & Anor v Mujaji (supra)* at 108C-E. Where the applicant's right is only *prima facie* established, the appropriate interim order should not be the return of the property (because that is a final order), but an interim interdict restraining the respondent from alienating the thing F or some such similar relief, coupled with an order for the respondent to show cause, if any, why he must not be ordered to restore possession at a future date. The rationale for such an approach is that a respondent should not be allowed to obtain a final order on the basis of *prima facie* proof.

In the instant case I am prepared to deal with the matter on an urgent basis. G The fact that the applicant has been carrying on development work on the disputed site is admitted by the respondent. What is in dispute is the extent of the work as well as whether the applicant used its own resources to carry on the work or merely used money obtained from the beneficiaries. It is established on the papers that during the period that the applicant has been carrying on work at the site the respondents were not working. It is H

Zhou J

A also admitted by the first respondent that it did bring onto the site some equipment on 13 November 2013 and that it commenced excavation work from about that date. The urgent chamber application was instituted on 19 November 2013. I am satisfied that the applicant acted with due expedition upon realising that its occupation and work were being interfered with by the respondents. See *Kuvarega v Registrar-General & Anor* 1998 (1) ZLR 188 (H) at 193F-G. B The meetings or so-called arbitrations which were held to discuss the applicant's presence on the site do not constitute an unlawful interference which could trigger the making of an urgent application. They were an attempt at resolving the merits of the right to be carrying on work on the site. They are not an act of self-help.

C The requirements for the granting of a *mandament van spolie* are settled. In *Botha & Anor v Barrett* 1996 (2) ZLR 73 (S) at 79D-E, the court stated the following:

> "It is clear law that in order to obtain a spoliation order two allegations must be made and proved. These are:
>
> (a) that D the applicant was in peaceful and undisturbed possession of the property; and
>
> (b) that the respondent deprived him of the possession forcibly or wrongfully against his consent."

See also *Kama Construction (Pvt) Ltd v Cold Comfort Farm Co-Operative & Ors* 1999 (2) ZLR 19 (S).

E The first respondent states that from about June 2012 its work on the site stalled due to liquidity challenges. I understand that to mean that from that time up to November this year only the applicant was working on the site. The respondent had stopped its operations during that period. It

only resumed in November 2013. The respondents state that the first respondent's F equipment remained on site, and that what was brought in during the month of November was simply additional equipment. But the bringing in of the additional equipment and the commencement of work on the site has interfered with the applicant's operations, as that work is being done on the same site on which the applicant has been working.

I am satisfied, therefore, that the applicant was in peaceful and undisturbed G possession of the site. I accept, too, that the resumption of work by the respondents on the same site on which the applicant is working constitutes interference with the occupation of the site. That interference constituted an act of spoliation on the part of the respondents. The fact that the respondents dispute the validity of the agreement in terms of which the applicant took H occupation of the site is not a valid defence to an application of this nature.

Zhou J

Fredericks & Anor v Stellenbosch Divisional Council 1977 (3) SA 113 (C) A at 117C succinctly explains the position of the law:

> "The court is not concerned with the nature of the applicants' occupation. What it is concerned with is that the respondent should not take the law into its own hands … Such conduct cannot be countenanced or condoned."

(cited with approval in *Mutsotso & Ors v Commissioner of Police & Ors* B 1993 (2) ZLR 329 (H) at 334A). See also *Kama Construction (Pvt) Ltd v Cold Comfort Farm Co-Operative & Ors* (supra) as to defences which are valid at law.

The final relief being sought by the applicant, other than on the question of costs, is that: "The Provisional Order be and is hereby confirmed." This court has held that it is undesirable to seek interim relief "which is exactly the C same as the substantive relief sued for and which has the same effect". See *Kuvarega v Registrar-General & Anor (supra)* at 193A-B. In considering the appropriate interim relief to be granted, I will consider, in addition to the other factors relevant, the fact that it has not been disputed by the applicant that the first respondent left some of its equipment at the site when it stopped work on the site in June 2012. The respondent merely brought in additional D equipment and its manpower. The question of the removal of the respondents' equipment from the site can therefore be dealt with on the return date after the parties have filed a full set of papers.

The question of the appropriate order of costs is equally left for debate on the date of the confirmation or discharge of the provisional order.

In the result, I make the following provisional order: E

A. TERMS OF FINAL ORDER SOUGHT

That you show cause to this Honourable Court why a final order should not be made in the following terms:

1. The respondents and all those claiming through them be and are hereby F ordered to remove all their construction equipment from Gimboki South Dangamvura, Mutare, upon service of this order.
2. The respondents shall pay the costs of this application on an attorney-client scale jointly and severally, the one paying the others to be absolved.

B. INTERIM RELIEF GRANTED G

Pending determination of this matter the applicant is granted the following relief:

1. The respondents be and are hereby ordered to restore peaceful and undisturbed occupation of Gimboki South Dangamvura, Mutare to the applicant upon service of this order by: H

Zhou J

1.1 Ceasing A or stopping all excavation or other construction or development work on the site; and

1.2 Removing all their employees from the site;

1.3 Not interfering with the applicant's work at the site.

C. SERVICE OF PROVISIONAL ORDER

B The applicant's legal practitioners are hereby granted leave to serve a copy of this provisional order upon the respondents or their legal practitioners.

Hogwe, Dzimirai& Partners, applicants' legal practitioners

C *F G Gijima & Associates*, respondents' legal practitioners

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Document 75 of 79

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2013/Volume 2/ABU-BASUTU v MOYO 2013 (2) ZLR 716 (H)

ABU-BASUTU v MOYO 2013 (2) ZLR 716 (H)

Citation	2013 (2) ZLR 716 (H)
Case No	Judgment No. HB- 173-13
Court	High Court, Bulawayo
Judge	Makonese J
Heard	29 November 2013; CAV
Judgment	12 December 2013
Counsel	*G Moyo,* for the plaintiff
Case Type	Civil application for damages
Annotations	No case annotations to date

Flynote

Damages – *delict – assessment – actio injuriarum – malicious prosecution and wrongful imprisonment – global figure preferable to damages based on a rate per day of detention – factors to be considered*

Delict – *actio injuriarum – malicious prosecution and wrongful imprisonment – action against individual who is not a State agent – action permissible* D *– what must be established*

Headnote

The defendant and plaintiff were co-directors of a company registered in South Africa. A bank account was opened in the company's name. The defendant, who was working for another business, fraudulently E transferred money from his employer's to the company's account. He then proceeded to withdraw all the ill-gotten funds from the account for his personal use without the plaintiff's knowledge. He then fled from South Africa and went to Zimbabwe, where he spent the funds. The plaintiff was arrested by the South African police and detained for 98 days before

the charges of fraud brought against him were withdrawn. F He brought an action against the defendant for malicious prosecution, basing the damages on a fixed amount per day.

Held, that the delict of malicious prosecution and detention is usually brought against Government institutions where a person's liberty and freedom is wrongfully deprived. In appropriate circumstances, actions for wrongful G arrest and detention can also be brought against individuals. The test is that where a party's direct or indirect conduct leads to the wrongful arrest of another, the person whose liberty has been infringed is entitled to recourse against the party causing such arrest and detention. The essential requirements in claims based on malicious arrest and prosecution are that (i) the defendant set the law in motion; (ii) he acted maliciously H

A and without reasonable and probable cause; and (iii) he acted without a duty of care towards the plaintiff.

Held, further, that by utilizing the bank account of the company for his illicit dealings, the defendant acted maliciously and set the law in motion against the plaintiff without reasonable and probable cause. When he B fled from South Africa he was well aware that he was exposing the plaintiff to the risk of arrest and detention. The defendant was well aware of the consequence of his actions. As co-directors, the defendant owed a special duty of care to the plaintiff not to utilise the company account in a manner that would endanger the plaintiff in any manner whatsoever. The defendant not only broke the trust between himself and C the plaintiff but also breached the duty of care to operate the company's bank account for lawful means. The plaintiff's arrest and detention was a direct consequence of the defendant's nefarious activities and so the plaintiff is entitled to compensation for the unwarranted deprivation of his liberty. The plaintiff's life was needlessly disrupted by the incarceration. He was prevented from carrying out his normal duties and his daily D activities. His loss of income for the 98 days he was in detention is not capable of easy ascertainment.

Held, further, that the plaintiff did not set out the basis upon which he arrived at the daily rate claimed, for which there was no rational basis. The correct approach to the quantum of damages would be to award a global figure E based on a fair reflection of an award that would adequately compensate the plaintiff. There was a need in all the circumstances of the case to award exemplary damages, regard being had to the following factors:

(a) the award must be fair and reasonable;

(b) the award must provide adequate compensation to the injured party;

(c) the F award must penalise the defendant for his malicious and reckless conduct;

(d) the award must be exemplary, in that the defendant had benefited financially whilst placing the plaintiff at serious risk.

Cases cited G

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

Masawi v Chabata 1991 (1) ZLR 148 (H)

Minister of Safety & Security v Seymour 2006 (5) SA 495 (SCA)

Thompson & Anor v Minister of Police 1971 (1) SA 371 (E)

Case information

H *G Moyo,* for the plaintiff

Judgment

Makonese J: The plaintiff filed a claim in this Honourable court seeking A the following relief :

"(a) Payment in the sum of R2 450 000 due for damages for detention of plaintiff by South African authorities for 98 days as a result of defendant having stolen money from his employer, deposited it in a bank account of a company jointly owned by the parties and withdrawing the said money for his own use without the knowledge of the plaintiff. The defendant, by his actions, B procured the arrest, charging and subsequent detention, for fraud of the plaintiff and the defendant's actions in so doing

were wrongful and plaintiff suffered damages of R25 000 per day for the 98 days. Despite demand, the defendant has refused to pay.

or alternatively

(b) Payment in the sum of R2 450 000 being damages arising out of the plaintiff's C detention by South African authorities for fraud arising out of the defendant's breach of trust and duty of care bestowed on him and / or which he owed the plaintiff in using the bank account of the parties' South African company. The defendant, during plaintiff's absence, without his knowledge and in breach of the said trust in appropriately or allegedly stole money from his employer and deposited it into the company's bank account and withdrew it thereafter, for his own use, before fleeing to Zimbabwe. Despite demand D the defendant has refused to pay.

or alternatively

(c) Payment in the sum of R2 450 000 due in respect of damages for embarrassment, trauma and humiliation suffered by the plaintiff for 98 days when he was arrested, charged and detained by South African authorities as a result of the E defendant's alleged criminal activities where it is alleged that he, without the plaintiff's knowledge, stole money from his employer, deposited it into the company's bank account and thereafter withdrew it for his own use before fleeing from South Africa to Zimbabwe. Despite demand, the defendant has refused to pay."

The Deputy Sheriff effected service of the summons at the defendant's F place of residence on 25 April 2013. The defendant entered an appearance to defend on 6 May 2013. A notice of intention to bar was filed and served on his legal practitioners on 31 May 2013. The defendant failed to file his plea and was duly barred on 18 June 2013. The plaintiff has made an application for default judgment and, in his affidavit of evidence, he avers that the defendant was his friend and a co-director of a company registered in G the Republic of South Africa. Following the incorporation of the said entity the parties opened a bank account with Nedbank South Africa. The plaintiff and the defendant never utilized the bank account. The defendant worked elsewhere whilst the plaintiff was working for another company. The plaintiff avers that during the period 31 August 2010 and 4 July 2011 the defendant fraudulently transferred money from his employer's account amounting H

Makonese J

A to R9 093 615.33 to the Nedbank account. The defendant's employer was Barloworld Logistics and is based in South Africa. The defendant then proceeded to withdraw all the ill-gotten funds from the Nedbank account for his personal use without the plaintiff's knowledge. The defendant fled from South Africa once he had finalised the illegal transactions and never returned to South Africa. The plaintiff remained in South Africa totally B oblivious of the activities of the defendant relating to the transfer of funds from Barloworld Logistics to the Nedbank account. On 18 January 2012 the plaintiff was picked up by the HAWKS (Commercial Crimes Unit) of South Africa and detained in connection with the illegal transactions that had been effected by the defendant.

C The plaintiff was questioned by the South African authorities from 18 January 2012 to 23 January 2012. It was then that the plaintiff discovered that the defendant had stolen R9 million from his employer and transferred it to the Nedbank account before withdrawing it for his own personal use. The plaintiff was kept in detention cells and formally charged with the defendant *in absentia*. The plaintiff was released from remand prison on 25 D April 2012 after 98 days of deprivation of liberty, when charges against him were provisionally withdrawn.

Upon his release from custody the plaintiff confronted the defendant who did not deny his wrong doing. In spite of his initial promise to compensate the plaintiff for the trauma and humiliation caused by his actions, the defendant E eventually became hostile and refused to compensate the plaintiff. Legal proceedings were commenced against the defendant who has been duly barred for failing to file a plea.

The plaintiff claims damages at the rate of R25 000 per day for each day that he spent in custody as a direct consequence of the defendant's actions. F The plaintiff claims that during his incarceration he suffered trauma and humiliation and his dignity was severely impaired. He was seen by friends and associates as a criminal. His credit-worthiness was seriously affected as he failed to service his accounts due to the wrongful detention. His family was deprived of a husband and a father for the entire period. The plaintiff was subjected to severe pain and anguish for being locked up in jail for no G good cause. The plaintiff avers that he then suffered unimaginable trauma. It was his first time to experience being arrested and interrogated and appearing in court under high security.

The plaintiff further indicates that the defendant had benefited from his illegal conduct and used the proceeds of the criminal transactions to purchase a house H in Malindela, Bulawayo and five Toyota Quantum vehicles, a Mercedes Benz

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Makonese J

GL, a Mercedes Benz A160, a Toyota Yaris, a Toyota Double Cab, Toyota A Hiaca vehicles and to open sports bars and other businesses in Bulawayo. The plaintiff contends that the defendant owed him a duty of care to ensure that whatever he did with the joint bank account did not affect or cause harm to him. The plaintiff further contends that the defendant's failure to apologise and his apparent lack of contrition increases his moral blameworthiness. The B plaintiff, who is a professional accountant, has become almost unemployable and his dignity and self-esteem have been heavily dented.

The legal position

The delict of malicious prosecution and detention is usually brought against Government institutions where a person is wrongfully deprived of liberty C and freedom. I am of the firm view that in appropriate circumstances actions for wrongful arrest and detention can also be brought against individuals. The test ought to be that where a party's direct or indirect conduct leads to the wrongful arrest of another, the person whose liberty has been infringed is entitled to recourse against the party causing such arrest and detention.

McKerron *Law of Delict* 7 ed at pp 259 and 260 states that: D

> "It is also an actionable wrong to procure the imprisonment or arrest of anyone by setting the law in motion against him maliciously and without reasonable cause".

The plaintiff has established the essential requirements in claims based on malicious arrest and prosecution, that is the need to allege and prove that the defendant: E

(i) set the law in motion.
(ii) acted maliciously and without reasonable and probable cause; and
(iii) acted without a duty of care towards the plaintiff

See *Thompson & Anor v Minister of Police* 1971 (1) SA 371 (E).

It is beyond dispute that the defendant, by utilizing the company's bank F account for his illicit dealings, acted maliciously and set the law in motion against the plaintiff without reasonable and probable cause. The defendant fled from South Africa and went on a spending spree in Zimbabwe, well aware that he was exposing the plaintiff to the risk of arrest and detention. The defendant was well aware of the consequences of his actions. As co- G directors, the defendant owed a special duty of care to the plaintiff not to utilise the company account in a manner that would endanger the plaintiff in any manner whatsoever. The defendant not only broke the trust between himself and the plaintiff but also breached the duty of care to operate the company's bank account for lawful means. The plaintiff's arrest and detention was a direct consequence of the defendant's nefarious activities and the H

Makonese J

A plaintiff is entitled to compensation for the unwarranted deprivation of his liberty. The plaintiff's life was needlessly disrupted by his incarceration. He was prevented from carrying out his normal duties and his daily activities. His loss of income for the 98 days he was in detention is not capable of easy ascertainment.

B In *Botha v Zvada* 1997 (1) ZLR 415 (H) it was held that:

> "As regards the quantum of damages . . . our courts have quite properly taken the stance that deprivation of liberty is a very serious infraction of fundamental rights"

In casu, the plaintiff's imprisonment was unjustified and unfortunate. Once the defendant had executed his illegal transactions and fled to Zimbabwe, the plaintiff remained as a sitting duck in South Africa. He had to fight to prove C that there was no wrongdoing on his part. When the plaintiff was released by the South African authorities he confronted the defendant who showed no remorse.

Any award of damages against the defendant should take into account the defendant's unrepentant attitude.

In support of his claim for damages the plaintiff has cited a number of cases D which are not helpful as regards an appropriate award of damages. All the cases involve legal suits for damages brought against institutions, more particularly the Home Affairs Ministry or Commissioner of Police. In *Minister of Safety & Security v Seymour* 2006 (5) SA 495 (SCA), a 65-year-old chairman of a small scale farmers association and managing director of a co-operative was awarded R90,000 per day as damages for wrongful arrest.

E The plaintiff is claiming a sum of R25 000 per day as damages. The plaintiff has not set out the basis upon which he arrives at the said daily rate. It seems to me that the figure being claimed per day has not been arrived at upon a rational basis. In fact there is no cognisable formula upon which the figure has been based. I propose to approach the quantum of damages by awarding F a global figure based on what I perceive to be a fair reflection of an award that would adequately compensate the plaintiff. There is a need in all the circumstances of the case to award exemplary damages regard being had to the following factors:

(a) the award must be fair and reasonable;

(b) the G award must provide adequate compensation to the injured party;

(c) the award must penalise the defendant for his malicious and reckless conduct;

(d) the award must be exemplary, in that the defendant has benefited financially whilst placing the plaintiff at serious risk; and

(e) the H defendant has tendered no apology to the injured party.

2013 (2) ZLR p722

Makonese J

In articulating the principle and basis upon which the quantum of damages A showed be determined, Greenland J, in *Masawi v Chabata* 1991 (1) ZLR 148 (H), stated at p 159A-B:

> "As regards quantum it must be borne in mind that the primary object of the action injuriam is to punish the defendant by the infliction of a pecuniary penalty, payable to the plaintiff as *solatium* for the injury to his feelings. The court has to relate the moral blameworthiness of the wrongdoer to the inconvenience, B physical discomfort and mental anguish suffered by the victim. Because of the various subjective aspects involved, which must necessarily be peculiar to the case, precedents can only be of general assistance."

As already pointed out, most of the cited cases are not helpful because the circumstances of those cases are materially different. This action is being brought against an individual and not a State institution. In this case the C defendant benefited to an amount of R9 million. He has acquired various assets and is living lavishly. He has also invested some of the proceeds of the crime to set up sports bars, which no doubt are generating some revenue for him. On the basis of the observations I have made above and the principles which I have set out, I now turn to make the award in this D matter. The plaintiff is claiming the sum of R2 450 000, being damages arising out of his wrongful arrest and detention. This amount translates to approximately US$245 000. This is a high award which is unprecedented in this jurisdiction. I am satisfied that adopting the approach I have set out above, a figure in the sum of US$30 000 would appropriately compensate the plaintiff for the wrongful arrest and detention for the period of 98 days E caused by the defendant's wrongful conduct.

In the result I make the following order:

1. The plaintiff is awarded damages in the sum of US$30 000 for wrongful arrest and detention and interest on the said amount at the prescribed rate, from the date of judgment to date of final payment F
2. The defendant is ordered to pay costs of suit.

Moyo & Nyoni, plaintiff's legal practitioners

S K M Sibanda & Partners, defendant's legal practitioners G

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Document 76 of 79

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2013/Volume 2/S v MUBAIWA 2013 (2) ZLR 723 (H)

S v MUBAIWA 2013 (2) ZLR 723 (H)

Citation	2013 (2) ZLR 723 (H)
Case No	Judgment No. HH-480-13
Court	High Court, Harare
Judge	Bhunu J
Heard	14 March 2013; 21 March 2013; 22 March 2013; 17 March 2013; *CAV*
Judgment	18 December 2013
Counsel	*I Chingarande,* for the State *M Z Chijara,* for the defence
Case Type	Criminal trial
Annotations	No case annotations to date

Flynote

Evidence – *criminal cases – hearsay – rule against – dying declarations as exception to rule – rationale for admissibility – requirements for admission – approach court should take even where requirements are met*

Headnote

D Dying declarations are only admissible in cases of murder or culpable homicide. The requirements for their admission are: (a) the declarant must have died; (b) the declarant must have made the statement in a state of hopeless expectation of death; (c) the statement must be complete; and (d) the declarant must have been a competent witness at the time E the statement was made.

The rationale for their admission despite being hearsay evidence has been stated to be "that they are declarations made in extremity when the party is at the point of death, and when every hope of this world is gone; when every motive to falsehood is silenced, and the mind is induced by the F more powerful consideration to speak the truth; a situation so solemn and so awful is considered by law as creating an obligation equal to that which is imposed by a positive oath administered in a court of justice". Although these philosophical sentiments constitute powerful persuasive rational justification, it is by no means conclusive and does not fit every case. There certainly would be exceptional cases where a dying person G might have a motive to misrepresent facts, particularly where there is a history of acrimony and enmity between the deceased and another as appears to be the position in this case. It is not difficult to imagine a dying person in those circumstances being mistaken or deliberately misrepresenting facts in order to get even with his adversary as a parting H shot as he departs this world. His vision and perception of the facts and

circumstances surrounding his mortal injury is likely to be coloured and A distorted by fear and apprehension of death.

However, this exception to the rule against hearsay has become too firmly imbedded in the law to be dislodged. Even if it is accepted that a dying person could have no motive to lie, there is still considerable danger in relying upon his statement because his injuries are likely to have impaired B his memory or powers of observation. The court must therefore take into account that the value of a dying declaration as evidence is diminished by the lack of opportunity to cross-examine the declarant.

Dying declarations therefore ought to be taken with a measure of scepticism and rejected out of hand where they fall short of essential elements and safeguards. C

Cases referred to

R v Hine 1910 CPD 371

Legislation considered

Criminal Procedure and Evidence Act [*Chapter9:07*], s 254(1) D

Case information

I Chingarande, for the State

M Z Chijara, for the defence

Judgment

Bhunu J: The deceased succumbed to death on 18 December 2011 from E burns sustained in a horrific inferno at her matrimonial home on 14 December 2013. The circumstances under which she sustained the mortal burns are hotly contested. That the deceased caught fire after she had been doused in paraffin and then set alight is beyond question. What is in dispute is whether the deceased committed suicide or was murdered by the accused as alleged by the state. F

It is common cause that the accused and the deceased cohabited as lovers in the Domboshawa area where they rented a cottage within shouting distance of Mverechena Business Centre. On the fateful day the two retired to bed and bolted the door. Later on they had a domestic dispute resulting in a scuffle. A short while later witnesses saw the deceased engulfed in a ball of fire. G The accused also sustained severe burns on his hands in the same inferno. Although the commotion attracted the attention of witnesses no one saw or witnessed how they had caught fire.

The State relied solely on the deceased's dying declarations to her sister Elinah Kachere and the attending doctor Kudzai Mukosera. They both testified that before her death she blamed the accused for having caused her burns. While H

Bhunu J

A Elinah's evidence is vague and imprecise, that of the doctor is more precise and to the point. Elinah's evidence was to the effect that the deceased advised her to stop crying and look at what the accused had done to her.

To put the doctor's evidence in its proper perspective it is necessary to quote his evidence verbatim. According to my longhand notes this is what B he had to say:

> "I was on duty, casualty department when I received a patient from Domboshava with a history of having received burns. I proceeded to take a history. She told me that she had paraffin poured on her by her husband. As she tried to escape she knocked over a burning candle resulting in a fire.
>
> I then proceeded to examine her. I discovered that she had sustained burns to the C face, neck, chest, abdomen, back, buttocks and both thighs which burns were superficial and totalling 49% body surface area.
>
> I then proceeded to administer appropriate treatment. After administering treatment I then referred the patient appropriately to the general surgeons.
>
> She indicated that she had sustained the burns inside her house. I saw her on 15 December 2011.
>
> D She had 49% burns. If one has burns beyond 35% the risk of death is high. That is why she was referred from the lower hospital to a higher hospital.
>
> She was fully conscious and alert. She knew what she was saying. She was obviously in pain. I have been a doctor for the past 6 years. I wouldn't say that she knew that she was going to die.

In my mind I knew that her chances of survival were very minimal. Her prognosis E was very poor. She then passed away 3 days later in the evening which means that my prognosis was right."

Under examination by the court the witness was asked:

"Q. Did the deceased exhibit any signs that she was conscious of the possibility of death?

A. From F my assessment I did not have any reason to suspect that she knew she was going to die. I wouldn't say that she was in a state of hopelessness. Normally when patients come to hospital they are hopeful.

Questions arising

Q. You say you could not have ascertained her state of mind. Does that rule out that she was afraid she was going to die?

A. No" G

The doctor's evidence concerning the deceased's state of mind at the time she attributed her injuries to the accused is amply corroborated by her sister Elinah Kachere. She told the court that when she saw the now deceased in the motor vehicle that ferried her to hospital she was hopeful that she H would survive. When they got to the hospital the now deceased refused to

be assisted to walk saying that she could walk on her own. She advised her A to stop crying to look at what the accused had done to her.

Section 254 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] provides for an exception to the hearsay rule in that it renders dying declarations admissible. The section provides as follows:

"254 Admissibility of dying declarations B

(1) A declaration made by any deceased person upon the apprehension of death shall be admissible or inadmissible in evidence in every case in which such declaration would be admissible or inadmissible in any similar case depending in the Supreme Court of Judicature in England."

It is important to note in passing that dying declarations in both England C and South Africa are only admissible in cases of murder or manslaughter, which is equivalent to culpable homicide in our law. It follows therefore that the same position obtains here at home in Zimbabwe. The rationale for the admission of dying declarations despite being hearsay evidence was well articulated in *R v Hine* 1910 CPD 371 where the court observed that

"The principle upon which this species of evidence is admitted is, that they are D declarations made in extremity when the party is at the point of death, and when every hope of this world is gone; when every motive to falsehood is silenced, and the mind is induced by the more powerful consideration to speak the truth; a situation so solemn and so awful is considered by law as creating an obligation equal to that which is imposed by a positive oath administered in a court of justice." E

Although the above philosophical sentiments constitute powerful persuasive rational justification, it is by no means conclusive and does not fit every case. There certainly would be exceptional cases where a dying person might have a motive to misrepresent facts particularly where there is a history of acrimony and enmity between the deceased and another as appears to be F the position in this case. It is not difficult to imagine a dying person in those circumstances being mistaken or deliberately misrepresenting facts in order to get even with his adversary as a parting shot as he departs this world. His vision and perception of the facts and circumstances surrounding his mortal injury is likely to be coloured and distorted by fear and apprehension of death. This must have prompted Hoffmann and Zeffertt *The South African* G *Law of Evidence* 4 ed at p 643 to remark that:

"These sentiments were highly questionable even at the time when they were uttered but the exception has become too firmly imbedded in the law to be dislodged. Even if it is allowed that a dying person could have no motive to lie, there is still considerable danger in relying upon his statement because his injuries are likely to have impaired his memory or powers of observation. The H

A court must therefore take into account that the value of a dying declaration as evidence is diminished by the lack of opportunity to cross-examine the declarant."

According to Hoffmann and Zeffertt the requirements for the admissibility of a dying declaration can be summarised as follows:

1. The declarant must have died.
2. The B case must be one of murder or culpable homicide.
3. The declarant must have made the statement in a state of hopeless expectation of death.
4. The statement must be complete.
5. The declarant must have been a competent witness at the time the C statement was made.

From the doctor's evidence it is clear that the declarant, that is to say, the deceased made a complete statement to the doctor. She accused the accused of pouring paraffin on her thereby causing her to catch fire from a burning candle.

D Both the doctor and Elinah concurred in saying that the deceased was hopeful that she would survive. It was Elinah's evidence that when she attempted to assist the deceased to walk she turned down the offer saying that she could walk on her own. The doctor was more precise in saying that although the deceased was badly injured she was hopeful that she would recover from E her injuries.

As we have already seen from Hoffmann and Zeffertt, one of the essential elements for a statement to qualify as a dying declaration is that it must have been made by the deceased in a state of hopeless expectation of death. In this case there is no evidence that when the deceased made the statements F accusing the accused of causing her burns she was in a state of hopeless expectation of death. For that reason alone none of her statements qualifies as a dying declaration. The statements are therefore inadmissible as dying declarations.

Reliance on dying declarations in the absence of any other evidence as to how the deceased met her death is fraught with the danger of convicting an G innocent person in that the declarant cannot be subjected to cross-examination to cross check the veracity of the declaration. Dying declarations therefore ought to be taken with a measure of scepticism and rejected off hand where they fall short of the essential elements and safeguards. Thus, in the absence of any other evidence pointing to the accused's guilt, it would be wholly H unsafe to convict the accused of the crime charged.

Bhunu J

For that reason the court comes to the conclusion that the State has failed to A prove its case against the accused beyond reasonable doubt. The accused is accordingly found not guilty and discharged.

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

C Kuhuni Attorneys, accused's legal practitioners B

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Document 77 of 79

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2013/Volume 2/MAPINI v OMNI AFRICA (PVT) LTD 2013 (2) ZLR 729 (H)

MAPINI v OMNI AFRICA (PVT) LTD 2013 (2) ZLR 729 (H)

Citation	2013 (2) ZLR 729 (H)
Case No	Judgment No. HH-494-13
Court	High Court, Harare
Judge	Tsanga J
Heard	8 November 2013; *CAV*

Judgment 18 December 2013

Counsel Applicant in person
F Mahere, for the respondent

Case Type Application for rescission of judgment

Annotations No case annotations to date

Flynote

Arbitration – *award – challenge to – award granted following referral in terms of Labour Act [Chapter 28:01] – award challenged on grounds set out in Arbitration Act [Chapter 7:15] – jurisdiction of High Court to entertain challenge not ousted*

D **Court** – *jurisdiction – High Court – arbitral award – award granted following referral in terms of Labour Act [Chapter 28:01] – award challenged on grounds set out in Arbitration Act [Chapter 7:15] – jurisdiction of High Court to entertain challenge not ousted*

Employment – *arbitral award – award granted following referral in terms of* E *Labour Act [Chapter 28:01] – award challenged on grounds set out in Arbitration Act [Chapter 7:15] – jurisdiction of High Court to entertain challenge not ousted*

Headnote

The applicant had been dismissed from her employment with the respondent. Aggrieved by what she considered to be unfair dismissal, she sought F resolution of the matter through compulsory arbitration. She obtained a default judgment from the arbitrator, the respondent not being present after a number of postponements, of which it had been notified. The respondent then brought an application in terms of article 34 of the First Schedule to the Arbitration Act [*Chapter 7:15*], seeking the setting aside G of the arbitral award. It argued that the award made by the arbitrator in its absence violated the dictates of natural justice in that it had not been granted a hearing. The respondent succeeded in setting aside the arbitral award. This was not on the basis of consideration of any merits but as a result of a default judgement granted in an unopposed matter.

The applicant sought to have this default judgment set aside. Among other H points raised, she challenged the setting aside of the arbitral award on

the grounds that the High Court lacked the necessary jurisdiction to hear A the matter. She maintained that the setting aside of an arbitral award is the exclusive jurisdiction of the Labour Court in terms of the Labour Act [*Chapter 28:01*].

Held, that where specific statutes apportion responsibility and authority for hearing certain matters, it is vital for the swift administration of justice B that the jurisdiction accorded any specific courts be recognised, respected and enforced. Clarity on the part of the legislature in according such jurisdiction is equally important as its absence can result in overlapping jurisdiction. A key issue in this regard is whether the jurisdiction of the High Court pertaining to setting aside arbitration awards in labour matters is now indisputably the strict preserve of the Labour Court or whether C the High Court maintains its jurisdiction. This issue arises in light of the wording of the applicable provision that deals with this issue. Article 34 still specifically mentions the High Court in no uncertain terms as the forum for applying for the setting aside of an arbitral award. The purported ouster of the High Court's jurisdiction in labour matters, while the provision remains couched as it is, is doubtful. There is no D inconsistency between the jurisdictional provisions of the Labour Act on issues relating to arbitration and the provisions of article 34 that would justify the invocation of s 5 of the Arbitration Act, because the issues envisaged in article 34 for setting aside an award are not dealt with elsewhere in the Labour Act. In the absence of a specific ouster E through an amendment clarifying the non-application of article 34 to labour matters, the jurisdiction of the High Court in such issues cannot be said to have been ousted. There is nothing

that stops the legislature from effecting the desired clarity in the interests of the smooth administration of justice in labour matters if indeed its intention was and is to exclude these from the ambit of the provision of article 34 in favour of the Labour F Court. Consequently, the issue was properly before the court.

Editor's note: decision of Chiweshe JP in *Samudzimu v Dairibord Hldgs* Ltd 2010 (2) ZLR 357 (H) not followed.

Cases referred to G

Barclays Bank of Zimbabwe Ltd v CC International (Pvt) Ltd S-16-86

de Wet v Deetlefs 1928 AD 286

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

Moyo v Delta Corp & Anor HB-34-07

Ndebele v Ncube 1992 (1) ZLR 288 (S) H

A *Roland & Anor v McDonnell* 1986 (2) ZLR 216 (S)

Samudzimu v Dairibord Hldgs 2010 (2) ZLR 357 (H)

Songore v Olivine Industries (Pvt) Ltd 1988 (2) ZLR 210 (S)

Stockhill v Griffiths 1992 (1) ZLR 172 (S)

Tuso v City of Harare 2004 (1) ZLR 1 (H)

B *Zimtrade v Makaya* 2005 (1) ZLR 427 (H)

Legislation considered

Arbitration Act [*Chapter 7:15*], s 5(2); First Schedule, art 34

Case information

Applicant in person

C *F Mahere*, for the respondent

Judgment

Tsanga J: This is an opposed application for rescission of judgment which has its genesis in the dismissal of the applicant, Patricia Mapini, from employment by the respondent, Omni Africa. The applicant was engaged as a Sage Pastel sales executive by the respondent. The working relationship D soured when the respondent terminated the applicant's contract of employment on the basis of certain allegations it made against her. Aggrieved by what she considered to be unfair dismissal, the applicant sought resolution of the matter through compulsory arbitration. She obtained a default judgment for the sum of US$36 064 on 29 June 2012. The present application for rescission has its foundations in this initial default judgment obtained by the applicant.

E Since two different sets of default judgments, one at the instance of the present applicant, and the other at the instance of the respondent, inflame this dispute, it is important to capture the details of both. Furthermore, in resolving disputes, the devil is often in the factual details ultimately examined against whatever the law provides.

F The first default judgement that resulted in the granting of the arbitral award, was spawned by two postponements of the arbitrator's hearing. Initially set for hearing on 9 February, the matter could not take place as the arbitrator was away on that day. Further postponed to 15 February, it again still failed to take off on that day. This time, the respondent's lawyer, Mr Mazhande, was unable to attend due to the need to attend a funeral. He however requested a G representative from another law firm to inform the arbitrator. The evidence on file suggests that this was duly done.

The papers filed of record further reveal that the arbitrator, after receiving word from the emissary, dutifully postponed the matter to 21 February. This was by written notice to both the applicant and

respondent. The information H in the papers placed before the court in addition confirms that respondent's

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Tsanga J

receptionist signed and received the notification of this new date, on 16 A February. Nonetheless, on the re-appointed day, 21 February, the respondent did not show up, which resulted in the granting of a default judgment by the arbitrator in favour of the applicant. This judgment was subsequently finalised on 29 June. The evidence placed before the court also shows that in carrying out the necessary processes for the finalisation of the award, the B respondent was accordingly notified at every stage. The applicant proceeded to register the arbitration award on 6 July 2012. The registration was granted on 4 December 2012. It is against this order that the High Court issued a writ of execution on 29 January 2013. This has also spawned yet a pending matter of stay of execution.

Parallel to the above processes, the respondent who had not been present at C the hearing on 21 February, filed an application on 1 October 2012 in terms of art 34 of the Model Law contained in the First Schedule to the Arbitration Act [*Chapter 7:15*], seeking the setting aside of the arbitral award which was granted on 29 June 2012. The respondent's primary argument was that the award made by the arbitrator in its absence violated the dictates D of natural justice in that it had not been granted a hearing. The respondent succeeded in setting aside the arbitral award. This was not on the basis of consideration of any merits but as a result of a default judgement granted in an unopposed matter.

It appears that applicant did respond to the application on the 18 October, (also confirmed by stamped documents in file HC 11439/12) attaching E documents challenging the respondent's averment of lack of notification. However, she sent her documents to the respondent's previous lawyers, Muchandibaya and Associates. These lawyers had indeed at some stage, as evidenced by correspondence, represented the respondent in the matter. There is some dispute as to when exactly they assumed agency. No record F was on file regarding this aspect. They were however no longer acting for the respondent at the time of the application for rescission as the application was issued by Mawere and Sibanda Legal Practitioners.

A default judgment was granted on 21 November 2012. It is this default judgment that the applicant seeks to rescind. The applicant states that she G only got to know of the default judgment on 15 July 2013. This was after she was served with an urgent chamber application for stay of execution. She filed her application for rescission on 23July 2013.

She avers in support of her application for rescission that she was unaware at the time that the respondent had since changed practitioners. She also disputes that the respondent was not aware of the arbitration award until H

Tsanga J

A its registration on the basis that the evidence from process shows that the respondent was informed at all times and generally chose to ignore correspondence. The applicant also challenges the setting aside of the arbitral award on the grounds that the High Court lacked the necessary jurisdiction to hear this matter. She maintains that the setting aside of an arbitral award is the exclusive jurisdiction of the Labour Court in terms of the Labour Act B [*Chapter 28:01*]. Reference was made to several judgements which I will canvass more fully later in this judgement in addressing this issue.

The respondent opposes the application for rescission on the basis that none of the acceptable grounds for rescission are met by the applicant. These include a reasonable explanation for the default; the *bona fides* of the application to C rescind; and the *bona fides* of the defence to the claim, which must have some prospect of success at the trial. Cases referred to include *Stockil v Griffiths* 1992 (1) ZLR 172 (S); *Roland and Anor v McDonnell* 1986 (2) ZLR 216 (S); *Songore v Olivine Industries (Pvt) Ltd* 1988 (2) ZLR 210 (S) and *Barclays Bank of Zimbabwe v CC International (Pvt) Ltd* S-16-86. Counsel for the respondent also argued that the applicant has to bear responsibility for not D being vigilant. See *Ndebele v Ncube* 1992 (1) ZLR 288 (S).

The applicant's reasons for her default in case no. HC 11439/12 are credible. Rule 5(2) of the High Court Rules requires a party who has changed legal practitioners to file a notice of change with the Registrar and to advise *all other parties* to the proceedings of the change. It is unreasonable and most E certainly irregular to simply expect that the applicant should have picked up the change of address from the fact that the application came from Mawere and Sibanda Legal Practitioners. There is nothing on record that shows that the applicant was advised of the sea of changes in practitioners representing the respondent at various turns. These include the take over from Mr Mazhande who is said to have been unable to attend the hearing F on 15 February by Muchandibaya and Associates who subsequently came into the picture sometime thereafter. Then there is the notification of the takeover by Mawere and Sibanda from Muchandibaya and Associates the respondent's current practitioners that is also not on file. In the result, the applicant assumed, albeit erroneously, that Muchandibaya and Associates were still handling the matter. Her opposition did not find its way to Mawere G and Sibanda and the matter was heard as unopposed. Once she got knowledge of the judgment she acted swiftly to seek its rescission. I find that the default was not wilful and that the applicant is bona fide in her application to rescind.

On the *bona fides* of the applicant's defence to the claim and whether it has some prospects of success if the matter is rescinded, again I find that H the weight of the evidence appears to favour her claim. The basis of the

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Tsanga J

respondent's application against which rescission is sought, was that it had A not been accorded a right to be heard. As I have earlier remarked, this is not supported by the papers placed before the court since the arbitrator put the postponement in writing. The notice was received and signed for at the respondent's offices. The applicant in my view has some prospects of success in challenging the respondent's claim. B

I proceeded in my analysis of this application on the basis that the matter against which rescission is sought was properly brought before the High Court by the respondent. The applicant in her heads of argument also argued that the primary matter had been improperly brought before this court. The crux of her averment is that the proper forum for an application to set aside an arbitration award is the Labour Court. Indeed various decisions of C this court have canvassed the increased jurisdictional issues as well as the specialist nature and positioning of the Labour Court in labour matters in relation to the High Court. This followed in particular amendments to the Act such as No. 17 of 2002 and Amendment No. 7 of 2005. See *Tuso v City of Harare* 2004 (1) ZLR 1 (H); *Zimtrade v Makaya* 2005 (1) ZLR 427 (H); *Moyo v Delta Corporation & Anor* HB-34-07; *Dhlodhlo v Deputy Sheriff,* D *Marondera, & Ors* 2011 (1) ZLR 416 (H); *Samudzimu v Dairibord Holdings* 2010 (2) ZLR 357 (H).

Where specific statutes apportion responsibility and authority for hearing certain matters, it is indeed vital for the swift administration of justice that the jurisdiction accorded any specific courts be recognised, respected and E enforced. Clarity on the part of the legislature in according such jurisdiction is equally important as its absence can result in overlapping jurisdiction. A key issue in this regard is whether the jurisdiction of the High Court pertaining to setting aside arbitration awards in labour matters is now indisputably the strict preserve of the Labour Court or whether the High Court maintains its jurisdiction. This issue arises in light of the wording of the applicable F provision that deals with this issue.

The relevant provisions of art 34 of the UNCITRAL Model Law in the First Schedule to the Arbitration Act [*Chapter 7:15*], upon which the respondent brought the matter to the High Court, read as follows:

> **"Application for setting aside as exclusive recourse against arbitral** G **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 Article
>
> (2) An arbitral award may be set aside by the *High Court* only if –
>
> (a) the party making the application furnishes proof that – H

Tsanga J

> (i) . . . A

(ii) the party making the application was not given proper notice of the appointment of the arbitrator or the arbitral proceedings or was otherwise unable to present his case; or. . .

(iii) . . .

(iv) . . .

(b) . . .

(3) . . . B

(4) . . .

(5) For the avoidance of doubt, and without limiting the generality of paragraph (2)(b)(ii) of this article, it is declared that an award is in conflict with the public policy of Zimbabwe if –

(a) . . .

(b) a C breach of the rules of natural justice occurred in connection with the making of the award."

Section 5(2) of the Arbitration Act, which addresses the application of the Arbitration Act under other enactments, is also vital. It is couched as follows:

> "Where an enactment provides for the determination of any matter by arbitration, the provisions of that enactment, to the extent that they are inconsistent with this Act, shall prevail."

The provisions of art 34 have found specific commentary in case law. For instance Chiweshe JP, in *Samudzimu (supra)* remarked as follows with specific reference to arts 34 and 36 of the Arbitration Act:

> "I agree with the applicant that the correct interpretation would be that, with E regards the law, the Labour Act takes precedence over the Arbitration Act or 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 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 is a F labour dispute. The mechanisms for challenging 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 entertain such matters."

This approach towards interpreting the enhanced powers of the Labour Court occasioned by legislative intervention helps to streamline and direct labour matters towards this court. However, art 34 still specifically mentions the High G Court in no uncertain terms as the forum for applying for the setting aside of an arbitral award. The purported ouster of the High Court's jurisdiction in labour matters while the provision remains couched as it is, is doubtful. In my view, there is no inconsistency between the jurisdictional provisions of the Labour Act on issues relating to arbitration and the provisions of art H 34 that would justify the invocation of s 5 of the Arbitration Act. I say this

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because the issues envisaged in art 34 for setting aside an award are not dealt A with elsewhere in the Labour Act.

Indeed, it is for this reason that Munyaradzi Gwisai, a labour scholar, attempts to argue at p 234 of *Labour and Employment Law in Zimbabwe: Relations of Work under Neo-Colonial Capitalism* (Harare: Zimbabwe Labour Centre and Institute of Commercial Law, UZ 2006) that appeals on questions of law B as stipulated in s 98(10) of the Labour Act, encompass the kind of issues envisaged by art 34.

To quote him:

> "Where the making of an award is in violation of grounds specified under art 34 of the Model law, discussed above, such violation qualifies the appeal as being on a question of law" C

The essence of his interpretation is that it is to the Labour Court, under appeals on question of law, that any matter relating to the award under art 34 should be brought. In my view, such an interpretation, while clearly recognising the specialist role of the Labour Court, is nonetheless a contortionist way of locating jurisdiction within the Labour Court for setting aside arbitral D awards. Given its specific wording, and in the absence of a specific ouster through an amendment clarifying the non-application of art 34 to labour matters, the jurisdiction of the High Court in such issues cannot be said to have been ousted. There is nothing that stops the legislature from effecting the desired clarity in the interests of the smooth administration of justice in labour matters if indeed its intention was and is to exclude these from the E ambit of the provision of art 34, in favour of the Labour Court. See *de Wet v Deetlefs* 1928 AD 286 at 290 where Solomon CJ remarked as follows:

"It is a well recognised rule in the interpretation of statutes that, in order to oust the jurisdiction of a court of law, it must be clear that such was the intention of the legislature".

Pending such clarity to the application of art 34 in labour matters, litigants F such as the respondent who have sought audience in the High Court to set aside an arbitral award cannot be said to be accidental, unwelcome visitors.

In the result, I therefore make the following order:

1. The judgment of this court under case No. HC 11439/12 be and is hereby rescinded. G
2. There is no order as to costs.

Mawere & Sibanda, respondent's legal practitioners H

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Document 78 of 79

Source:
Zimbabwe Law Reports/CHRONOLOGICAL LISTING OF CASES 1980 - 2014 Volume 1/2013/Volume 2/CMED (PVT) LTD v FIRST OIL COMPANY & ORS 2013 (2) ZLR 737 (H)

CMED (PVT) LTD v FIRST OIL COMPANY & ORS 2013 (2) ZLR 737 (H)

Citation	2013 (2) ZLR 737 (H)
Case No	Judgment No. HH-495-13
Court	High Court, Harare
Judge	Tsanga J
Heard	22 November 2013; *CAV*
Judgment	18 December 2013
Counsel	*Z T Zvobgo,* for the third defendant (excipient) *T K Hove,* for the plaintiff (respondent)
Case Type	Civil application
Annotations	No case annotations to date

Flynote

Practice and procedure – *exception – purpose of – what excipient must show – request for further particulars – not essential before excepting – permissible first to write letter to other party stating nature of complaint regarding pleadings – failure by other party to respond to complaint* D *– effect on award of costs*

Headnote

The third defendant was joined as one of the co-defendants in a matter in which the plaintiff was claiming damages arising out of the non-delivery of fuel that was due to it from the first defendant. The plaintiff cited the third defendant jointly and severally as one of those obliged to deliver E the fuel or to pay up on the basis of a letter that the third defendant wrote. In that letter it stated that it was holding the relevant amount of fuel on behalf of the second defendant, which

fuel had been reserved for the first defendant. The summons did not indicate whether the claim against the third defendant was in contract or in delict or how the third F defendant was implicated.

The third defendant's legal practitioners wrote to the plaintiff's legal representatives, saying that the summons did not disclose a cause of action. They replied briefly, saying that the summons did disclose a cause of action. They did not amend the summons or provide any further particulars. The third defendant then excepted to the summons as being G vague and embarrassing. The plaintiff argued that for an exception to be upheld the excipient must show that it has been prejudiced by the defect and that no other remedy was available. Further particulars should have been sought. The exception was meant to vex the plaintiff.

Held, that in terms of r 140(1) of the High Court Rules 1971, a defendant, H before excepting to a pleading, may state by letter to the other party

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the nature of his complaint and call upon the other party to amend his A pleading so as to remove his cause of complaint. The letter written by the third defendant's practitioners clearly complied with this provision. It is not necessary to request further particulars before an exception may be filed. Where the excipient has taken this course, it may have relevance to the question of costs. In terms of r 140(3), a court shall have regard B to the letter in dealing with the costs of any subsequent motion to strike out the pleadings. In appropriate circumstances such costs may even be awarded on the of legal practitioner and client.

Held, further, that the object of an exception is not to embarrass one's opponent or to take advantage of a technical flaw, but to dispose of the case or a portion thereof in an expeditious manner, or to protect oneself C against an embarrassment which is so serious as to merit the costs even of an exception. The purpose of an exception is to raise a substantive question of law which may have the effect of settling the dispute between the parties. An excipient who alleges that a summons does not disclose a cause of action must establish that, upon any construction of the D particulars of claim, no cause of action is disclosed. Here, the summons and declaration disclosed no cause of action against the third defendant. It was genuinely difficult to unearth the cause of action from the summons and declarations against the excipient. Even when one looked at the new averments in the opposition papers, the link between the non-delivery of the fuel and any action in delict or otherwise on the third defendant's E part was difficult to make. The exception would be upheld.

Cases referred to

Chirimuta v Action Property Sales (Pvt) Ltd HH-5-07

Living Hands (Pty) Ltd & Anor v Ditz & Ors 2013 (2) SA 368 (GSJ)

Shinga v General Accident Assurance Co (Zimbabwe) Ltd 1989 (2) ZLR 268 (H) F

Legislation considered

High Court Rules 1971 (RGN 1047 of 1971), rr 11(c), 109, 140(1) & 140(3) G

Case information

Z T Zvobgo, for the third defendant (excipient)

T K Hove, for the plaintiff (respondent)

Judgment

Tsanga J: This exception has been filed by the third defendant, National Oil Infrastructure Co of Zimbabwe (Pvt) Ltd, in a matter in which it is sued H

Tsanga J

A by the plaintiff (CMED) as one of the material players in the non-delivery of 3 million litres of diesel that was due to it from the first defendant, First Oil. The third defendant argues that the plaintiff's summons does not disclose a cause of action in terms of r 11(c), which requires a true

and concise statement of the nature, extent and grounds of the cause of action and of the relief and remedies sought in the action. The third defendant also relies on B r 109, which also deals with issues of conciseness in a plaintiff's declaration.

The brief facts are that the first defendant won a tender to supply this fuel. Before the plaintiff effected payment it sought to ascertain as part of a due diligence enquiry whether the first defendant would be able to supply the fuel. This fuel was not delivered. The plaintiff included the third defendant in B its summons suing for the delivery of the full or alternatively the repayme,nt of the sum of $2 700 000 advanced to the first defendant with the requisite interest. The plaintiff has cited the third defendant jointly and severally as one of those obliged to deliver the fuel or to pay up on the basis of a letter that it wrote in which it stated as follows:

> "This letter serves as a confirmation that we are holding 3 million litres of D diesel on behalf of Petrograde that has been reserved for First Oil at our Msasa Storage Tanks."

The third defendant has excepted to the summons as vague and embarrassing. The third defendant also argues that the summons does not disclose whether the plaintiff's claim lies in contract or delict. Mr *Zvobgo,* counsel for third E defendant, argued that the summons failed to disclose how the third defendant is implicated in the case. All that the plaintiff did was to refer to the above and that it is only in the motive of opposition to the exception that the plaintiff makes reference to what it claims to be defendant's obligations.

He also argued that despite the plaintiff's attempt to remedy the vagueness as to whether the claim against the third defendant lay in contract or F delict, by alleging a delictual link, the summons remained vague against the third defendant. This, according to Mr *Hove,* is because there was no misrepresentation by the third respondent. The essence of his objection was that fresh averments were being made in the notice of opposition which do not emerge in the declaration. He further stated that the third defendant had G taken steps through a letter informing plaintiff of a defect in the summons and the fact that they convoluted two claims. Instead of amending the summons, the plaintiff is said to have argued that they were sufficient. For these reasons Mr *Zvobgo* maintained that the plaintiff could not now seek to make new averments in the notice of opposition. Instead, he argued, the summons must be dismissed as disclosing no cause of action. He cited H *Shinga v General Accident Assurance Co (Zimbabwe) Ltd* 1989 (2) ZLR 268 in support of his argument.

2013 (2) ZLR p740

Tsanga J

Mr *Hove,* for the plaintiff, argued on the other hand that for an exception to A be upheld, the excipient must show that it has been prejudiced by the defect and that no other remedy was available. The test of prejudice, he averred, is that a defendant does not know what a case it has to answer. In such a case he argued that further particulars can be sought. His point was that the third defendant did not do so. He also maintained that his purpose of a declaration B is to provide a general statement rather than give evidence. His averment in this regard was that a general statement had been given in the summons. In his view instead of seeking further particulars which would have clarified the matter, the third respondent chose to except. He argued that the third respondent's exception is meant to vex the plaintiff. As a result he sought for the exception to be dismissed with costs *de bonis propriis* for adopting C wrong procedure.

In response Mr *Zvobgo,* for the third respondent, argued that the rules do not state that the only remedy before an exception can be sought is to request further particulars. He referred in this regard to r 140(1) which permits a letter to be written. It is apt to capture the relevant provisions alluded to in D this matter.

Rule 11(c) of the High Court Rules 1971 (the Rules) is couched as follows:

> "Before issue every summons shall contain –
>
> (a) . . .
>
> (b) . . .
>
> (c) a true and concise statement of the nature, extent and grounds of the cause E of action and of the relief and remedies sought in the action;
>
> (d) . . ."

Rule 109 provides in part as follows:

> "The statement of the plaintiff's claim shall be called his declaration, and it shall state truly and concisely . . . the capacity in which he is sued and the nature, F extent and grounds of the cause of action, complaint

or demand."

Rule 140 of the same Rules is worded as follows:

"(1) Before –

(a) making a court application to strike out any portion of a pleading on any grounds; or G

(b) filing any exception to a pleading;

the party complaining of any pleading may state by letter to the other party the nature of his complaint and call upon the other party to amend his pleading so as to remove his cause of complaint."

Subrule (3) of this rule also allows the court to take into account the above provision in dealing with the costs of any motion to strike out. H

2013 (2) ZLR p741

Tsanga J

A The letter written by the third defendant's practitioners on 11 June 2013 clearly complies with the above stipulation. The letter pointed out that the summons disclosed no cause of action. Instead of providing further particulars the plaintiff's two line response on 23 June was simply to the effect that the plaintiff's summons and declaration disclose the cause of action in respect of all the defendants.

B In *Living Hands (Pty) Ltd and Anor v Ditz and Ors* 2013 (2) SA 368 (GSJ) at 375-376, Makgoka J distils the general principles of exception as follows:

(a) In considering an exception that a pleading does not sustain a cause of action, the court will accept, as true, the allegations pleaded by the plaintiff to assess whether they disclose a cause of action.

(b) The C object of an exception is not to embarrass one's opponent or to take advantage of a technical flaw, but to dispose of the case or a portion thereof in an expeditious manner, or to protect oneself against an embarrassment which is so serious as to merit the costs even of an exception.

(c) The purpose of an exception is to raise a substantive question of law D which may have the effect of settling the dispute between the parties. If the exception is not taken for that purpose, an exception should make out a very clear case before it would be allowed to succeed.

(d) An excipient who alleges that a summons does not disclose a cause of action must establish that, upon any construction of the particulars of E claim, no cause of action is disclosed.

(e) An over-technical approach should be avoided because it destroys the usefulness of the exception procedure, which is to weed out cases without legal merit.

(f) Pleadings must be read as a whole and an exception cannot be taken to F a paragraph or a part of pleading that is not self-contained.

(g) Minor blemishes and unradical embarrassments caused by a pleading can and should be cured by further particulars.

Having heard counsel's arguments and gone through the documents, I fail to see how the summons and declaration disclosed a cause of action against the third defendant. I do not think that the third respondent has brought this G claim merely to embarrass the plaintiff. It filed the exception because it is genuinely difficult to unearth the cause of action from the summons and declarations against the excipient. Even when one looks at the new averments in the opposition papers, the link between the non-delivery of the fuel and any action in delict or otherwise on the third defendant's part is difficult to H make. The plaintiff alleges a duty of care towards it by the third defendant.

2013 (2) ZLR p742

Tsanga J

I do not see how this can be so. The documents placed before me fail to A disclose the cause of action against the third defendant. A letter was written to the plaintiff pointing out the defects. It was the plaintiff who chose to be curt and dismissive of the complaint raised by simply averring that its details were sufficient. The plaintiff's argument is that the third defendant is bound in delict as it concluded the contract with the first defendant on B the strength of the third defendant's letter. The reason for non-delivery of the fuel appears to have absolutely nothing to do with the fact that the third defendant had no fuel to deliver. The plaintiff's misfortunes appear to have emanated from a

transfer of monies outside the country at the behest of the first defendant. It is not at all clear how the third defendant can be said to be responsible for any eventualities that stemmed from this. C

The plaintiff cited *Chirimuta v Action Property Sales (Pvt) Ltd* HH-5-07 as being similar to the case in point. This is not the case, as in the *Chirimuta* case the involvement of the party upon whose statements reliance had been placed was a much more active one in the actual contract than it is in this case. The plaintiff appears to be casting its net very widely in the hope of some recovery of its monies. D

Taking all the above factors into account, the third defendant's exception is upheld. The third defendant has sought costs on an attorney and client scale. I do think that costs on a higher scale against the plaintiffs are justified as the third defendant did seek to obtain clarity from the plaintiff and received little meaningful cooperation. Rule 140(3) permits such effort to be taken E into account in the award of costs.

In the result the exception is upheld, with costs on a legal practitioner and client scale.

T K Hove & Partners, plaintiff's legal practitioners

Dube, Manikai & Hwacha, third defendant's legal practitioners F

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Document 79 of 79

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JSC v NDLOVU & ORS 2013 (2) ZLR 743 (H)

Citation	2013 (2) ZLR 743 (H)
Case No	Judgment No. HB-172-13
Court	High Court, Bulawayo
Judge	Moyo J
Heard	5 December 2013; *CAV*
Judgment	19 December 2013
Counsel	*P Madzivire,* for the applicant *M Nyathi,* for the first respondent
Case Type	Constitutional application
Annotations	No case annotations to date

Flynote

Court – *judicial officer – recusal – grounds – bias – action brought by Judicial Service Commission – no reasonable grounds for apprehension of bias in favour of Commission*

Headnote

D In an action brought by the Judicial Service Commission for rescission of a judgment made against it, the first respondent requested the judge to recuse herself, on the grounds of bias. The alleged grounds were that

(1) a serving judge was likely to be sympathetic with the applicant, as it is the employer of judicial officials in Zimbabwe;

(2) abuse E of office by a former employee of the Commission resulting in the suit by the first respondent against the Commission would render a serving judge sympathetic with their employer as such a scenario was likely to paint the Judicial Service Commission in a bad light in regard to the training of its officers; and

(3) since the Commission, being composed of the Judge President, the F Chief Justice and the Deputy Chief Justice, had decided to apply for rescission, a serving judge was likely to be persuaded by such a decision taken by her superiors.

Held, that an application for recusal must be based on a reasonable litigant's apprehension of bias and the apprehension must itself be reasonable. Mere apprehensiveness on the part of a litigant that a judge will be G biased – even a strongly and honestly felt anxiety – is not enough. The court must scrutinise the apprehension to determine whether it is to be regarded as reasonable. In adjudging this, the court superimposes a normative assessment on the litigant's anxieties. It attributes to the litigant's apprehension a legal value and thereby decides whether it is H such that it should be countenanced in law.

To suggest that a serving judge, who took an oath of office, would be A concerned about what the Judicial Service Commission becomes liable or not liable to pay to an individual defied logic and was farfetched. Again, to say that a serving judge would worry about what image the numerous officers employed by the Commission portray so as to paint their employer in a bad light to the extent that the judge becomes partial B is in fact grossly unreasonable and desecrates the independence of the judiciary. Why would a serving judge, a constitutional appointee, be worried about the misdeeds, if any, of the employees of the Commission as an organisation to the extent that she lacks objectivity on issues brought before her for determination? A judge sitting in court applies the law to the facts before her and makes a decision in accordance with C the legal principles enunciated in our law. To say that a judge makes a decision on the basis that the senior judges are part of the Commission and their mere decision to challenge the judgment would mean that a serving judge would then be persuaded to blindly find in favour of the Commission, was unfounded and totally baseless.

In terms of s 180(2) of the Constitution, the Judicial Service Commission does D the administrative work leading to the appointment of judges. However, in terms of s180(3), the authority to appoint the nominees selected by the Commission vests in the President, who has the final say in such appointments, as he can decline to appoint any of the Commission's nominees. Judges are constitutional appointees whose tenure of office E is protected in terms of s 187 of the Constitution, which stipulates the grounds upon which judges can be removed from their office.

There was no allegation of bias against the judge personally; the application in this matter arose out of a blanket apprehension of bias as against all the serving judges in this jurisdiction. F

Cases referred to

Matapo & Ors v Bhila NO & Anor 2010 (1) ZLR 321 (H)

President of the Republic of South Africa & Ors v South African Rugby Football Union & Ors 1999 (4) SA 147 (CC) G

Legislation considered

Constitution of Zimbabwe 1980 ss 175(4),180(2) and (3), 186(2), 187(3) and 188(3)

Case information

P Madzivire, for the applicant

M Nyathi, for the first respondent H

Judgment

A **Moyo J**: This is an application for referral to the Constitutional Court, of an application by the first respondent for my recusal in terms of s 175(4). The background of the matter is that the first respondent made an application that I recuse myself from hearing the application for rescission of judgment made by the Judicial Service Commission the applicant (herein).

B The grounds for the application for recusal were as follows.

Firstly, a serving judge is likely to sympathise with the applicant as it is the employer of judicial officials in Zimbabwe. The reason given for a serving judge to be so sympathetic is that the Judicial Service Commission, as my employer, was ordered in the judgment sought to be rescinded, to pay damages to the first respondent in the sum of $100 000 and therefore such an amount C would make me sympathetic to the financial concerns of the applicant.

Secondly, abuse of office by a former employee of the Judicial Service Commission resulting in the suit by the first respondent against the Judicial Service Commission would render a serving judge sympathetic with their employer as such a scenario is likely to paint the Judicial Service Commission D in a bad light in regard to the training of its officers.

Thirdly, the Judicial Service Commission, being composed of the Judge President, the Chief Justice and the Deputy Chief Justice, sat and decided that the judgment in HC 3033/12 should be rescinded, and a serving judge is likely to be persuaded by such a decision having been taken by her superiors.

E Fourthly, the speed with which the matter was set down raised fears on the part of the first respondent that there is a peculiar interest in the matter by all the parties concerned, including the judicial officials.

I dismissed the application for recusal as I found it to be baseless and to be devoid of merit. All the grounds raised by the first respondent do not pass the test of a reasonable apprehension of bias in the mind of a litigant as F enunciated in numerous decided cases. The principles are dealt with in depth in *Matapo & Ors v Bhila NO & Anor* 2010 (1) ZLR 321 (H), where there is an emphasis that the apprehension itself must be reasonable.

In that case it was held at 322F-H that

> "an application for recusal must be based on a reasonable litigant's apprehension G of bias and the apprehension must itself be reasonable. Mere apprehensiveness on the part of a litigant that a judge will be biased – even a strongly and honestly felt anxiety – is not enough. The court must scrutinise the apprehension to determine whether it is to be regarded as reasonable. In adjudging this the court superimposes a normative assessment on the litigant's anxieties. It attributes to the litigant's apprehension a legal value and thereby decides whether it is such H that it should be countenanced in law."

Moyo J

To suggest that a serving judge, who took an oath of office, would worry or A be concerned about what the Judicial Service Commission becomes liable or not liable to pay to an individual defies logic and is farfetched. Again to say that a serving judge would worry about what image the numerous officers employed by the Judicial Service Commission portray so as to paint their employer in bad light to the extent that the judge becomes partial is in B fact grossly unreasonable and desecrates the independence of the judiciary. Why would a serving judge, a constitutional appointee, be worried about the misdeeds if any, of the employees of the Judicial Service Commission as an organisation to the extent that she lacks objectivity on issues brought before her for determination? This again is a far-fetched and unreasonable assertion.

The third reason – that the Judge President and the Deputy Chief Justice as C well as the Chief Justice, who are part of the Judicial Service Commission, sat and deliberated that the matter be brought for rescission and that therefore a serving judge would then be persuaded by their decision – lacks merit. A judge sitting in court applies the law to the facts before her and makes a decision in accordance with the legal principles enunciated in our law. To say that a judge would sit in court and make a decision on the basis that the D afore-mentioned judges of the superior courts are part of the Judicial Service Commission and therefore that would mean that a serving judge would be persuaded to blindly find in favour of the Judicial Service Commission, is unfounded and totally baseless. Mr *Nyathi,* for the first respondent, withdrew the fourth ground on the expeditious setting down of the matter and I would E not address it herein although it is equally unfounded and illogical. Judges are expected to decide cases that are brought before them impartially without fear or favour

according to facts and law, and not according to subjective personal views. It is thus far-fetched that a judge would disregard legal principles and the facts before her so that she finds in favour of her purported "employer.''

In terms of s 180(2) of the Constitution, the Judicial Service Commission does F the administrative work leading to the appointment of judges. In terms of s 180(3), the authority to appoint the nominees selected by the Judicial Service Commission (in terms of s180(2)) vests in the President of the Republic of Zimbabwe and the President has the final say in such appointments, as he can decline to appoint any of the nominees submitted by the Judicial Service G Commission. The ultimate authority to appoint judges therefore rests in the President of the Republic of Zimbabwe.

Judges are constitutional appointees whose tenure of office is protected in terms of s 187 of the Constitution, as it stipulates the grounds upon which judges can be removed from their office.

The section states thus: H

Moyo J

"(1) A A judge may be removed from office only for –

(a) inability to perform the functions of his or her office due to mental or physical incapacity,

(b) gross incompetence,

(c) gross misconduct".

B It further states that a judge cannot be removed from office except in accordance with this section.

In terms of s 187(3) judges are removed from office by the President after a due enquiry by a tribunal appointed by the President. Section 186(2) provides that judges are appointed from the date of assumption of office until they C reach the age of 70 years.

In terms of s 188(3) of the Constitution the salaries, allowances and other benefits of members of the judiciary are a charge to the Consolidated Revenue Fund.

The aforementioned sections of the Constitution clearly show that the Constitution in its present form does go a long way in ensuring that judges, D as constitutional appointees, are protected in this regard to ensure an independent judiciary. To suggest that judges would be influenced to be partial in favour of the Judicial Service Commission is not only farfetched but it is devoid of merit.

On the application that the issue of my recusal be referred to the Constitutional E Court in terms of s 175(4), I have alluded to *President of the Republic of South Africa & Ors v South African Rugby Football Union & Ors* 1999 (4) SA 147 (CC). In that case, the application for recusal was being sought against certain judges who were believed to have been members of a political party that the first and second appellants also belonged to and the President F of the court had a long standing advocate-client relationship with the first appellant. It is important at this juncture to distinguish the South African case from the one before me as there is nothing that has been shown on the reasonable apprehension of bias against myself sitting in this matter as a judicial officer. The application in this matter has a blanket apprehension of bias as against all the serving judges in this jurisdiction. The court in that G case had to decide whether the matter was a constitutional matter or one connected with a decision on a constitutional matter.

The court held in that regard that a judge who sat in a case in which she or he was disqualified from sitting because, seen objectively, there existed a reasonable apprehension that such a judge might have been biased, acted in H a manner that was inconsistent with the Constitution.

Moyo J

It is important to note that the gist of the finding in the South African case A is that for the constitutionality of the matter to arise, there first must be a reasonable apprehension of bias, and therefore such a judge would already have been found, at the recusal stage, to be disqualified to hear the matter but nevertheless proceeded to do so. Where the court has found as in the case before me that there is no reasonable apprehension of bias and the application B for recusal would be baseless and devoid of merit, then the constitutionality or other wise of the matter never arises.

It is also important to note that the application for recusal in that case was dismissed. In conclusion the court in the *South African Rugby Football Union* case (*supra),* stated thus at 193H-194B.

> "Under our new constitutional order, judicial officers are now drawn from all C sectors of the legal profession, having regard to the constitutional requirement that the judiciary shall reflect broadly the racial and gender composition of South Africa. While litigants have a right to apply for the recusal of judicial officers where there is a reasonable apprehension that they will not decide the case impartially, this does not give them the right to object to their cases being heard by particular judicial officers simply because they believe that such persons will be less likely to decide the case in their favour, than would other judicial D officers drawn from a different segment of society. The nature of the judicial function involves the performance of difficult and at times unpleasant tasks. Judicial officers are nonetheless required to 'administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law'. To this end they must resist all manner of pressure, regardless of where it comes from. This is the constitutional duty common to all judicial officers. E If they deviate, the independence of the judiciary would be undermined, and in turn, the constitution itself.''

In Zimbabwe, our current judicial officers are also drawn from all sections of the legal profession. Consequently I find that the application before me that I refer this matter to the Constitutional Court is frivolous and vexatious for the afore-mentioned reasons. I accordingly dismiss the application. F

Mabhikwa, Hikwa & Nyathi, first respondent's legal practitioners

Kantor & Immerman, c/o Joel Pincus, Konson and Wolhuter, applicant's legal practitioners G

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